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

REPORT OF THE PANEL

BCI deleted, as indicated [[***]]

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Australia – Tobacco Plain Packaging	Panel Reports, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/R, Add.1 and Suppl.1 *(Honduras)* / WT/DS441/R, Add.1 and Suppl.1 *(Dominican Republic)* / WT/DS458/R, Add.1 and Suppl.1 *(Cuba)* / WT/DS467/R, Add.1 and Suppl.1 *(Indonesia)*, WT/DS458/R and WT/DS467/R adopted 27 August 2018, DSR 2018:VIII, p. 3925, and WT/DS435/R and WT/DS441/R adopted 29 June 2020, as upheld by Appellate Body Reports WT/DS435/AB/R / WT/DS441/AB/R, DSR 2018:VIII, p. 3925
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
Brazil – Aircraft (Article 21.5 – Canada)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS46/AB/RW, DSR 2000:IX, p. 4093
Brazil – Taxation	Panel Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, Add.1 and Corr.1 / WT/DS497/R, Add.1 and Corr.1, adopted 11 January 2019, as modified by Appellate Body Reports WT/DS472/AB/R / WT/DS497/AB/R, DSR 2019:II, p. 345
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bananas III	Panel Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU *(Ecuador)* / WT/DS27/R/GTM, WT/DS27/R/HND *(Guatemala and Honduras)* / WT/DS27/R/MEX *(Mexico)* / WT/DS27/R/USA *(US)*, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
EC – Bananas III (Article 21.5 – US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA, DSR 2008:XIX, p. 7761
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, p. 6499

Short Title	Full Case Title and Citation
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Fasteners (China) (Article 21.5 – China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW, DSR 2016:I, p. 195
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EU – Fatty Alcohols (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R and Add.1, adopted 29 September 2017, as modified by Appellate Body Report WT/DS442/AB/R, DSR 2017:VI, p. 2765
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615
EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017, DSR 2017:III, p. 1067
India – Export Related Measures	Panel Report, *India – Export Related Measures*, WT/DS541/R and Add.1, 31 October 2019, mutually agreed solution reported
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Korea – Radionuclides	Panel Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/R and Add.1, adopted 26 April 2019, as modified by Appellate Body Report WT/DS495/AB/R, DSR 2019:VII, p. 3823
Korea – Stainless Steel Bars	Panel Report, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020, appealed 22 January 2021

Short Title	Full Case Title and Citation
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
Morocco – Hot-Rolled Steel (Turkey)	Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/R and Add.1, adopted 8 January 2020; appeal withdrawn by Morocco as reflected in Appellate Body Report WT/DS513/AB/R, DSR 2020:I, p. 45
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed 22 February 2021
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R, DSR 2018:III, p. 1329
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Ukraine – Ammonium Nitrate	Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R, DSR 2019:X, p. 5339
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Anti-Dumping and Countervailing Duties (Korea)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available*, WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed 19 March 2021
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018, DSR 2018:I, p. 273
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
US – Countervailing Measures (China) (Article 21.5 – China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW and Add.1, adopted 15 August 2019, DSR 2019:IX, p. 4737
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7

Short Title	Full Case Title and Citation
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
US – Pipes and Tubes (Turkey)	Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed 25 January 2019
US – Ripe Olives from Spain	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted 20 December 2021, DSR 2021:I, p. 7
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Supercalendered Paper	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R, DSR 2020:III, p. 1227
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description/Long title
IDN-1	Countervailing duty final determination	Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia, Official Journal of the European Union, L Series, No. 88 (16 March 2022)
IDN-2	Anti-dumping final determination	Commission Implementing Regulation (EU) 2021/2012 of 17 November 2021 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, Official Journal of the European Union, L Series, No. 410 (18 November 2021)
IDN-3	Anti-dumping preliminary determination	Commission Implementing Regulation (EU) 2021/854 of 27 May 2021 imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products originating in India and Indonesia, Official Journal of the European Union, L Series, No. 188 (28 May 2021)
IDN-55 (BCI)	IRNC Group's comments on countervailing duty disclosure	IRNC Group's comments on the definitive disclosure in the countervailing duty investigation (7 January 2022)
IDN-56.b (BCI)	IRNC's customs declaration	IRNC's customs declaration for the import of [[***]] (English translation) (provided to the Commission by IRNC as RCC Exhibit IRNC-26 in the countervailing duty investigation)
IDN-57.b (BCI) (English translation)	Import duty exemption approval letter	Decree of the Minister of Finance of the Republic of Indonesia No. 192/PABEAN/PMA/2017 on exemption of import duty on the import of machinery for the construction of PT Indonesia Ruipu Nickel and Chrome Alloy in the framework of foreign investment (12 September 2017) (English translation and Indonesian original) (provided to the Commission by IRNC as RCC Exhibit IRNC-30 in the countervailing investigation)
IDN-62 (English translation)	2009 Mining Law	Law of the Republic of Indonesia No. 4 of 2009 concerning mineral and coal mining (English translation and Indonesian original) (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-3-1 in the countervailing duty investigation)
IDN-63 (English translation)	Government Regulation 23/2010 as amended by Government Regulation 24/2012	Regulation of the Government of the Republic of Indonesia No. 23 of 2010 concerning implementation of mineral and coal mining business activities, as amended by the Regulation of the Government of Indonesia No. 24 of 2012 (English translation and Indonesian original) (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-3-11 in the countervailing duty investigation)
IDN-67	MOT Regulation 1/2017	Regulation of the Minister of Trade of the Republic of Indonesia No. 01/M-DAG/PER/1/2017 concerning export provisions for processed and purified mining products (English translation)
IDN-69	MEMR Regulation 25/2018	Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia No. 25 of 2018 concerning mineral and coal mining businesses (English translation) (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-3-2 in the countervailing duty investigation)
IDN-70	MEMR Regulation 11/2019	Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia No. 11 of 2019 on the second amendment to the Regulation of the Minister of Energy and Mineral Resources No. 25 of 2018 concerning mineral and coal mining business (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-3-3 in the countervailing duty investigation)
IDN-71	GOID's response to countervailing duty questionnaire	GOID's response to the countervailing duty questionnaire intended for the authorities of Indonesia (21 July 2021)

Exhibit	Short Title (if any)	Description/Long title
IDN-80	Countervailing duty exporter questionnaire	Countervailing duty questionnaire for producers exporting to the European Union
IDN-81 (BCI)	List of ten largest producers of input materials	List of ten largest producers of nickel ore, nickel pig iron, coal, and scrap stainless steel (provided to the Commission by the GOID as EXHIBIT-GOI-IV-2-6 in the countervailing duty investigation)
IDN-83 (BCI)	GOID's response to countervailing duty deficiency letter	GOID's response to the deficiency letter in the countervailing duty investigation (21 July 2021)
IDN-91 (BCI)	Gag Nikel countervailing duty RCC report	Remote cross-checking video-conference report for Gag Nikel in the countervailing duty investigation, annex 4 to the note verbale dated 17 December 2021 from the Commission to the Mission of the Republic of Indonesia to the European Union
IDN-92	GOID's response to Article 28 letter	GOID's response to the Article 28 letter in the countervailing duty investigation (14 December 2021) (open version)
IDN-102 (BCI)	List of nickel smelters in Indonesia	List of nickel smelters in Indonesia (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-2-8 in the countervailing duty investigation)
IDN-105	EUROFER's anti-subsidy complaint	EUROFER's complaint pursuant to Article 10 of the basic anti-subsidy Regulation requesting the initiation of a countervailing duty investigation concerning imports of cold-rolled stainless steel flat products originating in India and Indonesia (23 December 2020) (open version)
IDN-108	Countervailing duty GDD	General disclosure document in the anti-subsidy proceeding concerning imports of stainless steel cold-rolled flat products originating in India and Indonesia (17 December 2021)
IDN-109	Basic anti-subsidy Regulation	Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 176/55 (30 June 2016)
IDN-112	MOF Regulation 150/2018	Regulation of the Minister of Finance of the Republic of Indonesia Number 150/PMK.010/2018 of 2018 on the granting of corporate income tax deduction facilities (English translation)
IDN-114	Government Regulation 9/2016	Government Regulation of the Republic of Indonesia No. 9 of 2016 on the amendment to Government Regulation No. 18 of 2015 on income tax facility for capital investment in certain business fields and/or in certain areas (English translation)
IDN-115	Government Regulation 18/2015	Government Regulation No. 18 of 2015 on income tax facility for capital investment in certain business fields and/or in certain areas (English translation)
IDN-117 (BCI)	GOID countervailing duty RCC report	Remote cross-checking video-conference report for the GOID and the Indonesia EXIM Bank in the countervailing duty investigation, annex 3 to the note verbale dated 17 December 2021 from the Commission to the Mission of the Republic of Indonesia to the European Union
IDN-122.b	Director General Customs Regulation 20/2016	Regulation of the Director General of Customs and Excise No. PER-20/BC/2016 on Third amendment to Regulation of the Director General of Customs and Excise No. P-22/BC/2009 on import customs declaration (English translation) (provided to the Commission by the GOID as EXHIBIT GOI-RCC 10c in the countervailing duty investigation)
IDN-125	GOID countervailing duty questionnaire cover letter	Letter dated 18 May 2021 from the Commission to the Embassy of the Republic of Indonesia in Belgium enclosing the countervailing duty questionnaire intended for the authorities of Indonesia
IDN-126	GOID Article 28 letter	Letter dated 3 December 2021 from the Commission to the Embassy of the Republic of Indonesia in Brussels notifying the intended application of Article 28 of the basic anti-subsidy Regulation
IDN-127	GOID countervailing duty questionnaire	Countervailing duty questionnaire intended for the authorities of Indonesia (18 May 2021)
IDN-128	Appendix B questionnaire	Questionnaire for input suppliers, appendix B to the countervailing duty questionnaire intended for the authorities of Indonesia (18 May 2021)

Exhibit	Short Title (if any)	Description/Long title
IDN-129 (BCI)	Input supplier questionnaire receipts	Post receipts of Appendix B questionnaire dated 31 May 2021 (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-2-9 in the countervailing duty investigation) (Indonesian original only)
IDN-130 (BCI) (English translation)	GOID's email to nickel ore suppliers	Email dated 13 October 2021 from the GOID to certain nickel ore suppliers enclosing the Appendix B questionnaire (Indonesian original and English translation)
IDN-143 (BCI)	Ceria's response to Appendix B questionnaire	Ceria's response to the Appendix B questionnaire (provided to the Commission by the GOID as EXHIBIT-GOI-DEF 17a in the countervailing duty investigation)
IDN-144 (BCI)	Tiran's response to Appendix B questionnaire	Tiran's response to the Appendix B questionnaire (provided to the Commission by the GOID as EXHIBIT-GOI-DEF 17c in the countervailing duty investigation)
IDN-146 (BCI)	GOID countervailing duty deficiency letter	List of deficiency questions, annex II to the letter dated 4 October 2021 from the Commission to the Embassy of the Republic of Indonesia in Brussels regarding the remote cross-checking process for the GOID
IDN-149	Notice of initiation of countervailing duty investigation	Notice of initiation of an anti-subsidy proceeding concerning imports of stainless steel cold-rolled flat products originating in India and Indonesia, Official Journal of the European Union, C Series, No. 57 (17 February 2021).
IDN-155 (BCI)	IRNC Group Article 28 letter	Letter dated 6 December 2021 from the Commission to the IRNC Group notifying the intended application of Article 28 of the basic anti-subsidy Regulation
IDN-157 (BCI)	Ekasa's response to Appendix B questionnaire	Ekasa's response to the Appendix B questionnaire (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-2_10 in the countervailing duty investigation)
IDN-158 (BCI)	Gag Nikel's response to Appendix B questionnaire	Gag Nikel's response to the Appendix B questionnaire (provided to the Commission by the GOID as EXHIBIT-GOI-C-IV-2_10 in the countervailing duty investigation)
IDN-159.b	Director General Customs Regulation 28/2016	Regulation of Director General of Customs and Excise No. PER-28/BC/2016 on Amendment to Regulation of the Director General of Customs and Excise No. P-23/BC/2009 on customs declaration in the context of the entry of goods from other places in the customs area to places under the supervision of the Directorate General of Customs and Excise (1 July 2016) (English translation) (provided to the Commission by the GOID as EXHIBIT GOI-RCC 10b in the countervailing duty investigation)
IDN-165 (BCI)	IMIP's response to countervailing duty questionnaire	IMIP's response to the questionnaire intended for PT Indonesia Morowali Industrial Park in the countervailing duty investigation
IDN-169 (BCI)	IRNC Group countervailing duty RCC report	Remote cross-checking video-conference report for the IRNC Group in the countervailing duty investigation, annex 4 to the letter dated 17 December 2021 from the Commission to the IRNC Group
IDN-171 (BCI)	IMIP countervailing duty questionnaire	Questionnaire intended for PT Indonesia Morowali Industrial Park in the countervailing duty investigation
IDN-172 (BCI)	GCNS's response to countervailing duty exporter questionnaire	GCNS's response to the countervailing duty questionnaire for producers exporting to the European Union
IDN-173 (BCI)	SMI's response to countervailing duty exporter questionnaire	SMI's response to the countervailing duty questionnaire for producers exporting to the European Union
IDN-174 (BCI)	TSI's response to countervailing duty exporter questionnaire	TSI's response to the countervailing duty questionnaire for producers exporting to the European Union
IDN-181	GOID countervailing duty disclosure cover letter	Note verbale dated 17 December 2021 from the Commission to the Mission of the Republic of Indonesia to the European Union enclosing countervailing duty definitive disclosure documents
IDN-182	IRNC Group countervailing duty disclosure letter	Letter dated 17 December 2021 from the Commission to the IRNC Group enclosing countervailing duty definitive disclosure documents
IDN-185 (BCI)	IRNC Group countervailing duty disclosure of benchmarks for subsidy calculations	Spreadsheets detailing benchmarks for subsidy calculations, attached as annex 2.1 to the countervailing duty definitive disclosure letter to the IRNC Group

Exhibit	Short Title (if any)	Description/Long title
IDN-189 (BCI)	IRNC Group countervailing duty disclosure of nickel ore data for subsidy calculations	Spreadsheets containing nickel ore data for subsidy calculations, attached as annex 2.5 to the countervailing duty definitive disclosure letter to the IRNC Group
IDN-192 (BCI)	IRNC Group countervailing duty disclosure of undercutting calculation overview	Overview of the methodology for undercutting calculations, attached as annex 3a to the countervailing duty definitive disclosure letter to the IRNC Group
IDN-193 (BCI)	IRNC Group countervailing duty disclosure of undercutting calculation spreadsheet	Undercutting calculation spreadsheet, attached as annex 3b to the countervailing duty definitive disclosure letter to the IRNC Group
IDN-194	IRNC Group's deadline extension request for comments on countervailing duty final disclosure	Email dated 21 December 2021 from the IRNC Group to the Commission requesting an extension of the deadline for comments on the definitive disclosure in the countervailing duty investigation
IDN-195	Commission's response to IRNC Group's deadline extension request	Email dated 21 December 2021 from the Commission to the IRNC Group responding to the IRNC Group's request for an extension of the deadline for comments on the definitive disclosure in the countervailing duty investigation
IDN-206 (BCI)	IRNC Group anti-dumping RCC report	Remote cross-checking video-conference report for the IRNC Group in the anti-dumping investigation
IDN-211 (BCI)	IRNC's comments on anti-dumping provisional disclosure	IRNC's comments on the provisional disclosure of 28 May 2021 in the anti-dumping investigation (14 June 2021)
IDN-213 (BCI)	IRNC's comments on anti-dumping final disclosure	IRNC's comments on the final disclosure of 16 August 2021 in the anti-dumping investigation (26 August 2021)
IDN-214	Basic anti-dumping Regulation	Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Unions, Official Journal of the European Union, L Series, No. 176/21 (30 June 2016)
IDN-216 (BCI)	IRNC Group additional anti-dumping final disclosure	Additional final disclosure to IRNC in the anti-dumping investigation
IDN-224	IRNC Group additional anti-dumping final disclosure cover letter	Letter dated 16 September 2021 from the Commission to the IRNC Group enclosing the additional final disclosure
IDN-233	MOI Regulation 47/2019	Regulation of the Minister of Industry of the Republic of Indonesia No. 47 of 2019 on criteria and/or requirements in order to obtain income tax facility for investments in certain business fields and/or in certain regions in the industrial sector (English translation)
EU-138 (BCI) (English translation)	Facility agreement	Facility Agreement between EXIM Bank of China and PT Indonesia Ruipu Nickel and Chrome Alloy dated 26 April 2017 (Chinese original and English translation)
EU-147	GOID's email of 14 December 2021	Email dated 14 December 2021 from the Embassy of the Republic of Indonesia in Belgium to the Commission
EU-161 (BCI)		IRNC Group's response to first countervailing duty deficiency letter
EU-162 (BCI)		IRNC Group's response to second countervailing duty deficiency letter

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Antam	PT Aneka Tambang
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASEAN	Association of Southeast Asian Nations
ASEAN-China FTA	Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People's Republic of China
BCI	Business confidential information
BNM	PT Bina Niaga Multiusaha
Bukit Asam	PT Bukit Asam Tbk
CAF	China-ASEAN Investment Cooperation Fund
Cantostar	Cantostar (Hong Kong) Limited
Ceria	PT Ceria Nugraha Indotama
Commission	European Commission
DPO	domestic processing obligation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Ekasa	PT Ekasa Yad Resources
Eternal Tsingshan	Eternal Tsingshan Group Co., Ltd.
EUROFER	European Steel Association
Gag Nikel	PT Gag Nikel
GATT 1994	General Agreement on Tariffs and Trade 1994
GCNS	PT Indonesia Guang Ching Nickel and Stainless Steel Industry
GDD	general disclosure document
GOC	Government of China
GOID	Government of Indonesia
Hanwa Indonesia	PT Hanwa Indonesia
ILC Articles on State Responsibility	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
IMIP	PT Indonesia Morowali Industrial Park
IRNC	PT Indonesia Ruipu Nickel and Chrome Alloy
IRNC Group	IRNC and its related companies
ITSS	PT Indonesia Tsingshan Stainless Steel
IUP license	Mining business license
IUPK license	Special mining business license
IUPOPK license	IUP operation production for processing and refining (smelter) license
Jindal Indonesia	PT Jindal Stainless Indonesia
MEMR	Ministry of Energy and Mineral Resources of the Republic of Indonesia
NPI	nickel pig iron
PCN	product control number
RCC	Remote cross-checking
Recheer	Recheer Resources (Singapore) Pte. Ltd.
RKAB	annual working and budget plan
Rules of Conduct for the DSU	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG&A	selling, general, and administrative
SOCB	state owned commercial bank
SSCRFP	Stainless steel cold-rolled flat products
SMI	PT Sulawesi Mining Investment
Tiran	PT Tiran Indonesia
TSI	PT Tsingshan Steel Indonesia
USDOC	United States Department of Commerce
Vale	PT Vale Indonesia Tbk
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 24 January 2023, Indonesia requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 13 March 2023 but did not resolve the dispute.

1.2 Panel establishment and composition

1.3. On 17 April 2023, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU to examine the matter based on the standard terms of reference contained in Article 7.1 of the DSU.[2] The Dispute Settlement Body (DSB) established the Panel at its meeting on 30 May 2023.[3]

1.4. The Panel's terms of reference are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS616/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. Based on the agreement of the parties, the panel was composed on 13 September 2023 as follows:

Chairperson:	Mr William James DAVEY
Members:	Mr Paul Richard O'CONNOR Mr Peter VAN DEN BOSSCHE

1.6. Argentina, Australia, Brazil, Canada, China, Egypt, India, Japan, the Republic of Korea, the Russian Federation, Singapore, Chinese Taipei, Thailand, Türkiye, Ukraine, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] on 2 November 2023 and a partial timetable on 31 October 2023.[6]

1.8. In light of subsequent developments and requests by the parties and third parties, the Panel revised its Working Procedures on 12 April 2024, and the timetable on 20 December 2023[7],

[1] Request for consultations by Indonesia, WT/DS616/1 and Corr.1/Rev.1 (Indonesia's consultation request).
[2] Request for the establishment of a panel by Indonesia, WT/DS616/2 (Indonesia's panel request).
[3] DSB, Minutes of the meeting held on 30 May 2023, WT/DSB/M/479, para. 3.4.
[4] Constitution note of the Panel, WT/DS616/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] The Panel provided the parties with a draft partial timetable on 2 October 2023. During the organizational meeting, which was held on 18 October 2023, the Panel noted that because of constraints associated with the availability of a member of the Panel about which the parties were aware, and the scheduling of the 13th Ministerial Conference, the earliest date at which the first substantive meeting could be held was the week of 8 April 2024.
[7] On 13 December 2023, the United States requested the Panel to extend the deadline for third party submissions from 15 January 2024 to 8 February 2024 in view of, among other things, "the length and complexity of Indonesia's arguments … the anticipation of receiving a similarly significant response from the EU" and technical issues associated with the Secretariat's electronic online filing system which precluded it from accessing Indonesia's first written submission when it was filed. On 15 December 2023, Canada and

23 April 2024[8], 30 April 2024[9], 31 July 2024[10], 8 August 2024[11], 4 December 2024[12], 19 December 2024[13], 24 June 2025[14], and 21 July 2025.[15]

1.9. The Panel held a first substantive meeting with the parties on 17 and 18 April 2024.[16] A session with the third parties took place on 18 April 2024. Pursuant to paragraph 11 of the Working Procedures, and taking into account the views of the parties and third parties, the Panel conducted the sessions with the parties solely in person, and the third-party session in a hybrid format providing for remote participation via Webex.[17]

Australia submitted a joint request to similarly extend the deadline for the filing of third party submissions until 8 February 2024. The European Union did not oppose these requests. On 18 December 2023, Indonesia indicated that it could agree to extend the deadline a maximum of four days, until 19 January 2024. After considering the views of the requesting third parties and the parties and confirming the technical difficulties associated with the Secretariat's online filing system, the Panel extended the deadline for third party submissions to 2 February 2024. The timetable was updated accordingly.

Shortly after the Panel announced its decision to extend the deadline for third party submissions to 2 February 2024, Egypt, on 8 January 2024, requested the Panel to further extend this deadline for an additional thirteen days, to 15 February 2024. The European Union opposed Egypt's request. Indonesia noted that the Panel had already extended the deadline until 2 February 2024, but stated that it would defer to the Panel's decision on Egypt's request. After considering Egypt's request and the views of the parties, the Panel maintained the 2 February 2024 deadline for third party submissions.

[8] In view of the number of written questions issued to the parties after the first substantive meeting, the Panel extended the time for the parties' responses. The timetable was updated accordingly.

[9] On 26 April 2024, the United States requested the Panel to extend the deadline to respond to the Panel's questions following the first substantive meeting from 6 May 2024 to 13 May 2024 in view of the number and complexity of the questions, and also to extend the deadline for the filing of the integrated executive summaries of the third parties' arguments from 13 May 2024 to 20 May 2024. The Panel granted these requests on 30 April 2024. The timetable was updated accordingly.

[10] On 19 July 2024, the Panel advised the parties that due to the availability of the panelists (including one panelist who, by the agreement of the parties, was concurrently serving on a separate ongoing dispute settlement proceeding involving the European Union and Indonesia) that it proposed to hold the second substantive meeting on 3-4 December 2024. Both parties indicated that this date was acceptable to them. The timetable was updated accordingly.

[11] On 31 July 2024, having considered the parties' views regarding the date of the second substantive meeting, the Panel proposed certain deadlines for the submission of materials following the second meeting (i.e. responses to the Panel's questions following the meeting, comments on the responses to questions, and integrated executive summaries). The parties did not object to the proposed deadlines. The timetable was updated accordingly.

[12] On 4 December 2024, before closing the second substantive meeting, the Panel indicated to the parties that it intended to send written questions to the parties on 10 December 2024 and proposed that to the extent that the parties wished to pose written questions to each other they should also submit any such questions by the same date. The parties did not object to the proposed deadline. The timetable was updated accordingly.

[13] On 17 December 2024, the European Union requested additional time to respond to questions from the Panel following the second substantive meeting in view of the "number and complexity" of the questions. The European Union also requested the Panel to extend the deadline for the parties to submit comments on their respective responses to the Panel's questions and to extend the deadline to submit integrated executive summaries by two weeks. Indonesia did not object to these requests. After considering the European Union's communication and Indonesia's response, and taking account of the volume of submissions in the proceeding (e.g. the parties' first and second written submissions, excluding exhibits, exceeded 1200 pages) and the significant number of questions that the Panel posed to the parties related to these materials, the Panel agreed to extend the deadlines as requested. The timetable was updated accordingly.

[14] On 13 June 2025, the Panel informed the parties of the expected date of issuance of the Interim Report and proposed the deadlines for the parties' submissions after the issuance of the Interim Report. Indonesia requested the Panel to delay the deadline for the parties to request review of the Interim Report and to request an interim review meeting until 15 July 2025, and the deadline for the parties' written comments on each other's requests for review, if no interim view meeting is requested, until 29 July 2025. The European Union did not object to Indonesia's request. The Panel granted Indonesia's request and the timetable was updated accordingly upon the issuance of the Interim Report.

[15] In light of the parties' communications of 15 July 2025 (see para. 6.1 below), the Panel decided to issue the Final Report to the parties on 28 July 2025 and the timetable was updated accordingly.

[16] The Panel considered Indonesia's request to take account of public holidays in Indonesia from 6-15 April 2024 when setting the date of the first substantive meeting.

[17] Panel's communication of 9 April 2024.

1.10. The Panel held a second substantive meeting with the parties on 3 and 4 December 2024. At the request of the European Union, and taking into account the parties' comments, the Panel conducted the second substantive meeting in a hybrid format.[18]

1.11. On 24 February 2025, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 June 2025. The Panel issued its Final Report to the parties on 28 July 2025.

1.4 Additional Working Procedures concerning business confidential information

1.12. After consulting the parties, the Panel adopted its Additional Working Procedures concerning Business Confidential Information (BCI)[19] on 2 November 2023.

1.13. On 5 November 2023, Indonesia requested the Panel to revise the Additional Working Procedures concerning BCI to preclude third parties from being automatically granted access to parties' submissions that contain BCI.[20] The European Union did not object to Indonesia's request.[21] Taking into account the views of the parties, the Panel revised the Additional Working Procedures concerning BCI on 7 November 2023.

1.5 Request for enhanced third-party rights

1.14. On 15 December 2023, the Panel received a joint communication from Canada and Australia requesting the Panel to exercise its discretion under Article 12.1 of the DSU to grant certain enhanced third-party rights. Specifically, Canada and Australia requested the right to: (a) receive electronic copies of all submissions and statements of the parties up to the issuance of the Interim Report; (b) attend all substantive meetings of the Panel with the parties, including portions of such meetings when BCI may be discussed; (c) respond, at the invitation of the Panel, to arguments, questions or responses of the parties at both substantive meetings, or to questions from the Panel; and (d) participate in a third-party session to be held at the second substantive meeting of the Panel.

1.15. Indonesia objected to "the granting of any additional third-party rights beyond what is contained in Articles 10.2 and 10.3" of the DSU. The European Union did not oppose the request.[22]

1.16. On 25 January 2024, the Panel informed the parties and third parties of its decision to decline the joint request of Canada and Australia. In the same communication, the Panel informed the parties and third parties that it would address this subject in additional detail in its Report. The Panel's discussion on this subject is set out in section 7.3 below.

1.6 Disclosure of information under the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes

1.17. On 28 February 2024, Mr Peter Van den Bossche provided the parties with a letter disclosing certain information pursuant to paragraph VI:5 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Rules of Conduct for the DSU).

1.18. On 22 March 2024, Indonesia submitted that "[i]n the interest of moving forward with the panel proceedings", it had no objection to Mr Van den Bossche continuing to serve as a member of the Panel and that it "trust that he will be fair and impartial in his conduct". On 25 March 2024, the European Union submitted that it had "no comments to raise on the subject".

1.19. On 6 December 2024, Mr Van den Bossche provided the parties with another letter disclosing certain information pursuant to paragraph VI:5 of the Rules of Conduct for the DSU. On 16 December 2024, in response to a request of the European Union, Mr Van den Bossche disclosed additional information regarding the subject of the disclosure, and the parties were invited to provide any comments they may have on that matter. On 4 March 2025, Indonesia submitted that it was of

[18] Panel's communication of 22 November 2024.
[19] Additional Working Procedures of the Panel concerning Business Confidential Information (Annex A-2).
[20] Indonesia's communication of 5 November 2023.
[21] European Union's communication of 6 November 2023.
[22] European Union's communication of 18 December 2023.

the view that the disclosed information does not give rise to conflict of interest and that Mr Van den Bossche would "remain neutral and impartial in undertaking his role as member of the Panel". The European Union did not provide any further comments before the Panel issued its Final Report on 28 July 2025.

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. Indonesia's panel request identifies the measures at issue as follows:

> The measures at issue are the definitive countervailing and anti-dumping duties on SSCRFP from Indonesia as well as the underlying investigation that led to the imposition of these measures (hereafter "countervailing measures" and "anti-dumping measures", respectively), which include, amongst others, the actions taken or omitted by the European Commission ("Commission") during the course of – or in relation to – the investigations.
>
> The countervailing and anti-dumping measures include, but are not limited to, and are evidenced by the following instruments/documents:
>
> > Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia (hereafter "Countervailing Regulation"); and
> >
> > Commission Implementing Regulation (EU) 2021/2012 of 17 November 2021 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, published in the Official Journal of the European Union (hereafter "Definitive Anti-Dumping Regulation") and Commission Implementing Regulation (EU) 2021/854 of 27 May 2021 imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products originating in India and Indonesia (hereafter "Provisional Anti-Dumping Regulation").[23, 24]

2.2. Indonesia also challenges any amendments, supplements, extensions, replacement measures, renewal measures, implementing measures, and any future action or other measures the European Union may take in connection with the measures at issue.[25]

2.3. In the following sections, we briefly set out certain basic facts relating to the underlying investigations that are relevant to Indonesia's claims in this proceeding.

2.1 Anti-dumping investigation

2.4. The European Commission (Commission) initiated the underlying anti-dumping investigation on imports of stainless steel cold-rolled flat products (SSCRFP) originating in India and Indonesia on 30 September 2020, following a complaint lodged on 17 August 2020 by the European Steel Association (EUROFER).[26] Two exporting producers from India and three exporting producers from

[23] Indonesia's panel request, pp. 1-2. (fns omitted)
[24] This Report uses the terms "preliminary determination" and "final determination" to refer the European Union's instruments that detail the European Commission's decision to, respectively, apply either provisional or definitive anti-dumping or countervailing duties.
[25] Indonesia's panel request, p. 5.
[26] Anti-dumping preliminary determination (Exhibit IDN-3), recitals 1-2.

Indonesia, including PT Indonesia Ruipu Nickel and Chrome Alloy (IRNC)[27], participated in the investigation.[28]

2.5. On 28 May 2021, the Commission published its preliminary determination and applied provisional anti-dumping duties. The applicable duty rate for IRNC was set at 19.9%.

2.6. On 18 November 2021, the Commission published its final determination and applied definitive anti-dumping duties. The applicable duty rate for IRNC was set at 10.2%.

2.2 Countervailing duty investigation[29]

2.7. The Commission initiated the underlying countervailing duty investigation on imports of SSCRFP originating in India and Indonesia on 17 February 2021, following a complaint lodged on 4 January 2021 by the EUROFER. [30, 31]

2.8. In its notice of initiation, the Commission requested all exporting producers in India and Indonesia to provide information so that the Commission could decide whether sampling was necessary, and if so, to select a sample. As regards Indonesia, three exporting producers (or groups of exporting producers) provided the Commission with the requested information, from which the Commission selected a sample of two producers, including IRNC.[32] IRNC's related input suppliers located in the Morowali Industrial Park (i.e. PT Indonesia Guang Ching Nickel and Stainless Steel Industry (GCNS), PT Indonesia Tsingshan Stainless Steel (ITSS), PT Sulawesi Mining Investment (SMI), and PT Tsingshan Steel Indonesia (TSI)) also participated in the investigation. These companies were collectively referred to as "the IRNC Group" in the countervailing duty investigation.[33]

2.9. During the countervailing duty investigation, the Commission requested and verified information from the IRNC Group by way of the exporter questionnaire[34], deficiency letters[35], and a remote cross-checking (RCC) videoconference.[36] By a letter dated 6 December 2021, the Commission informed the IRNC Group of its intent to apply Article 28 of the basic anti-subsidy Regulation of the European Union and to use facts available.[37]

2.10. The Commission also requested and verified information from the government of Indonesia (GOID) during the investigation. Among other things, on 18 May 2021, the Commission sent a questionnaire to the GOID that it asked the GOID to complete.[38] This questionnaire contained several attachments, including a "questionnaire for input suppliers" that was attached to the GOID

[27] In the anti-dumping investigation proceeding, the following companies were jointly referred to as "the IRNC Group": IRNC, PT Ekasa Yad Resources (Ekasa), PT Hanwa (Hanwa), Cantostar Limited (Cantostar), Eternal Tsingshan Group Co., Ltd. (Eternal Tsingshan), and Recheer Resources Pte. Ltd. (Recheer). While Ekasa and Hanwa are located in Indonesia, Cantostar and Eternal Tsingshan are located in Hong Kong, China, and Recheer is located in Singapore. See Anti-dumping preliminary determination (Exhibit IDN-3), recital 19(c).

[28] Anti-dumping preliminary determination (Exhibit IDN-3), recitals 13-14.

[29] The Panel notes that the relevant instruments of the European Union use the term "anti-subsidy investigation" to refer to the underlying investigation that led to the imposition of the countervailing duties at issue.

[30] Notice of initiation of countervailing duty investigation (Exhibit IDN-149), section 1; Countervailing duty final determination (Exhibit IDN-1), recitals 1-2.

[31] The Panel notes that the "open version" of the EUROFER's complaint submitted to the Panel as Exhibit IDN-105 is stamped and dated 23 December 2020.

[32] Countervailing duty final determination (Exhibit IDN-1), recitals 29 and 35.

[33] Countervailing duty final determination (Exhibit IDN-1), recital 36. The Panel will also use the term "the IRNC Group" to refer to these companies in the context of the countervailing duty investigation in this Report.

[34] Countervailing duty exporter questionnaire (Exhibit IDN-80); GCNS's response to countervailing duty exporter questionnaire (Exhibit IDN-172 (BCI)); SMI's response to countervailing duty exporter questionnaire (Exhibit IDN-173 (BCI)); TSI's response to countervailing duty exporter questionnaire (Exhibit IDN-174 (BCI)).

[35] IRNC Group's response to first countervailing duty deficiency letter (Exhibit EU-161 (BCI)); IRNC Group's response to second countervailing duty deficiency letter (Exhibit EU-162 (BCI)).

[36] IRNC Group countervailing duty RCC report (Exhibit IDN-169 (BCI)).

[37] IRNC Group Article 28 letter (Exhibit IDN-155 (BCI)). See also Basic anti-subsidy Regulation (Exhibit IDN-109), Article 28.

[38] GOID countervailing duty questionnaire cover letter (Exhibit IDN-125); GOID countervailing duty questionnaire (Exhibit IDN-127).

questionnaire as appendix B (Appendix B questionnaire).[39] The government questionnaire asked the GOID to forward this Appendix B questionnaire to "the top 10 producers and distributors of the input materials in question [(including nickel ore)], as well as to any other producers and distributors of the materials in question, which have provided inputs to the two cooperating companies".[40] The government questionnaire also asked the GOID to forward a separate company-specific questionnaire to PT Indonesia Morowali Industrial Park (IMIP).[41] The GOID responded to the Commission's government questionnaire on 21 July 2021.[42] As part of its response, the GOID provided responses to the Appendix B questionnaire from eight companies[43], including PT Ekasa Yad Resources (Ekasa)[44] and PT Gag Nikel (Gag Nikel)[45]. The GOID also included IMIP's response to the company-specific questionnaire that the Commission had asked the GOID to forward to IMIP.[46] On 4 October 2021, the Commission sent a deficiency letter to the GOID[47], to which the GOID submitted a response on 25 October 2021.[48] Subsequently, the Commission conducted the RCC process with the GOID, the Indonesia EXIM Bank, and Gag Nikel in October and November 2021. The Commission sent an Article 28 letter to the GOID on 3 December 2021[49], and the GOID provided comments on the Article 28 letter on 8 December 2021.[50]

2.11. On 17 December 2021, the Commission provided the parties to the investigation with a general disclosure document that disclosed the essential facts and considerations on the basis of which the Commission intended to apply definitive countervailing duties on imports of SSCRFP originating in India and Indonesia.[51] In addition, the Commission provided the IRNC Group with specific disclosure documents concerning the Commission's calculation of the IRNC Group's subsidy margins and injury finding as well as the IRNC Group's RCC report.[52] The Commission also provided the GOID with copies of the RCC reports that the Commission prepared after it conducted the RCC process with the GOID, the Indonesia EXIM Bank, and Gag Nikel.[53] The deadline for comments on the disclosure was initially set as 4 January 2022. However, after the IRNC Group requested that this deadline be extended to 11 January 2022, the Commission subsequently extended the comment date to 7 January 2022.

2.12. On 16 March 2022, the Commission published its final determination and applied definitive countervailing duties. The applicable countervailing duty rate for IRNC was set at 21.4%. The Commission's final determination revised the applicable anti-dumping duty rate for IRNC to 9.3%.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the measures at issue are inconsistent with the European Union's obligations under the SCM Agreement, the Anti-Dumping Agreement, and the GATT 1994 in the following respects:

a. With respect to the Commission's findings regarding the provision of preferential financing and other support by Chinese grantors to Indonesian SSCRFP producers, the European Union acted inconsistently with Articles 1.1(a)(1), 1.1(b), 1.2, 2.1, 2.2, 2.4, 10, 14, and 32.1 of the SCM Agreement;

[39] Appendix B questionnaire (Exhibit IDN-128).
[40] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 23. See also Countervailing duty final determination (Exhibit IDN-1), recital 44.
[41] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 34; IMIP countervailing duty questionnaire (Exhibit IDN-171 (BCI)).
[42] GOID's response to countervailing duty questionnaire (Exhibit IDN-71).
[43] GOID's response to countervailing duty questionnaire (Exhibit IDN-71), p. 63.
[44] Ekasa's response to Appendix B questionnaire (Exhibit IDN-157 (BCI)).
[45] Gag Nikel's response to Appendix B questionnaire (Exhibit IDN-158 (BCI)).
[46] GOID's response to countervailing duty questionnaire (Exhibit IDN-71), p. 100; IMIP's response to countervailing duty questionnaire (Exhibit IDN-165 (BCI)).
[47] GOID countervailing duty deficiency letter (IDN-146 (BCI)).
[48] GOID's response to countervailing duty deficiency letter (Exhibit IDN-83 (BCI)).
[49] GOID Article 28 letter (Exhibit IDN-126).
[50] GOID's response to Article 28 letter (Exhibit IDN-92).
[51] Countervailing duty GDD (Exhibit IDN-108).
[52] IRNC Group countervailing duty disclosure cover letter (Exhibit IDN-182).
[53] GOID countervailing duty disclosure cover letter (Exhibit IDN-181); GOID countervailing duty RCC report (Exhibit IDN-117 (BCI)); Gag Nikel countervailing duty RCC report (Exhibit IDN-91 (BCI)).

b. With respect to the Commission's findings regarding the provision of nickel ore at less than adequate remuneration, the European Union acted inconsistently with Articles 1.1(a)(1) (specifically, Article 1.1(a)(1)(iii) and Article 1.1(a)(1)(iv)), 1.1(b), 1.2, 2.1(a), 2.4, 10, 14, 19.4, and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994;

c. With respect to the Commission's findings regarding the government revenue foregone that is otherwise due, the European Union acted inconsistently with Footnote 1, Articles 1.1.(a)(1)(ii), 1.1(b), 1.2, 2.1, 2.2, 2.3, 2.4, 3.1(a), 10[54], 14, and 32.1 of the SCM Agreement, as well as Articles VI:3 and VI:4 of GATT 1994;

d. With respect to the Commission's actions and omissions during the course of – or in relation to – the countervailing duty investigation, the European Union acted inconsistently with Articles 10, 12.1, 12.7, 12.8 (both sentences), 12.9, 14 (*chapeau* thereof), and 22.3 of the SCM Agreement; and

e. With respect to 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, the European Union acted inconsistently with Articles 2.4 and 6.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[55]

3.2. Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the European Union bring its measures into conformity with its WTO obligations.[56]

3.3. The European Union requests that the Panel reject Indonesia's claims in this dispute.[57]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Canada, China, Egypt, Japan, the Republic of Korea, the Russian Federation, Chinese Taipei, Thailand, Türkiye, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-12). Brazil, India, Singapore, Ukraine, and the United Kingdom did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 15 July 2025, the European Union stated that it had no comments on the Interim Report. In a communication received on the same day, Indonesia also stated that it had "no substantive comments to offer" on the Interim Report but noted "a few minor clerical or typographical errors".

[54] The Panel notes that the concluding sections of Indonesia's first written submission and second written submission cited at fn 55 do not request a finding of inconsistency with Article 10 of the SCM Agreement with respect to the Commission's findings regarding the governmental revenue forgone that is otherwise due, and accordingly, the Panel did not include the reference to Article 10 in this subparagraph in the draft descriptive part that the Panel issued to the parties on 24 February 2025. In its comments on the draft descriptive part, Indonesia requested the Panel to add a reference to Article 10 in this subparagraph. Specifically, Indonesia submitted that the reference to Article 10 was "mistakenly omitted from the paragraphs that the Panel rightly quotes", and refers to other parts of its submissions, as well as claim 4.f on page 4 of its panel request, that include the reference to Article 10.

The Panel invited the European Union to comment on Indonesia's request. The European Union responds, in its communication of 20 March 2025, that it would not oppose the requested correction "to the extent that such inclusion takes into account the specific context and purpose sought by Indonesia when making this claim".

We have decided to grant Indonesia's request. We note that this modification in the descriptive part of the Report does not affect the scope of the matter referred to the Panel.

[55] Indonesia's first written submission, para. 1415; second written submission, para. 939.

[56] Indonesia's first written submission, para. 1416.

[57] European Union's first written submission, para. 937; second written submission, para. 427.

Accordingly, the Panel has made no changes to the Interim Report apart from inserting this paragraph, modifying the respective last sentences of paragraphs 1.8 (including new footnotes 14-15), 1.11, and 1.19 above, and correcting certain typographical or editorial errors, including those identified by Indonesia.

7 FINDINGS

7.1 General principles regarding treaty interpretation, standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.[58]

7.2. Article 17.6(ii) of the Anti-Dumping Agreement directs a panel to the same customary rules of treaty interpretation, and further provides:

> Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.1.2 Standard of review

7.3. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]

7.4. In addition to Article 11 of the DSU, Article 17.6(i) of the Anti-Dumping Agreement provides that in disputes under the Anti-Dumping Agreement:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]

7.5. Thus, Article 17.6(i) of the Anti-Dumping Agreement is explicit that in carrying out its objective assessment, the Panel is barred from conducting a *de novo* review of the facts. Instead, the Panel is directed to "determine whether the authorities' establishment of the facts was proper", and "whether their evaluation of those facts was unbiased and objective".

7.6. As to the universe of relevant facts whose "establishment" and "evaluation" by the authority the Panel must assess, Article 17.5(ii) of the Anti-Dumping Agreement provides that the Panel is to "examine the matter based upon … the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.7. Although the SCM Agreement does not contain a similar provision, Members have declared that disputes arising from anti-dumping and countervailing duty measures should be resolved in a consistent manner.[59]

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[58] See e.g. Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, section D.

[59] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

7.8. The "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.

7.9. Prior dispute settlement reports – with which we agree – that have considered questions related to the standard of review have observed that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[60]

7.10. Notwithstanding this, a panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[61] A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[62] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[63] That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion.[64]

7.1.3 Burden of proof

7.11. The Panel notes that prior dispute settlement reports – with which we also agree – have determined that the general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[65] As such, Indonesia bears the burden of demonstrating that the European Union's measures are inconsistent with the WTO Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[66] Finally, it is generally for each party asserting a fact to provide proof thereof.[67]

7.2 Special and differential treatment

7.12. Article 12.11 of the DSU provides that:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.13. In the present dispute, Indonesia refers to Part VIII of the SCM Agreement, in particular Article 27.1.[68] Indonesia makes no claims of inconsistency with those provisions. Instead, Indonesia argues, in relation to its claim under Article 1.1(a)(1) concerning the Commission's findings regarding the alleged provision of preferential financing and other support by Chinese grantors to

[60] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[61] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[62] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[63] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[64] Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.
[65] See e.g. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[66] Appellate Body Report, *EC – Hormones*, para. 104.
[67] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[68] Article 27.1 of the SCM Agreement provides that "Members recognize that subsidies may play an important role in economic development programmes of developing country Members."

Indonesian SSCRFP producers, that these provisions reflect the object and purpose of the SCM Agreement to ensure that "developing countries secure a share in the growth in international trade commensurate with the needs of their economic development", such that the SCM Agreement should be interpreted "in a way that does not hinder [foreign direct investment] and value-addition as these contribute to economic development".[69]

7.14. We consider it sufficient, for the purposes of resolving this claim, to limit our reasoning to the discussion set out in section 7.4.2.1.2. Having taken account of the provisions of Part VIII of the SCM Agreement in our deliberation, we do not consider it necessary to express an opinion on Indonesia's argument relating to these provisions for the purposes of resolving this dispute.

7.3 Enhanced third-party rights

7.15. On 25 January 2024, the Panel issued its decision declining Australia and Canada's joint request that the Panel grant enhanced rights to third parties in this proceeding. In that communication, the Panel noted that it would address this decision in additional detail in its Report.

7.16. In this section, the Panel provides its reasoning for that decision.

7.3.1 Arguments of the requesting third parties and the parties

7.17. Australia and Canada request the Panel to grant certain additional third-party rights in these proceedings. Specifically, these third parties request the right to: (a) receive electronic copies of all submissions and statements of the parties up to the issuance of the Interim Report; (b) attend all substantive meetings of the Panel with the parties, including portions of such meetings when BCI may be discussed; (c) respond, at the invitation of the Panel, to arguments, questions or responses of the parties at both substantive meetings, or to questions from the Panel; and (d) participate in a third-party session to be held at the second substantive meeting of the Panel.[70]

7.18. Australia and Canada primarily support their request on two related grounds: (a) the fact that the proceedings raise novel questions concerning the scope of the SCM Agreement; and (b) the fact that the Panel's decision may affect the manner in which Members decide to structure support measures going forward. Both assert that their "ability to adequately respond to the central interpretative questions at stake in this case will be significantly impaired" if they are not provided enhanced third-party rights and that "granting these rights would not impose any undue burden on either of the disputing Parties".[71]

7.19. The European Union does not oppose this request.[72]

7.20. Indonesia objects to "the granting of any additional third-party rights beyond what is contained in Articles 10.2 and 10.3" of the DSU, which in its view "already sufficiently protects the rights of third parties". Indonesia supports its position in part by noting that the panel in *Korea – Radionuclides* rejected a request for enhanced third-party rights that, as here, was similarly premised on the fact that the dispute raised important interpretation questions. Among other things, Indonesia notes that the panel in *Korea – Radionuclides* reasoned that, "when drafting the DSU, WTO Members were aware that panels would regularly be called upon to consider important systemic issues of first impression and they had drafted the basis for third-party access with this in mind".[73] Indonesia asserts that Australia and Canada have not pointed to any specific economic or other interests that would be directly affected by this dispute. It also asserts that granting third parties enhanced rights could slow or otherwise delay the proceedings.[74]

[69] Indonesia's first written submission, para. 130 (referring to Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.47).
[70] Australia and Canada's joint communication of 15 December 2023.
[71] Australia and Canada's joint communication of 15 December 2023.
[72] European Union's communication of 18 December 2023.
[73] Panel Report, *Korea – Radionuclides*, para. 1.17.
[74] Indonesia's communication of 18 December 2023.

7.3.2 Evaluation

7.21. Articles 10.2 and 10.3 of the DSU and paragraph 6 of Appendix 3 of the DSU define the rights of third parties in panel proceedings. Pursuant to these provisions, third parties have the right to: (a) receive the submissions of the parties up to the first meeting of the panel; (b) make submissions to the panel; and (c) present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session.

7.22. We examine Australia and Canada's joint request in light of the above considerations.

7.23. Australia and Canada assert that "[t]his dispute raises a novel issue concerning the proper scope of the disciplines" of the SCM Agreement, including "important questions regarding the interpretation of Articles 1 and 2 of the ASCM, and in particular, of terms that are fundamental to the scope of application of the Agreement, such as 'government', 'granting authority' and 'jurisdiction'" and that "[t]he Panel's decision on these novel issues could impact the way that Members decide to structure support measures".[75] While we are mindful of the systemic importance of these issues, prior dispute settlement reports that have considered requests for enhanced third-party rights, with which we agree, have found that a generalized systemic interest in the interpretation of the WTO Agreements, standing alone, does not normally suffice to warrant granting enhanced third-party rights in the absence of agreement by the parties.[76] We agree with Indonesia that Australia and Canada have not demonstrated the existence of any specific economic interests that might be affected by the outcome of this dispute. In this instance, we note that: (a) one party to the proceedings opposes the granting of enhanced third-party rights; and that (b) Australia and Canada have not identified any exceptional circumstances that would otherwise warrant the granting of enhanced third-party rights, including identifying any specific economic interests in the outcome of the dispute.

7.24. The Panel also disagrees with the contention that third parties' "ability to adequately respond to the central interpretative questions at stake in this case will be significantly impaired without [the requested] enhanced rights".[77] The Panel recalls that both Indonesia and the European Union provided detailed arguments concerning the interpretative questions under Articles 1 and 2 of the SCM Agreement in their first written submissions. Furthermore, we note that paragraph 9 of the Working Procedures allows the Panel to pose questions to third parties "at any time" during the proceedings. Given this, we consider that the current Working Procedures provide sufficient flexibility for the Panel to take third party views into account.[78]

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[75] Australia and Canada's joint communication of 15 December 2023.

[76] See e.g. *Australia – Anti-Dumping Measures on Paper*, Decision of the panel concerning the requests for enhanced third-party rights, WT/DS529/12, para. 1.12. We note that prior dispute settlement panels in previous disputes granted certain enhanced third-party rights on the basis of, *inter alia*:

a. the fact that certain specific third-party economic benefits were directly implicated by the measure at issue (Panel Reports, *EC – Bananas III*, para. 7.8; *EC – Bananas III (Article 21.5 – US)*, para. 7.722; *EC – Tariff Preferences*, Annex A, para. 7; and *EU – Poultry Meat (China)*, para. 7.44.);
b. the importance of the trade in the product at issue to certain third parties (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.44; *EC – Export Subsidies on Sugar (Australia)*, para. 2.5.);
c. the potential impact of the outcome of the dispute on similar third-party measures (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 1.44; *EC – Tariff Preferences*, Annex A, para. 7); and
d. the claims that the measures at issue derived from an international treaty to which certain third parties were parties (Panel Reports, *EC – Bananas III*, para. 7.8).

[77] Australia and Canada's joint communication of 15 December 2023.

[78] We note that the Panel posed questions to third parties, both orally and in writing, concerning the interpretation of Articles 1 and 2 of the SCM Agreement before, during, and after the third-party session of the first substantive meeting, and that Argentina, Australia, Canada, China, Egypt, and the United States provided written responses to these questions. See Argentina's third-party responses to Panel question Nos. 1, 2, 5, and 9; Australia's third-party responses to Panel question Nos. 2, 4, 5, 11, and 13, paras. 1-10; Canada's third-party response to Panel question No. 10, paras. 1-3; China's third-party responses to Panel question Nos. 1, 2, 3, 6, 9, 10, 13, and 14, paras. 1-29; Egypt's third-party responses to Panel question Nos. 1, 2, and 13, paras. 1.1-1.11; and United States' third-party responses to Panel question Nos. 1-14, paras. 1-43.

7.25. For the foregoing reasons, the Panel declines Australia's and Canada's request for enhanced third-party rights.

7.4 Claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged provision of preferential financing and other support by Chinese grantors to Indonesian SSCRFP producers

7.4.1 Introduction

7.26. In the SSCRFP countervailing duty investigation, the Commission attributed to the GOID financial contributions that certain Chinese grantors provided to an Indonesian exporting producer, the IRNC Group, in Indonesia.[79] The Commission reached this attribution decision after concluding that the GOID had "induced" the Government of China (GOC) to provide the financial contributions at issue and had "acknowledged and adopted" those financial contributions as its own.[80] The Commission determined that these attributed financial contributions were subsidies within the meaning of Article 1.1(a)(1) of the SCM Agreement, and countervailed them.

7.27. The Commission found that the Chinese grantors had provided the financial contributions in question, and that the recipient, the IRNC Group, received these contributions in Indonesia either directly or indirectly through the IRNC Group's parent companies in China. The Commission determined that these contributions consisted of: (a) loans and credit lines that Chinese state-owned banks extended to the IRNC Group; (b) inter-company loans that IRNC Group's Chinese shareholders provided to the IRNC Group; (c) in-kind capital equipment that IRNC Group's Chinese shareholders provided to the IRNC Group; and (d) capital investment support that the China-ASEAN Investment Cooperation Fund (CAF) provided to the IRNC Group.[81,82] We note that the sum total of the subsidy rates that the Commission determined for these contributions amounted to 7.92%.[83]

7.28. Indonesia alleges that:

a. The European Union contravened Article 1.1(a)(1) of the SCM Agreement by attributing to the GOID the financial contributions that certain Chinese grantors provided to the IRNC Group, and by considering these attributed financial contributions to be subsidies within the meaning of that provision.

b. The European Union violated Articles 2.1 and 2.2 of the SCM Agreement by determining that the GOID – and not the Chinese grantors – was the granting authority and, consequently, the European Union also violated these provisions by determining that these alleged subsidies were specific.

c. The European Union's decision to countervail the alleged subsidies provided by the Chinese grantors was not supported by positive evidence that the subsidies were specific, in contravention of Article 2.4 of the SCM Agreement.[84]

[79] We note that the Commission found that the "preferential financing granted by the GOC" to the IRNC Group in Indonesia amounted to a financial contribution by the GOID. (Countervailing duty final determination (Exhibit IDN-1), recitals 654-680). We further note that the Commission refers to the alleged financial contribution provided by the Chinese grantors either as "financial contribution provided by the GOC" or "preferential financing granted by GOC". (See, for instance, Countervailing duty final determination (Exhibit IDN-1), recitals 680 and 703). Like the Commission, the Panel uses these terms interchangeably.

[80] Countervailing duty final determination (Exhibit IDN-1), recitals 654, 661, 668, and 673-674.

[81] Countervailing duty final determination (Exhibit IDN-1), sections 4.6.1–4.6.4.

[82] The Commission found that "Chinese public bodies granted the preferential financing after negotiation and signature of the relevant documents in China," and that the IRNC Group received this financing "directly or indirectly" through its parent company in China (i.e. in the form of inter-company loans). (Countervailing duty final determination (Exhibit IDN-1), recital 682).

[83] The Commission established the following subsidy rates for the contributions in question to the IRNC Group: (a) loans from Chinese policy banks: 1.84%; (b) provision of credit lines: 0.06%; and (c) support for capital investment (CAF's equity infusion, provision of in-kind capital equipment, and shareholder loans): 6.02%. (See Countervailing duty final determination (Exhibit IDN-1), recitals 749, 768, and 801).

[84] See Indonesia's first written submission, para. 64. See also section 7.4.3 below for further detail on Indonesia's claims in respect of the Commission's specificity determination.

7.29. Before we consider Indonesia's claims enumerated above, we note that both parties appear to concur that this dispute does not raise the issue of whether the term "subsidy" that appears in Article 1 of the SCM Agreement may be interpreted to encompass a financial contribution that may be provided by one WTO Member in the territory of another WTO Member.[85]

7.30. In particular, we note that the European Union states that "the Panel does not need to address the issue of whether the SCM Agreement permits WTO Members to countervail transnational subsidies (i.e. subsidies provided by a WTO Member outside its territory); rather, the Panel needs to examine whether the SCM Agreement permits to attribute the financial support provided by one WTO Member to another WTO Member, in light of the specific evidence available".[86]

7.31. We also note Indonesia's statement that it "does not exclude that the financial contributions provided by the Chinese government could be challenged directly before the WTO dispute settlement system under Part III of the SCM Agreement [relating to actionable subsidies]".[87]

7.32. We agree with the parties' observations that this dispute does not raise the issue of whether the SCM Agreement permits WTO Members to countervail subsidies provided by a WTO Member outside its territory. We therefore begin our analysis, in the section below, by examining Indonesia's claim set out in paragraph 7.28.a above, concerning the Commission's "attribution" to the GOID of the alleged financial contributions provided by the GOC.

7.4.2 Did the specific method by which the Commission attributed the Chinese financial contributions to the GOID contravene Article 1.1(a)(1) of the SCM Agreement?

7.33. Indonesia's claim challenging the Commission's decision to attribute to the GOID the financial contributions that certain Chinese grantors provided to the IRNC Group raises two principal questions:

a. First, did Article 1.1(a)(1) of the SCM Agreement preclude the Commission from adopting the specific method of attribution that it used in the underlying investigation to conclude that the financial contributions at issue could be attributed to the GOID?

b. Second, assuming *arguendo* that Article 1.1(a)(1) of the SCM Agreement did not preclude the Commission from employing the specific method of attribution that it used to attribute the financial contributions at issue to the GOID, has the European Union established that sufficient evidence existed to support the Commission's attribution finding?

7.34. We note that Indonesia's attribution claim could be addressed in view of the two questions above, the first of which approaches the issue as a matter of interpretation and the second as a matter of fact. We consider that should we answer the first question in the affirmative – that is, in the event that we determine that Article 1.1(a)(1) of the SCM Agreement precluded the Commission from adopting the particular method of attribution that the Commission used in the underlying investigation in reaching its attribution finding – we may, on that basis alone, uphold Indonesia's attribution claim, in which case we need not address the second question – that is, whether the Commission had a sufficient evidentiary basis for its decision to attribute the financial contributions to the GOID.

7.35. We will therefore begin our evaluation by addressing the first question. Based on how we decide that question, we will assess whether we need to address the second question.

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[85] See Indonesia's second written submission, para. 150; European Union's first written submission, fn 22. Among other things, we note Indonesia's statement that in the underlying countervailing duty investigation, the Commission distinguished between "the question of whether the GOC is accountable under the SCM Agreement for granting subsidies for the production of goods overseas, which are exported to third countries" and "the separate question whether, in specific cases, the government of the exporting country is accountable under the SCM Agreement for having proactively sought, acknowledged and adopted as its own such subsidies for the benefit of the products made therein". (Indonesia's second written submission, para. 150 (quoting Countervailing duty final determination (Exhibit IDN-1), recital 646) (emphasis omitted)).

[86] European Union's first written submission, fn 22.

[87] Indonesia's second written submission, para. 143.

7.4.2.1 Did Article 1.1(a)(1) of the SCM Agreement preclude the Commission from employing the specific method of attribution used in the investigation to attribute to the GOID the financial contributions provided by Chinese grantors (i.e. via the concept of "inducement")?

7.36. In the sections below, we first set out the relevant aspects of the specific method that the Commission used in the underlying investigation to attribute to the GOID the financial contributions in question provided by the Chinese grantors. We then evaluate whether Article 1.1(a)(1) of the SCM Agreement precluded the Commission from employing that method to reach its attribution finding.

7.4.2.1.1 The Commission's specific method of attribution

7.37. In attributing to the GOID the financial contributions provided by certain Chinese grantors to the IRNC Group in Indonesia, the Commission relied on its interpretation of the term "by a government" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement.

7.38. The Commission concluded that the term "by a government" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, "interpreted *inter alia* in light of Article 11 of [the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility)] permits the attribution to the GOID of the financial support granted by the GOC to Indonesian exporting producers in the Morowali Industrial Park in Indonesia".[88]

7.39. The Commission observed that "[u]nder Article 11 of the ILC Articles, conduct can be attributed to a State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'".[89] The Commission considered that "[t]he 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".[90] The Commission further took the view that "[t]he rules in the ILC Articles are also 'relevant' within the meaning of Article 31(3)(c) of the [Vienna Convention on the Law of Treaties] because they provide guidance for the interpretation of the notion of attribution, i.e. when certain acts or omission can be attributed to one State, even when those acts or omissions do not emanate from that State directly".[91]

7.40. The Commission considered that "the notion of attribution becomes relevant to interpret the term 'by a government' in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, and more in particular, to determine the correct attribution of a conduct in a situation of cooperation between two States with respect to subsidies".[92] The Commission found that "[j]ust like the notion of 'public body', the notion of government is open to interpretation taking into account its context, object and purpose. Thus, the actions attributable to the government of the county of origin or export may not only be actions directly emanating from such a government but also actions imputable to such a government".[93]

7.41. Based on this reasoning, the Commission stated that it would "examine whether the conduct of the foreign government (i.e. the GOC, when granting preferential loans) should be attributed to the exporting country (i.e. the GOID) as providing those subsidies indirectly via the foreign government, as agreed by both governments."[94] To this end, it considered that "a demonstrable/explicit link must be established between the GOID, and the actions taken by the GOC in order to provide the agreed preferential support to the exporting producers in Indonesia. In that case, the GOID would be accountable for having actively sought, acknowledged, and adopted as its own such subsidies for the benefit of the products produced in Indonesia."[95]

[88] Countervailing duty final determination (Exhibit IDN-1), recital 647.
[89] Countervailing duty final determination (Exhibit IDN-1), recital 648.
[90] Countervailing duty final determination (Exhibit IDN-1), recital 695.
[91] Countervailing duty final determination (Exhibit IDN-1), recital 695.
[92] Countervailing duty final determination (Exhibit IDN-1), recital 695.
[93] Countervailing duty final determination (Exhibit IDN-1), recital 696.
[94] Countervailing duty final determination (Exhibit IDN-1), recital 650.
[95] Countervailing duty final determination (Exhibit IDN-1), recital 650.

7.42. After establishing this analytic framework, the Commission made the following key findings:

a. Indonesia and China had cooperated "very close[ly]" to "develop a completely integrated downstream stainless-steel industry" in Indonesia. In doing so, they relied "on the nickel ore reserves available in Indonesia and on the finances and the know-how brought in by China".[96] The "bilateral cooperation materialised in agreements specifying the terms and contribution of each government".[97] Policies to favour the development of the nickel ore processing industry and of the downstream stainless-steel industry in Indonesia by "*inducing*" the Chinese investment via Chinese preferential support are specifically covered in certain agreements and documents pertaining to the bilateral cooperation.[98]

b. "One of the pillars of the bilateral cooperation in the stainless-steel industry was that the Chinese side would provide preferential financial support to Chinese companies in order to develop the stainless-steel industry in Indonesia. This was *a condition imposed by Indonesia* to give Chinese companies access to its large reserves of nickel ore suitable for their production process".[99]

c. "The close cooperation between the GOID and the GOC … culminated with the establishment and operation of the Morowali Park [in Indonesia]. The GOID and the GOC have pooled their resources to provide the stainless-steel companies manufacturing in this Park with favourable conditions that confer benefits to them. This pooling of resources via such close cooperation serves a common purpose and benefits a common beneficiary, that is, the IRNC Group."[100]

7.43. The Commission found that the main document sanctioning the GOC's provision of preferential funding was the written agreement between the GOID and the GOC of 29 April 2011 on expanding and deepening bilateral economic and trade cooperation. Article VI of that agreement states that "[t]he Parties agree to *encourage their respective financial and insurance institutions to give priority to financing and insurance support for those projects*".[101]

7.44. The Commission further found that the GOC provided the financing in question "in the context of the main objective of the bilateral cooperation 'to encourage competitive and reputable Chinese enterprises and financial institutions to participate in the development of six economic corridors in Indonesia and the project listed in the GOI[D]'s [Masterplan for Acceleration and Expansion of Indonesia Economic Development 2011-2025] and to encourage competitive and reputable Indonesian enterprises in the development of the GOC's 12th five-year plan'".[102]

7.45. The Commission also found that certain "written documents, statements and actions confirm in an unequivocal manner that the GOID actively sought, adopted and acknowledged the preferential financial support provided by the GOC as its own".[103] Based on these materials, and its interpretation of the relevant provisions of the European Union's basic anti-subsidy Regulation and the relevant provisions of the WTO SCM Agreement and of the ILC Articles on State Responsibility, the Commission "concluded that it was entitled to countervail the subsidies provided by the GOID which not only acknowledged and accepted the underlying countervailable financial contributions provided by the GOC as its own, but even proactively sought it."[104]

7.46. We note that pivotal to the Commission's attribution decision was its finding that the GOID had "proactively sought" or "induced" the GOC to provide the financial contributions in question. In this respect we note that, in its final determination, the Commission concluded that "[t]he fact that Indonesia proactively sought the preferential financing from China" as part of their bilateral cooperation "confirm[ed] that the preferential support granted by the GOC should be attributed to the GOID". The Commission noted that "[t]his underpins the conclusion that Indonesia

[96] Countervailing duty final determination (Exhibit IDN-1), recital 544.
[97] Countervailing duty final determination (Exhibit IDN-1), recital 580.
[98] Countervailing duty final determination (Exhibit IDN-1), recital 580.
[99] Countervailing duty final determination (Exhibit IDN-1), recital 582. (emphasis added)
[100] Countervailing duty final determination (Exhibit IDN-1), recital 643.
[101] Countervailing duty final determination (Exhibit IDN-1), recital 586. (emphasis original)
[102] Countervailing duty final determination (Exhibit IDN-1), recital 588.
[103] Countervailing duty final determination (Exhibit IDN-1), recital 594.
[104] Countervailing duty final determination (Exhibit IDN-1), recital 697.

acknowledged and adopted Chinese preferential financing as its own".[105] The European Union confirms that the Commission used the terms "proactively sought" and "induced" interchangeably insofar as "'induced' is understood as [having] 'persuaded' or 'decisively influenced' the GOC's conduct so that there is genuine causal effect relationship between the GOID's action seeking the GOC's financial support and the provision of such a financial support by the GOC".[106, 107]

7.47. In its questions to the parties, the Panel asked the European Union to explain whether the European Union's concept of "induce[ment]" necessarily constitutes "adoption/acknowledgement". The European Union responded that "in the present case, when the GOID induced, persuaded or decisively influenced the GOC to provide the financial support to the project in the Morowali park for the benefit of the IRNC Group, in the context where the evidence shows that the GOID was seeking such a financial support needed for the specific project to work … then such an *inducement necessarily constitutes the adoption of the GOC's conduct*".[108]

7.48. The European Union further clarified that:

> In the SSCR investigation, the Commission examined whether the evidence available indicated that the GOID, by its actions, ***sought, acknowledged and adopted*** the GOC's financial support to the IRNC Group's activities in Indonesia as its own. ***In other words***, the Commission examined whether the GOID, rather than providing the financial support necessary for the development of the smelting facilities in the Morowali Park, sought or ***induced*** the GOC to provide such a financial support. In the Contested AS Regulation, the Commission confirmed that this approach was similar to showing the existence of a demonstrable link between the GOID's actions and the GOC's conduct.[109]

7.49. The European Union's clarification confirms that the Commission, based on its conclusion that the GOID had "induced" the GOC to provide the financial contributions in question, found that the GOID had sought, acknowledged, and adopted as its own the GOC's financial support to the IRNC Group's activities in Indonesia.[110] The Commission's finding that the GOID had "induced" the GOC to provide the financial contributions in question thus formed the basis for the Commission's decision to attribute to the GOID those financial contributions.

7.50. Finally, we note that in the underlying investigation, the Commission drew a parallel between the inducement standard that the Commission developed to analyse whether the financial contributions provided by the GOC could be attributed to the GOID and the Article 1.1(a)(1)(iv) standard that the Appellate Body considered in *US – Countervailing Duty Investigation on DRAMS* to evaluate claims involving government entrustment or direction of a private entity.[111] Specifically, the Commission noted that:

> [T]he possibility for governments to provide a financial contribution indirectly through private bodies is neither exogenous to the basic Regulation nor to the SCM Agreement. Indeed, in cases where governments entrust or direct private bodies into a particular conduct, a key issue is that there must be 'a demonstrable link' between the government act and the conduct of the private body. Similarly, in this case, there is a clear and explicit link between the affirmative actions taken by China in order to provide the agreed financial support to the IRNC Group and the GOID.[112]

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[105] Countervailing duty final determination (Exhibit IDN-1), recital 673.

[106] European Union's response to Panel question No. 10(a), para. 42.

[107] The European Union clarifies that it uses the term "induced" interchangeably with the terms "persuaded" or "influenced" in accordance with the dictionary meaning of the term "induce". (See European Union's response to Panel question No. 8, para. 16 and fn 21).

[108] European Union's response to Panel question No. 10(b), para. 47. (emphasis added)

[109] European Union's response to Panel question No. 14, para. 76 (referring to Countervailing duty final determination (Exhibit IDN-1), recitals 648–650). (emphasis added)

[110] See European Union's responses to Panel question No. 7, para. 13; No. 8, para. 19; No. 10(a), para. 42; No. 10(b), para. 47; and No. 10(c), paras. 49-50; and second written submission, paras. 10 and 38.

[111] Countervailing duty final determination (Exhibit IDN-1), recital 679 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112).

[112] Countervailing duty final determination (Exhibit IDN-1), recital 679 (referring to Article 3(1)(a)(iv) of the European Union's basic anti-subsidy Regulation and Article 1.1(a)(1)(iv) of the SCM Agreement). (fn omitted)

7.51. In this regard, the European Union confirms that "the Commission considered that under any attribution rules, i.e. the ones under Article 11 of the ILC Articles, or the ones contained in Article 1.1(a)(1)(iv) of the SCM Agreement on entrustment or direction, as developed by the WTO case-law, the GOC's preferential financial support to the IRNC Group's activities in Indonesia should be attributed to the GOID".[113] According to the European Union, "[t]he Commission *explicitly referred to those standards in the Contested AS Regulation* as applied in the SSCR investigation".[114]

7.52. We note that the European Union thus asserts that "the 'adoption as its own' standard and the 'entrustment or direction' standard both cover a situation where a State *induces* another State to act in a particular manner so that the conduct of the latter should be attributed to the former".[115]

7.4.2.1.2 Evaluation

7.53. Indonesia claims that the Commission's decision to attribute to the GOID the financial contributions that certain Chinese grantors provided to the IRNC Group contravenes the text of Article 1.1(a)(1) of the SCM Agreement, its context, and the object and purpose of the SCM Agreement.

7.54. As an initial matter, Indonesia asserts that Article 1.1(a)(1) of the SCM Agreement enumerates a *closed* "list of entities" whose actions can be attributed to the 'government' of a WTO Member.[116] Given the closed nature of this list, Indonesia argues that Article 1.1(a)(1) only permits the conduct of the following five entities to be attributed to the 'government' of a WTO Member: (a) a government in the narrow sense; (b) a public body; (c) entrusted private bodies; (d) directed private bodies; and (e) funding mechanisms.[117] Indonesia contends that Article 1.1(a)(1) "does not provide for the attribution of the actions of the government of one WTO member to the government of another WTO Member".[118] In this regard, Indonesia states that Article 1.1(a)(1) makes no explicit mention of rules pertaining to the "attribution" to the government of one WTO Member the actions of the government of another WTO Member. Indonesia asserts that this omission means that Article 1.1(a)(1) must be read as standing for the principle that "[a]ctions by (or attributed to) one government of a WTO Member cannot be further attributed to another government of a WTO Member."[119]

7.55. Indonesia further reasons that the "list of entities" whose actions can be attributed to the 'government' in Article 1.1(a)(1) of the SCM Agreement should be considered to be closed because the "other list" in that provision, namely the "list of government conduct" that constitutes a financial contribution as set out in subparagraphs (i) to (iv) of that provision is also a closed list.[120] Indonesia asserts that the Appellate Body reasoned in *US – Large Civil Aircraft (2nd complaint)* that the "list of government conduct" is exhaustive.[121] Indonesia considers that the Appellate Body's reasoning confirms that, as observed by a prior panel, "by introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of any government action that resulted in a benefit as a subsidy".[122] Indonesia considers that "the same reasoning and conclusion must extend to the 'list of entities' whose conduct can be attributed to a 'government'".[123]

7.56. The European Union rejects Indonesia's arguments. The European Union contends that contrary to what Indonesia suggests, the fact that Article 1.1(a)(1) of the SCM Agreement contains a closed "list of transactions" does not mean that Article 1.1(a)(1) automatically creates a closed "list of entities" to which the transactions can be attributed.[124] For the European Union, the term "by a government" in "the chapeau of Article 1.1(a)(1) permits the possibility that a financial

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[113] European Union's response to Panel question No. 14, para. 76.
[114] European Union's response to Panel question No. 14, para. 76. (emphasis added)
[115] European Union's second written submission, para. 38. (emphasis added)
[116] Indonesia's first written submission, para. 89; second written submission, para. 71.
[117] Indonesia's second written submission, para. 76.
[118] Indonesia's second written submission, para. 76.
[119] Indonesia's first written submission, para. 93.
[120] Indonesia's response to Panel question No. 1(b).
[121] Indonesia's response to Panel question No. 1(b) (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 613).
[122] Indonesia's response to Panel question No. 1(b) (quoting Panel Report, *US – Export Restraints*, para. 8.38).
[123] Indonesia's response to Panel question No. 1(b).
[124] European Union's second written submission, para. 26.

contribution provided by a WTO Member [may] be attributed to another WTO Member, in light of the specific evidence available."[125] The European Union asserts that the use of the word "by" in the phrase "by a government" in the *chapeau* of Article 1.1(a)(1) suggests that the actions of the government of one WTO Member can be attributed to the government of another WTO Member. This is because the word "by" "ordinarily indicates that something can be attributed/imputed to somebody as the subject of the action".[126]

7.57. The European Union asserts that Article 1.1(a)(1) of the SCM Agreement refers to the notion of a "financial contribution by a government" in its *chapeau* to then illustrate by means of a finite/exhaustive list in subparagraphs (i) to (iv), the "forms or types" such financial contributions may adopt.[127] For the European Union, such a list refers to "at least" three categories of entities whose conduct may be attributed to a Member: (a) "a government" (which is to be understood pursuant to the definition in the *chapeau* as government in the narrow sense as well as a public body within the territory of a Member)[128]; (b) a "private body" which is entrusted or directed by a government; and (c) a "funding mechanism" where a government makes payments.[129] The European Union further contends that the fact that Article 1.1(a)(1) identifies "at least three categories of entities whose conduct may be attributed to a Member … indicate[s] that there can be situations where the financial contribution of one WTO Member can be attributed to another WTO Member."[130]

7.58. The parties' arguments could be viewed as suggesting that the Panel should evaluate and issue interpretive findings on the "general" questions of whether and in what circumstances the term "by a government" in Article 1.1(a)(1) of the SCM Agreement may be interpreted to permit an investigating authority to attribute to the government of one WTO Member a financial contribution provided by the government of another WTO Member, and, more broadly, whether and when the SCM Agreement permits the conduct of one state to be imputed to another.[131, 132]

7.59. In our view, to secure a positive resolution of the claim before us, we need not address, in the abstract, whether either the SCM Agreement *writ large* or Article 1.1(a)(1) of the SCM Agreement in particular permits state-to-state attribution *in general.*[133] While we do not exclude the possibility that such attribution may be permissible in some factual circumstances, we consider it sufficient, for the purposes of resolving this claim, to limit our inquiry to whether the *specific means* that the Commission adopted to attribute to the GOID the financial contributions in this dispute is or is not permitted by Article 1.1(a)(1).[134] The specific manner in which the Commission sought to establish the attribution (i.e. via the concept of "inducement") is set out in section 7.4.2.1.1 above. We note that, in evaluating this claim, we do not express any view as

[125] European Union's first written submission, para. 54.
[126] European Union's first written submission, para. 57.
[127] European Union's response to Panel question No. 1(a), para. 1.
[128] European Union's response to Panel question No. 1(a), para. 2 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288).
[129] European Union's response to Panel question No. 1(a), para. 2.
[130] European Union's first written submission, para. 59.
[131] As this matter has not been previously raised in the context of a dispute, these "general" questions are ones of first impression.
[132] We note that the term "attribution" does not appear either in the text of Article 1.1(a)(1) or elsewhere in the SCM Agreement; the word "attributed" appears in Article 15.5 of the SCM Agreement, which contains certain parameters related to the determination of injury.
[133] See e.g. Australia's third-party submission, paras. 2 and 9 (expressing the view that "the Panel should not endorse an interpretation of the SCM Agreement that unduly constrains WTO Members from taking action against trade-distortive subsidies that circumvent the disciplines in the SCM Agreement" and noting that "the SCM Agreement is silent on the issue of 'transnational subsidies'").
[134] See e.g. Canada's third-party submission, paras. 5-7 (expressing the view that the Panel need not evaluate broad claims regarding the proper interpretation of Article 1.1(a)(1), including whether only actions of governments or public bodies, and actions of private bodies entrusted or directed by a government of one Member, can be attributed to "government" under the SCM Agreement, and inviting the Panel to "limit its consideration to the narrow question of whether the Commission's particular means of attributing the financial contributions at issue here to Indonesia is permissible under Article 1.1(a)(1)").

regards whether attribution through some manner *other* than the specific one that the Commission pursued is permissible under Article 1.1(a)(1).[135]

7.60. We recall that in its countervailing duty determination, the Commission attributed to the GOID financial contributions made by certain Chinese grantors based on its finding that the GOID had "induced" the GOC to provide the financial contributions in question.[136] Bearing in mind the facts of this case, the interpretive question before us is thus: Whether the phrase "by a government" in Article 1.1(a)(1) of the SCM Agreement may be interpreted to permit the Commission to have attributed the Chinese-origin financial contributions to the GOID based on the Commission's finding that the GOID "induced" the GOC to provide those contributions.

7.61. We wish to emphasize that, although we note that the European Union asserts that inducement constitutes proactively seeking/adopting something as its own, the Panel does not take a position on this assertion. We do not express an opinion on whether the conduct of one state that a second state "adopts as its own" may or may not, under any circumstances, be attributed to the second state.

7.62. Further, in assessing whether Article 1.1(a)(1) of the SCM Agreement may be interpreted to permit the Commission to have attributed the Chinese-origin financial contributions to the GOID based on the Commission's finding of "inducement", the Panel concerns itself more with what constitutes the particular conduct that the European Union associates with the word "inducement" and less with the mere characterization of that conduct as "inducement". The nature of the conduct that the word "inducement" represents for the European Union is detailed in section 7.4.2.1.1, and in particular, in paragraph 7.46 above.

7.63. Bearing in mind these considerations, we now turn to review the interpretive question before us that this claim raises.

7.64. We begin our review by looking to the text of Article 1.1(a)(1), read in its context, and in light of the object and purpose of the SCM Agreement. In accordance with the above approach, we consider that interpreting the phrase "by a government" requires reading that phrase, not in isolation but, in view of its immediate context within Article 1.1(a)(1). That provision states that "a subsidy shall be deemed to exist if":

> [T]here is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.65. Given the language and structure of Article 1.1(a)(1) of the SCM Agreement, we consider that the provision may be interpreted as describing the conduct that constitutes a financial contribution "by a government".

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[135] We again note that neither the analysis in which we engage nor the findings that we reach in evaluating this claim express any opinion regarding whether the term "subsidy" that appears in Article 1 of the SCM Agreement may be interpreted to encompass a financial contribution that may be provided by one WTO Member in the territory of another WTO Member.

[136] See paras. 7.46-7.47 above.

7.66. Specifically, we note that the phrase "there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government')" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement is followed immediately by the words "i.e. where". The *chapeau* is then followed by subparagraphs (i) to (iv) which list specific types of government conduct. The initials "i.e." are a shortened version of the Latin phrase "id est", which may be translated as "that is" or "that is to say".[137] The phrase "id est" (or "i.e.") is typically "[u]sed to introduce an explanation of a word or phrase"[138] so that "[w]hat follows the *i.e.* is meant to clarify the earlier statement."[139] We are of the view that the words "i.e. where" thus serve to identify and define the government conduct that constitutes "a financial contribution by a government" for the purposes of Article 1.1(a)(1).

7.67. We note that: (a) the words "i.e. where" both follow the phrase "a financial contribution by a government" and immediately precede subparagraphs (i) to (iv); and that (b) the *chapeau* of Article 1.1(a)(1) of the SCM Agreement does not appear to contain additional language that might otherwise qualify or introduce a degree of ambiguity regarding the specific conduct that will be considered to be "a financial contribution by a government". Given this, the text of Article 1.1(a)(1) suggests that government conduct that falls outside the conduct listed in subparagraphs (i) to (iv) does not constitute a "financial contribution by a government". This in turn suggests that government conduct other than that captured in subparagraphs (i) to (iv) falls outside of the scope of Article 1.1(a)(1) and so is not considered to be a subsidy for the purposes of the SCM Agreement.

7.68. This understanding comports with the Appellate Body's finding in *US – Large Civil Aircraft (2nd complaint)* that "Article 1.1(a)(1) defines and identifies the government conduct that constitutes a financial contribution for purposes of the SCM Agreement. Subparagraphs (i)-(iv) exhaust the types of government conduct deemed to constitute a financial contribution. This is because the introductory *chapeau* to the subparagraphs states that 'there is a financial contribution by a government …, i.e. *where*:'".[140]

7.69. Notably, conduct whereby the government of one WTO Member "induces" the government of another WTO Member to carry out one or more of the functions referred to in the subparagraphs of Article 1.1(a)(1) of the SCM Agreement does not appear to be captured among the range of conduct listed in subparagraphs (i) to (iv).

7.70. We consider that subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement provides additional context for purposes of interpreting the meaning of the phrase "a financial contribution by a government". Subparagraph (iv) pertains to conduct where a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii). The inclusion of this subparagraph could be read to suggest that Article 1.1(a)(1) and its subordinate clauses may be interpreted as cataloguing (a) the "type of functions" that constitute a "financial contribution by a government" within the meaning of the provision (subparagraphs (i) to (iii)), *as well as* (b) the "circumstances in which the conduct of [*certain*] *entities* will be considered to be conduct of" a WTO Member (subparagraph (iv)).[141]

7.71. In particular, the entrustment and direction of a private body as set out in subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement has been understood in prior dispute settlement proceedings to correspond to a situation where "the government uses a private body as proxy to

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[137] Oxford Dictionaries online, definition of "id est" https://www.oed.com/dictionary/id-est_phr?tab=meaning_and_use#907879 (accessed 10 June 2025).

[138] Oxford Dictionaries online, definition of "id est" https://www.oed.com/dictionary/id-est_phr?tab=meaning_and_use#907879 (accessed 10 June 2025).

[139] Merriam-Webster Dictionary online, "How to Use 'i.e.'" https://www.merriam-webster.com/grammar/ie-vs-eg-abbreviation-meaning-usage-difference (accessed 10 June 2025).

[140] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 613. (emphasis original)

[141] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis added) See also Appellate Body Report, *US – Softwood Lumber IV*, para. 52 (expressing the view that "[p]aragraph (iv) of Article 1.1(a)(1) recognizes that paragraphs (i) – (iii) could be circumvented by a government making payments to a funding mechanism or through entrusting or directing a private body to make a financial contribution. It accordingly specifies that these kinds of actions are financial contributions as well").

effectuate one of the types of financial contributions"[142] listed in subparagraphs (i) to (iii). We agree with this understanding. Further, while the word "inducement" does not appear in subparagraph (iv) of Article 1.1(a)(1), we are of the view, as was observed by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, that "in most cases one would expect entrustment or direction of a private body to involve some form of threat or *inducement*, which could in turn, serve as evidence of entrustment or direction".[143, 144] For the purposes of our analysis, we refer to the "inducement" of a private body by a government to provide financial contributions of the type listed in subparagraphs (i)-(iii) as "government-to-private body inducement". Further, given the context of the Commission's underlying investigation, we refer to the notional "inducement" of the government of one Member by the government of another Member to provide financial contributions as "government-to-government inducement".

7.72. The inclusion of subparagraph (iv) in Article 1.1(a)(1) of the SCM Agreement points to two considerations. First, the SCM Agreement expressly includes in the scope of the phrase "financial contribution by a government" conduct in which a government entrusts or directs another entity – a private body – to provide a financial contribution of the type listed in subparagraphs (i)-(iii). As noted in the preceding paragraph, we understand such entrustment or direction to cover conduct in which a government "induces" a private body to provide those financial contributions (government-to-private body inducement). This indicates that the phrase "by a government" in the *chapeau* of Article 1.1(a)(1) does not, *in and of itself*, cover such conduct of "inducement". Second, Article 1.1(a)(1) lists in the scope of the phrase "financial contribution by a government" conduct where a government entrusts or directs *a private entity* to provide a financial contribution (government-to-private body inducement) but *not* conduct where a government of one Member "induces" *a government of another Member* to do the same (government-to-government inducement). The fact that subparagraphs (i)-(iv) of Article 1.1(a)(1) do not mention conduct whereby a government of one Member "induces" a government of another Member to provide a financial contribution leads us to consider that such conduct does not constitute a financial contribution for purposes of the SCM Agreement.

7.73. Further, as the European Union asserts, "[s]ubparagraph (iv) is an anti-circumvention provision which ensures that governments are not able to escape the rules on subsidies by providing subsidies indirectly via a funding mechanism or through private bodies".[145] Our consideration that government-to-government inducement does not constitute a financial contribution for purposes of the SCM Agreement is reinforced by the fact that Article 1.1(a)(1) expressly addresses, in a closed list of government conduct, the circumvention of subsidies rules by the government of a Member through the indirect provision of subsidies via a funding mechanism or through private bodies – but not through the "inducement" of the government of another Member.

7.74. The European Union argues that the plain meaning of the phrase "by a government" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement includes that conduct (i.e. government-to-government inducement).[146] In our view, however, the meaning of the phrase

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[142] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116. See also Panel Reports, *US – Supercalendered Paper,* para. 7.37; *US – Export Restraints*, paras. 8.28-8.29; and *Korea – Commercial Vessels*, para. 7.368.

[143] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116. (emphasis added) See also Panel Reports, *US – Supercalendered Paper,* para. 7.38; *US – Countervailing Measures (China),* paras. 7.396 and 7.402; *EC and certain member States – Large Civil Aircraft*, fn 368; and *Japan – DRAMs (Korea)*, paras. 7.62-7.63.

[144] As noted in paragraph 7.50 above, in the underlying investigation the Commission drew a parallel between the standard it developed to find that the financial contributions provided by the GOC could be attributed to the GOID and what the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* has considered to be the standard for entrustment and direction of a private entity in Article 1.1(a)(1). (See Countervailing duty final determination (Exhibit IDN-1), recital 679). The European Union also asserts that "the 'adoption as its own' standard and the 'entrustment or direction' standard both cover a situation where a State induces another State to act in a particular manner so that the conduct of the latter should be attributed to the former". (European Union's second written submission, para. 38).

[145] European Union's first written submission, para. 59. (fns omitted) See also Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS,* para. 113; *US – Softwood Lumber IV,* para. 52.

[146] Pertinent to recall here is the European Union's reasoning that the term "by the government" could cover conduct where the government of one WTO Member "induces" the government of another WTO Member to provide financial contributions because the word "by" "ordinarily indicates that something can be attributed/imputed to somebody as the subject of the action". (European Union's first written submission, para. 57).

"by a government" cannot be considered in isolation but should, instead, be considered within its immediate context of Article 1.1(a)(1). That context, namely the surrounding language of the *chapeau*, the words "i.e. where", and the Article's associated subparagraphs, and particularly subparagraph (iv), suggests that the conduct that constitutes "financial contribution by a government" is limited to that identified in subparagraphs (i)-(iv). That conduct does not include the alleged government conduct on which the Commission based its finding that the GOID had provided a financial contribution, i.e. that the GOID had "induced" the GOC to carry out the type of functions listed in subparagraphs (i) to (iii) (government-to-government inducement).

7.75. In other words, we consider that government-to-government inducement does not constitute a financial contribution for purposes of the SCM Agreement not simply because government-to-government inducement does not expressly appear in the list of government conduct that constitutes a financial contribution in Article 1.1(a)(1)(i)–(iv) but also because: (a) the use of the words "i.e. where" in the *chapeau* suggests to us that this list is a "closed" list; and (b) that closed list includes subparagraph (iv) of Article 1.1(a)(1), the text of which indicates that the "inducement" of certain entities (government-to-private body inducement) does, in fact, constitute a financial contribution.

7.76. In our view, Article 1.1(a)(1) of the SCM Agreement does not allow us to 'open' what the plain text of the provision indicates is a "closed" list of government conduct that constitutes "financial contribution by the government" by reading additional types of government conduct into the provision, based on the phrase "by a government". We note that both parties agree that the "list of government conduct" enumerated in subparagraphs (i) to (iv) of Article 1.1(a)(1) is closed.[147] In this regard, in response to the Panel's questioning, the European Union states that "the negotiating history of Article 1 [of the SCM Agreement] confirms that the introduction of the 'financial contribution' requirement was intended specifically to prevent the countervailing of benefits from any sort of (formal, enforceable) government measures, by restricting to a *finite* list the kind of government *measures* that would, if they conferred benefits, constitute subsidies".[148]

7.77. We note that the European Union asserts that in previous disputes the words "i.e. where" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement have been interpreted as enumerating a "closed list" of "forms"[149], "type of actions"[150], "functions"[151], "conduct"[152], or "transactions"[153] in which the financial contribution can take place.[154] The European Union thus appears to accept the view that the "list of government conduct" in *subparagraphs (i) to (iv)* of Article 1.1(a)(1) is "closed", so that the use of the words "i.e. where" in the *chapeau* "narrows down the type of forms or actions which can be qualified as financial contribution".[155] We further note, however, that the European Union also asserts that the use of the words "i.e. where" "does not prevent the overarching [attribution] principle in the *chapeau* of Article 1.1(a)(1) to apply to" a situation where the GOID "induced" the GOC to carry out the type of functions illustrated in subparagraphs (i) to (iii) (government-to-government inducement).[156]

7.78. We find it difficult to reconcile these arguments, as the European Union does not explain why the "list" of conduct described in subparagraphs (i) through (iv), which it agrees is "closed" and

[147] European Union's response to Panel question No. 228, para. 10; Indonesia's response to Panel question No. 229.
[148] European Union's response to Panel question No. 228, para. 10 (referring to Panel Report, *US – Export Restraints,* para. 8.73) (emphasis added); European Union's response to Panel question No. 1(a), para. 1 and fn 1.
[149] European Union's response to Panel question No. 228, para. 10 (referring to Panel Report, *US – Export Restraints,* para. 8.69).
[150] European Union's response to Panel question No. 228, para. 10 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108).
[151] European Union's response to Panel question No. 228, para. 10 (referring to Panel Report, *US – Export Restraints,* para. 8.65 and 8.73; Appellate Body Report, *US – Carbon Steel (India),* para. 4.9).
[152] European Union's response to Panel question No. 228, para. 10 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China),* para. 297).
[153] European Union's response to Panel question No. 228, para. 10 (referring to Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.955 (stating that "Article 1.1(a)(1) is a definitional provision that sets forth an exhaustive, closed list ('… i.e. where …') of the types of transactions that constitute financial contributions under the SCM Agreement")).
[154] European Union's response to Panel question No. 228, para. 10.
[155] European Union's response to Panel question No. 228, para. 10.
[156] European Union's response to Panel question No. 228, para. 10.

"finite", nonetheless captures other government conduct that is not specifically enumerated in those subparagraphs. Stated differently, the European Union does not explain why the form a financial contribution may take in Article 1.1(a)(1) of the SCM Agreement may go beyond what is set out in subparagraphs (i) to (iv) to include the concept of government-to-government inducement, when the European Union itself asserts that the form a financial contribution may take is limited to the conduct described in those subparagraphs.

7.79. In response to the Panel's questioning, the European Union argues that, while the "list of government conduct" in Article 1.1(a)(1) of the SCM Agreement is closed, it does not "exhaustively narrow[] the "type of entities" whose actions can be attributed to the "government" under that provision.[157] The European Union appears to argue that because the "list of entities" whose actions can be attributed to the "government" is "not rigid", this flexibility therefore permits the phrase "by a government" to be interpreted to include the alleged government conduct at issue in this dispute (i.e. government-to-government inducement).[158]

7.80. We are of the view, however, that Article 1.1(a)(1) of the SCM Agreement does not contain two *separate* lists – on the one hand, a "list of government conduct" that constitutes a financial contribution and on the other hand, a "list of entities" whose actions can be "attributed" to the "government".[159] Instead, the provision contains, in a *single* "list", a definition of government conduct that constitutes financial contribution by a government. This list describes *both* the "type of functions" that constitute a "financial contribution by a government" within the meaning of the provision (subparagraphs (i) to (iii)), *as well as* the circumstances in which the conduct of certain entities other than a government, namely certain funding mechanisms, and private bodies, will be considered to be conduct of the relevant WTO Member.[160] For the reasons set out in paragraphs 7.66-7.67 above, we are of the view that this list is a closed list.

7.81. We note, further, that the *chapeau* of Article 1.1(a)(1) of the SCM Agreement identifies certain entities, namely "government" and "public body" both of which are referred to in the SCM Agreement as "government". We consider that the term "government" in the *chapeau* encompasses entities that share characteristics with the government and not entities that are "induced" to carry out one or more of the functions of the type listed in the subparagraphs of Article 1.1(a)(1).

7.82. We note that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* distinguished the phrase "a government or any public body" from the term "a private body" that appears in subparagraph (iv), on the basis that the former are "governmental".[161] The Appellate Body in that case also considered that "the joining under the collective term 'government' of both a 'government' in the narrow sense and 'any public body' in Article 1.1(a)(1) of the SCM Agreement, suggests certain commonalities in the meaning of the term 'government' in the narrow sense and the term 'public body' and a nexus between these two concepts".[162] In particular it "implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a 'financial contribution' for purposes of the SCM Agreement".[163]

7.83. As regards what characteristics an entity must share with government in the narrow sense in order to be a public body and, thus, part of government in the collective sense, we note that prior dispute settlement reports have reasoned that the term "government" may be conceived as the "continuous exercise of authority over subjects; authoritative direction or regulation and control"[164],

[157] European Union's comments on Indonesia's response to Panel question No. 229, paras. 1-5.
[158] See European Union's second written submission, para. 26 (asserting that "the close[d] list of transactions does not mean the automatic existence of a close[d] list of entities to which the transaction can be attributed"). See also European Union's response to Panel question No. 226, para. 2.
[159] We note that the parties, in response to the Panel's questions, agree with this view. (European Union's response to Panel question No. 229, paras. 13-14; Indonesia's response to Panel question No. 229).
[160] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[161] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[162] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288.
[163] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288.
[164] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

and that the "government" enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.[165]

7.84. We agree with the view that, in order for an entity to form part of the government "in the collective sense", an entity must share certain characteristics with the government.[166] In our view, however, the determination of whether such entities could be considered to be "the government" is a fact-specific inquiry that would include an examination of the characteristics that they share with the government, rather than whether such entities are "induced" by the government to provide financial contributions of the type listed in the subparagraphs of Article 1.1(a)(1) of the SCM Agreement.

7.85. In the underlying investigation, the Commission did not determine that the actions of the GOC (or the other Chinese grantors in question) could be attributed to the GOID because of any characteristics that they shared with the GOID, but because the GOID had allegedly "induced" them to provide the financial contributions in question.[167] We therefore consider that, given the specific "inducement" analysis that it employed in the underlying proceeding, the Commission did not establish that the conduct of the GOC (or any of the other Chinese grantors in question), namely the provision of financial contributions, could be considered to be the conduct of (or "attributed" to) the GOID in this instance.

7.86. We note that the parties make certain contextual arguments about Article 1.1(a)(1) of the SCM Agreement which relate to the broader question of whether Article 1.1(a)(1) permits attributing to one WTO Member the financial contributions provided by another WTO Member.[168] Given that we have chosen to limit our interpretive inquiry to whether Article 1.1(a)(1) permits state-to-state attribution through the particular manner in which the Commission sought to establish the attribution at issue, we do not consider it necessary to address whether Article 1.1(a)(1) permits state-to-state attribution *in general*. This would be consistent with our approach that we need not express any view as regards whether attribution through some manner other than the one that the Commission pursued is permissible under Article 1.1(a)(1).

7.87. We next turn to examine whether our understanding of Article 1.1(a)(1) comports with the object and purpose of the SCM Agreement.

7.88. In this regard, Indonesia argues that the object and purpose of the SCM Agreement does not permit Article 1.1(a)(1) to be interpreted in a manner that would allow an investigating authority to attribute the actions of the government of one WTO Member to the government of another, exporting WTO Member, and to thereby impose countervailing duties on the exporting WTO Member.[169] Contending that the object and purpose of the SCM Agreement is to discipline the application of countervailing measures, Indonesia cautions against an expansive interpretation of Article 1.1(a)(1) which would "open the door" to the application of more countervailing measures rather than disciplining them.[170]

7.89. The European Union responds that the attribution of financial contributions provided by the GOC to the GOID in the specific circumstances found in the SSCRFP investigation is consistent with the object and purpose of the SCM Agreement, which is "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures"[171], and "to impose multilateral disciplines on subsidies which distort international trade".[172] For the European Union, Indonesia's suggestion that Article 1.1(a)(1) of the SCM Agreement can be interpreted to permit WTO Members to "only offset financial support directly granted by governments within their territories … is systemically dangerous as it opens the door to circumvention of the rules disciplining

[165] Appellate Body Report, *Canada – Dairy*, para. 97.
[166] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.
[167] See para. 7.27 above for details regarding the types of financial contributions that the Commission found certain Chinese grantors had allegedly provided to the IRNC Group in Indonesia.
[168] See Indonesia's first written submission, paras. 100-116; the European Union's first written submission, paras. 60-61.
[169] Indonesia's first written submission, para. 128.
[170] Indonesia's first written submission, para. 128.
[171] European Union's first written submission, para. 86 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 64).
[172] European Union's first written submission, para. 86 (quoting Panel Report, *Brazil – Aircraft*, para. 7.26).

subsidies."[173] The European Union takes the view that adopting such an interpretation would establish a mechanism whereby WTO Members could "easily elude the subsidy disciplines, just by agreeing with other countries to provide financial support on their behalf to companies within their respective territories."[174]

7.90. We recall that by limiting our interpretive inquiry to whether Article 1.1(a)(1) of the SCM Agreement permits state-to-state attribution *through the specific manner* in which the Commission sought to establish the attribution at issue, we do not express an opinion on whether Article 1.1(a)(1) can be interpreted to permit state-to-state attribution *in general*. Nor do we opine on whether Article 1.1(a)(1) can be interpreted to permit WTO Members to "only offset financial support directly granted by governments within their territories". We therefore do not believe that our interpretation gives rise to the threat of circumvention of the rules disciplining subsidies envisaged by the European Union.

7.91. We further consider that the object and purpose of the SCM Agreement is "to strengthen and improve GATT disciplines relating to the use of *both* subsidies and countervailing measures, while recognizing at the same time, the right of members to impose such measures under certain conditions"[175] to offset the effects caused by injurious subsidization. We also agree that the object and purpose of the SCM Agreement "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose disciplines on the application of countervailing measures".[176]

7.92. As regards disciplining the use of subsidies, we note that the panel in *US – Export Restraints* found that "this object and purpose can only be in respect of 'subsidies' *as defined* in the Agreement" and that this definition "was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement".[177] In our view, the object and purpose in respect of disciplining the use of countervailing measures would similarly entail that any countervailing measures be applied only in respect of "subsidies" defined in the Agreement.

7.93. As for the specific manner in which the Commission sought to establish the attribution at issue in the underlying investigation, that is by way of the notion of "inducement", for the reasons set out in paragraphs 7.65-7.73 above, we are of the view that the omission, in the subparagraphs (i)-(iv) of Article 1.1(a)(1), of conduct whereby a government of one Member "induces" a government of another Member to provide a financial contribution suggests that such conduct does not constitute a financial contribution, and therefore a subsidy, for purposes of the SCM Agreement.

7.94. As noted in paragraph 7.74 above, the European Union argues that the phrase "by a government" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement covers the conduct in question (i.e. government-to-government inducement) such that that conduct constitutes a "financial contribution" within the meaning of that provision. In support, the European Union asserts that the object and purpose of the SCM Agreement is an important element to interpret the terms "by a government" in the *chapeau* of Article 1.1(a)(1).[178] Recalling that the object and purpose of the SCM Agreement includes disciplining the use of subsidies measures, the European Union urges against interpreting the SCM Agreement "rigidly or formalistically in a manner that would undermine its ability to discipline trade-distorting subsidization".[179]

7.95. We recall, however, that the surrounding language of the *chapeau*, particularly the words "i.e. where" and the following subparagraphs, particularly subparagraph (iv), suggests that the conduct that constitutes "financial contribution by a government" is limited to that identified in the subparagraphs. That conduct does not include the alleged government conduct at issue (government-to-government inducement). In our view, accepting the

[173] European Union's first written submission, para. 87.
[174] European Union's first written submission, para. 96.
[175] Appellate Body Report, *US – Softwood Lumber IV*, para. 64. (emphasis added)
[176] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.
[177] Panel Report, *US – Export Restraints*, para. 8.63. (emphasis original)
[178] European Union's first written submission, para. 86.
[179] European Union's first written submission, para. 86.

European Union's interpretation would amount to reading the words "i.e. where" out of Article 1.1(a)(1) of the SCM Agreement, reducing them to inutility.[180]

7.96. As to the European Union's concern that failing to interpret the phrase "by the government" as including the conduct in question (government-to-government inducement) would undermine the object and purpose of disciplining trade-distorting subsidization, we agree with a prior panel that "[not] every government intervention that might in economic theory be deemed a subsidy with the potential to distort trade is a subsidy within the meaning of the SCM Agreement. Such an approach would mean that the 'financial contribution' requirement would effectively be replaced by a requirement that the government action in question be commonly understood to be a subsidy that distorts trade".[181] Like that panel, we do "not see any contradiction between the said object and purpose of the SCM Agreement and the fact that certain measures that might be commonly understood to be subsidies that distort trade might in fact be *excluded* from the scope of the Agreement".[182]

7.97. We consider that this reading comports with the observation by the Appellate Body that "not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a)"; otherwise paragraphs (i) through (iv) of Article 1.1(a) would not be necessary "because all government measures conferring benefits, *per se,* would be subsidies".[183]

7.98. We thus consider that our evaluation of whether Article 1.1(a)(1) of the SCM Agreement permits state-to-state attribution through the specific manner in which the Commission sought to establish that attribution is in keeping with the object and purpose of the SCM Agreement.

7.99. Finally, we recall that in its final determination the Commission interpreted the phrase "by a government" in Article 1.1(a)(1) of the SCM Agreement *inter alia* in light of Article 11 of the ILC Articles on State Responsibility.[184] Article 11 of the ILC Articles on State Responsibility provides that:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

7.100. In its final determination, the Commission observed that "[u]nder Article 11 of the ILC Articles, conduct can be attributed to a State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'".[185] We further recall that the Commission, based on its conclusion that the GOID had "induced" the GOC to provide the financial contributions in question, found that the GOID had sought, acknowledged and adopted as its own the GOC's financial support to the IRNC Group's activities in Indonesia.[186] The Commission's finding that the GOID had "induced" the GOC to provide the financial contributions in question thus "underpin[ned] its conclusion that Indonesia acknowledged and adopted Chinese preferential financing as its own"[187] and formed the basis for the Commission's decision to attribute to the GOID those financial contributions.

7.101. In respect of the Commission's findings, we express no opinion on the extent to which Article 11 of the ILC Articles on State Responsibility provides guidance on whether Article 1.1(a)(1) of the SCM Agreement can be interpreted to permit state-to-state attribution *in general*. Our assessment is confined to examining the extent to which Article 11 sheds light on whether Article 1.1(a)(1) permits state-to-state attribution *through the specific manner* in which the Commission sought to establish the attribution at issue, namely on the basis of alleged government-to-government inducement.

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[180] See Appellate Body Report, *US – Shrimp*, para. 114; Panel Report, *US – Export Restraints*, para. 8.62.
[181] Panel Report, *US – Export Restraints*, para. 8.62.
[182] Panel Report, *US – Export Restraints*, para. 8.63. (emphasis original)
[183] Appellate Body Report, *US – Softwood Lumber IV*, fn 35.
[184] Countervailing duty final determination (Exhibit IDN-1), recital 647.
[185] Countervailing duty final determination (Exhibit IDN-1), recital 648.
[186] See European Union's responses to Panel question No. 7, para. 13; No. 8, para. 19; No. 10(a), para. 42; No. 10(b), para. 47; and No. 10(c), paras. 49-50; and second written submission, paras. 10 and 38.
[187] Countervailing duty final determination (Exhibit IDN-1), recital 673.

7.102. We recall that the surrounding language of the *chapeau* of Article 1.1(a)(1), particularly the words "i.e. where" and the following subparagraphs, particularly subparagraph (iv), read in their context and in the light of the object and purpose of the SCM Agreement, suggests that the conduct that constitutes "financial contribution by a government" is limited to that identified in the subparagraphs. That conduct does not include the alleged government conduct at issue (government-to-government inducement). We consider that in our interpretation of the phrase "financial contribution by a government" in Article 1.1(a)(1) we cannot, on the basis of Article 11 of the ILC Articles on State Responsibility, include in the scope of Article 1.1(a)(1) what the text of that provision, read in its context and in the light of the object and purpose of the SCM Agreement, itself excludes.

7.103. Based on the foregoing, we conclude that Article 1.1(a)(1) of the SCM Agreement precluded the Commission from employing the particular method it used to attribute to the GOID the Chinese-origin financial contributions, relying solely on its finding of "inducement". We therefore find that the European Union contravened Article 1.1(a)(1) of the SCM Agreement by relying on this method to attribute to the GOID the financial contributions in question that certain Chinese grantors provided to the IRNC Group in Indonesia, and by considering these attributed financial contributions to be subsidies within the meaning of that provision.

7.104. Having decided Indonesia's claim at hand on interpretive grounds, we uphold this claim on that basis alone and do not find it necessary to review whether the Commission had a sufficient evidentiary basis to support its attribution finding.

7.4.3 Whether the Commission's specificity determination was inconsistent with Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement

7.105. In the underlying countervailing duty investigation, the Commission made the following findings in examining whether the alleged subsidies were specific:

> By way of acknowledgment and adoption, the GOID was the granting authority with respect to the preferential financing. In particular, the GOID acknowledged and adopted the designation by the GOC of the Morowali Park and IMIP as an overseas investment territory and endorsed the fully-fledged implementation of the bilateral agreement and other bilateral documents thereof by, *inter alia*, the GOC's provision of preferential financing.
>
> These subsidies were limited to companies operating in the Morowali Park. Consequently, the Commission concluded that they were regional subsidies within the meaning of Article 4(3) of the basic Regulation and falling within the jurisdiction of the granting authority in accordance with Articles 4(2) through (4) of the basic Regulation.[188]

7.106. Indonesia claims that the European Union acted inconsistently with Articles 2.1 and 2.2 of the SCM Agreement by concluding that the GOID – and not the Chinese grantors – was the granting authority within the meaning of those provisions. Indonesia further claims that consequently, the European Union also acted inconsistently with Articles 2.1 and 2.2 by determining that the alleged subsidies in question provided to recipients in Indonesia were specific.[189]

7.107. Indonesia further claims that the Commission failed to meet the standard of Article 2.4 of the SCM Agreement in establishing specificity pursuant to Articles 1.2, 2.1, and 2.2 of the SCM Agreement on the grounds that the Commission:

a. did not substantiate its findings that the examined subsides were regionally specific;

b. failed to assess each alleged subsidy separately; and

[188] Countervailing duty final determination (Exhibit IDN-1), recitals 684-686.
[189] Indonesia's first written submission, para. 229.

c. failed to assess whether the access to the alleged subsidies was limited only to companies located in the Morowali Park, and as a result, erred in concluding that the alleged subsidies were regionally specific.[190]

7.108. We recall that we have found, as discussed in section 7.4.2 above, that Article 1.1(a)(1) of the SCM Agreement precluded the Commission from employing the particular method it used to attribute to the GOID the Chinese-origin financial contributions, relying solely on its finding of "inducement".[191] Having thus found the Commission's financial contribution determination to be inconsistent with Article 1.1(a)(1), we do not consider it necessary to evaluate Indonesia's claim challenging the Commission's specificity analysis to resolve the dispute between the parties.[192]

7.4.4 Whether the Commission's determination of the existence, and the calculation, of a benefit was inconsistent with Articles 1.1(b), 10, 14, and 32.1 of the SCM Agreement

7.109. In the final determination, the Commission found, using facts available, that the IRNC Group's Chinese parent companies had received a financial contribution from the GOC in the form of grants or preferential financing in order to, among other things, fund their investments in Indonesia for the production of the subject goods. The Commission further found that the Chinese parent companies used those grants or preferential financing to provide shareholder loans and capital in-kind in the form of production equipment to their subsidiaries, namely the IRNC Group, to facilitate their financial capabilities and operations in Indonesia.[193]

7.110. The Commission found that "the benefit from the grants or preferential loans received by the Chinese parent companies was allocated to the activities of the subsidiaries in Indonesia using zero interest inter-company loans".[194]

7.111. In analysing whether the financial contribution provided by the GOC via the Chinese parent companies conferred a benefit to the IRNC Group, the Commission reached the following conclusion:

> The conditions of the shareholder loans (including the fact that no interests were charged) show that the Chinese parent companies fully allocated the benefit from the grants and preferential loans received in China to its activities in Indonesia.[195]
>
> Concerning the equipment, the Commission analysed whether the equipment in question was purchased at arm's length prices, by making a comparison with the market prices for similar equipment used in the stainless-steel industry. Based on this analysis, the Commission found that [the] equipment was provided at a significant discount compared with international market prices for similar, representative sets of production equipment for cold-rolling mills. Based on the evidence on file, and in accordance with Article 28(1) of the basic Regulation, the Commission concluded that the financial contribution provided by the GOC via the Chinese parent companies conferred a benefit within the meaning of Article 3(2) of the basic Regulation.[196]

7.112. In these panel proceedings, Indonesia challenges the Commission's determination concerning the existence, as well as the calculation, of benefit for the IRNC Group. Indonesia asserts, in particular, that in determining benefit for the IRNC Group in respect of the shareholder loans and the provision of capital in kind, the Commission acted inconsistently with Articles 14(a), 14(b), and 14(d) of the SCM Agreement, and consequentially with Articles 1.1(b), 10, and 32.1 of the SCM Agreement.[197]

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[190] Indonesia's first written submission, para. 271; second written submission, para. 235.
[191] See para. 7.103 above.
[192] We note, in this regard, that the Commission's specificity analysis builds upon the Commission's findings attributing to the GOID the Chinese-origin financial contributions, which we have found to be WTO-inconsistent.
[193] Countervailing duty final determination (Exhibit IDN-1), recital 792.
[194] Countervailing duty final determination (Exhibit IDN-1), recital 792.
[195] Countervailing duty final determination (Exhibit IDN-1), recital 795.
[196] Countervailing duty final determination (Exhibit IDN-1), recital 796.
[197] Indonesia's first written submission, para. 370.

7.113. In this connection, Indonesia states that its claims concerning the Commission's determination of the existence of a benefit and the calculation of benefit are "conditional upon the Panel (1) accepting that the financial contributions of Chinese grantors can be attributed to the GOID; and (2) accepting that these attributed financial contributions can be considered subsidies within the meaning of Article 1.1 of the SCM Agreement; and (3) accepting that Indonesia was the granting authority within the meaning of Articles 2.1 and 2.2 of the SCM Agreement with respect to financial contributions provided by Chinese grantors; and (4) accepting that the alleged subsidies were specific in accordance with Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement".[198]

7.114. Given the conditional nature of Indonesia's challenge, and in light of our finding in section 7.4.2 that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by attributing to the GOID the financial contributions provided by the Chinese grantors, we need not address Indonesia's claims challenging the Commission's benefit determination.

7.5 Claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged provision of nickel ore at less than adequate remuneration

7.5.1 Introduction

7.115. The Commission investigated the alleged subsidization by Indonesia in the form of the provision of nickel ore for less than adequate remuneration (LTAR).[199] The complaint in the underlying investigation alleged that nickel contained in "nickel ore is the key component"[200] in the production of "stainless steel and its main price driver"[201] and that, "by intervening in the nickel ore market the GOID ensured that the price of raw materials for the production of stainless steel remains significantly lower than international prices to the benefit of the SSCR exporting producers in Indonesia".[202]

7.116. To determine whether a countervailable subsidy existed, the Commission examined the following three elements: "(a) a financial contribution by the GOID via a public body and/or entrustment or direction of private bodies to provide the nickel ore domestically; (b) a benefit to the recipient, and (c) specificity."[203] Based on its analysis of these elements, the Commission ultimately concluded that:

> By a specific set of measures the GOID, through the mining companies acting as public bodies or entrusted/directed by the GOID, provide nickel ore to the stainless steel industry for less than adequate remuneration. This provision of goods constitutes a financial benefit for the recipient and is specific, and thus countervailable.[204]

In addition, the Commission determined that the "subsidy amount established with regard to the provision of nickel ore" for LTAR for the IRNC Group amounted to 9.64%.[205]

7.117. In these panel proceedings, Indonesia challenges several aspects of the Commission's findings of financial contribution, benefit, and specificity in the context of the alleged provision of nickel ore to the SSCRFP producers. Specifically, Indonesia claims that[206]:

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[198] Indonesia's first written submission, para. 295. (emphasis omitted)
[199] Countervailing duty final determination (Exhibit IDN-1), recital 304.
[200] Countervailing duty final determination (Exhibit IDN-1), recital 325.
[201] Countervailing duty final determination (Exhibit IDN-1), recital 325.
[202] Countervailing duty final determination (Exhibit IDN-1), recital 325.
[203] Countervailing duty final determination (Exhibit IDN-1), recital 369.
[204] Countervailing duty final determination (Exhibit IDN-1), recital 540.
[205] Countervailing duty final determination (Exhibit IDN-1), recital 542. The Commission was unable to establish the extent to which Jindal Indonesia benefitted from this scheme, as it was "not vertically integrated" and started its production process at the level of hot-rolled coils. (Countervailing duty final determination (Exhibit IDN-1), recital 541).
[206] Indonesia's first written submission, para. 373. In its first written submission, Indonesia also challenged separately the Commission's finding of financial contribution, arguing that the Commission did not "properly establish that there existed a financial contribution in the form of governmental provision of goods"

a. the Commission's determination that all nickel ore mining companies in Indonesia are public bodies is inconsistent with Article 1.1(a)(1) of the SCM Agreement (the "public body" claim);

b. the Commission's determination, in the alternative, that the nickel ore mining companies are private bodies entrusted or directed by the GOID is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement (the "entrustment or direction" claim);

c. the Commission's determination that the provision of nickel ore conferred a benefit to the stainless steel industry, including the fact that the Commission's calculation of the amount of that benefit relied on an external benchmark that did not reflect prevailing market conditions, is inconsistent with Articles 1.1, 10, 14, 19, and 32.1 of the SCM Agreement (the "benefit" claim); and

d. the Commission's determination that the provision of nickel ore was specific is inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement (the "specificity" claim).

7.118. We examine these claims in the order presented by Indonesia.

7.5.2 Claim under Article 1.1(a)(1) of the SCM Agreement: the public body determination

7.5.2.1 Introduction

7.119. Indonesia claims that the Commission's finding that the nickel ore mining companies in Indonesia "constituted public bodies is inconsistent with Article 1.1(a)(1) of the SCM Agreement".[207] Specifically, Indonesia challenges the Commission's assessment – as part of its public body determination – of[208]: (a) "ownership and formal indicia of control by the GOID"[209]; (b) "[c]ore characteristics and functions of the mining companies in Indonesia"[210]; (c) "[g]overnment authority and the exercise of meaningful control by the GOID"[211]; and (d) the designation of nickel ore mining companies as "national vital objects".[212] According to Indonesia, neither these "separate elements of the Commission's determination, nor the interaction of these elements, justified the Commission's conclusion that nickel ore mining companies constituted 'public bodies'".[213] Indonesia also presents a "cross-cutting" or "horizontal" argument that the Commission's "public body" analysis "manifestly disregarded the case-by-case nature of public body determinations".[214]

7.120. We begin by briefly reviewing the relevant facts of the underlying investigation as they relate to the Commission's public body determination. We then recall the requirements under Article 1.1(a)(1) of the SCM Agreement. Finally, we examine Indonesia's claim that the Commission's "public body" determination is inconsistent with Article 1.1(a)(1), beginning, first, with Indonesia's "cross-cutting" argument, before turning to Indonesia's other arguments that challenge other discrete aspects of the Commission's analysis.

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because the regulatory measures at issue "do not constitute or lead to a government provision of goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. (Indonesia's first written submission, para. 410). Subsequently, however, Indonesia agreed with the European Union's assertion that "the relevant financial contribution in the present case consists of a 'provision of goods' in form of sales by mining companies of nickel ore to the downstream industries". (Indonesia's response to Panel question No. 252). In response to questioning by the Panel, Indonesia confirmed that it "does not challenge the Commission's financial contribution determination separately". We note, however, that Indonesia still challenges the Commission's financial contribution finding as part of its public body and entrustment or direction claims. (Indonesia's response to Panel question No. 252).

[207] Indonesia's first written submission, para. 449.
[208] Indonesia's first written submission, para. 458.
[209] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[210] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[211] Countervailing duty final determination (Exhibit IDN-1), p. 73.
[212] Countervailing duty final determination (Exhibit IDN-1), p. 80.
[213] Indonesia's first written submission, para. 460.
[214] Indonesia's first written submission, para. 461.

7.5.2.2 Brief overview of the Commission's public body determination

7.121. The Commission arrived at its conclusion that the GOID had – "through mining companies acting as [public bodies]" – provided Indonesia's SSCRFP producers with nickel ore for LTAR by first reviewing what it understood to be the "relevant legal standard" for making a "public body" determination[215] pursuant to the European Union's regulations. The Commission stated that this standard, which "stem[med] from the WTO jurisprudence on 'public body'"[216], could be found in Article 3(1)(a) and Article 2(b) of the European Union's basic anti-subsidy Regulation[217] and established that a "public body is an entity that 'possesses, exercises or is vested with governmental authority".[218] The Commission further stated that:

> A public body inquiry must be conducted on a case-by-case basis, having due regard to 'the core characteristics and functions of the relevant entity', that entity's 'relationship with the government', and 'the legal and economic environment prevailing in the country in which the investigated entity operates'. Depending on the specific circumstances of each case, relevant evidence may include: (i) evidence that 'an entity is, in fact, exercising governmental functions', especially where such evidence 'points to a sustained and systematic practice'; (ii) evidence regarding 'the scope and content of government policies relating to the sector in which the investigated entity operates'; and (iii) evidence that a government exercises 'meaningful control over an entity and its conduct'.[219]

7.122. In the context of determining whether Indonesia's nickel ore mining companies could be considered to be public bodies, the Commission stated that this standard necessarily required the Commission to analyse "the core characteristics and functions of those companies, and their relationship with the GOID".[220]

7.123. The Commission's subsequent analysis was divided under the following four headings: (a) "Core characteristics and functions of the mining companies in Indonesia"[221]; (b) "Relationship with the GOID: ownership and formal indicia of control by the GOID"[222]; (c) "Government authority and the exercise of meaningful control by the GOID"[223]; and (d) "Designation of mining companies as 'National vital objects'".[224]

7.124. In its review under the "Core characteristics and functions of the mining companies in Indonesia" heading, the Commission stated that it examined the "legal and economic environment prevailing in Indonesia", and concluded that "the purpose of the mining companies, often owned by the State, is to put in effect Indonesian policies as to how to manage natural resources in a manner which best serves and contributes to national development".[225]

7.125. In its review under the "Relationship with the GOID: ownership and formal indicia of control" heading, the Commission stated that it had considered evidence relating to the nature of the mining companies' ownership, and management and control, but noted that most of its findings were based "almost entirely on facts available" because the GOID and nickel ore miners had refused to provide it with evidence on ownership, control, and decision making.[226] As such, the Commission concluded that:

> Even taking into account the public information available for the very limited number of companies (five) compared to the total number of mining companies reported by the GOID (more than 290), it could be concluded that the share of the State-owned

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[215] Countervailing duty final determination (Exhibit IDN-1), recital 224.
[216] Countervailing duty final determination (Exhibit IDN-1), recital 224.
[217] Countervailing duty final determination (Exhibit IDN-1), recital 224. See also Basic anti-subsidy Regulation (Exhibit IDN-109).
[218] Countervailing duty final determination (Exhibit IDN-1), recital 225.
[219] Countervailing duty final determination (Exhibit IDN-1), recital 225.
[220] Countervailing duty final determination (Exhibit IDN-1), recital 372.
[221] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[222] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[223] Countervailing duty final determination (Exhibit IDN-1), p. 73.
[224] Countervailing duty final determination (Exhibit IDN-1), p. 80.
[225] Countervailing duty final determination (Exhibit IDN-1), recital 376.
[226] Countervailing duty final determination (Exhibit IDN-1), recital 377.

> companies in the total production in 2020 was more than 27% (the shares of PT Vale and PT Tim Nikel Sejahtera were not included in the information provided by the GOID). This alone already represents a substantial market share of companies owned by the State and should be considered as underestimated, as it is very likely that among the numerous other mining companies for which public information was not available there are other State-owned ones.[227]

7.126. The Commission also stated that it "had to rely on its own research" for the findings that the Commission made related to the companies' management and control "due to the lack of cooperation of GOID" and the "limited availability" of public information on the topic.[228] As such, the Commission's "ownership and formal indicia of control by the GOID" analysis concluded that:

> Based on the information on file and on its own research due to the widespread non-cooperation by the GOID, the Commission concluded that mining companies representing a substantial production of nickel ore are fully or partially State-owned, and also managed and/or controlled by the State in a close relationship with the GOID.[229]

7.127. In its review under the "Government authority and the exercise of meaningful control by the GOID" heading, the Commission stated that it "assessed whether the mining companies possess governmental authority and whether they exercise this authority in the performance of governmental functions"[230] and that the "investigation confirmed that all mining companies, regardless of their ownership, are subject to and must implement a number of government-prescribed measures concerning the provision of nickel ore, namely: (1) domestic processing obligation ('DPO'), (2) export restrictions and/or export ban, (3) mandatory annual working plan and budget ('RKAB'), (4) divestment obligations, (5) mandatory pricing mechanism".[231] Having analysed evidence relating to each of these measures, the Commission concluded that these "obligations clearly show that the mining companies are performing governmental functions".[232]

7.128. Finally, in its review under the "Designation of mining companies as 'national vital objects'" heading, the Commission observed that the GOID formally designated certain nickel ore mining companies as "National Vital Object in the Mineral and Coal Sector"[233], and that this designation conferred certain benefits to these firms related, *inter alia*, to "security assistance" and "intervention … in case there are actions of trade unions".[234] The Commission concluded that this evidence demonstrated that "mining companies active in the nickel ore business", regardless of "whether [they are] public or private", "possess, exercise or are vested with governmental authority".[235] The Commission described this as "additional piece of evidence showing that mining companies are vested with government authority".[236]

7.129. Based on the above analysis, the Commission ultimately concluded that:

> The … overall legal environment and assessment shows that the mining companies providing nickel ore are "public bodies". The legal and economic environment prevailing in Indonesia shows that mining companies perform governmental functions by providing nickel ore on behalf of the GOID. Indeed, nickel ore, like other minerals in Indonesia, are natural resources fully controlled and managed by the GOID. Despite the widespread lack of cooperation by the GOID, the investigation has shown that a number of mining companies representing a substantial domestic production of nickel ore are fully or partially State-owned, and/or that they are managed and/or controlled by the GOID.
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> In addition to the formal indicia of control, the GOID has created a complete normative framework mining companies have to adhere to. As such, the core characteristics of the

[227] Countervailing duty final determination (Exhibit IDN-1), recital 389. (fn omitted)
[228] Countervailing duty final determination (Exhibit IDN-1), recital 390.
[229] Countervailing duty final determination (Exhibit IDN-1), recital 393.
[230] Countervailing duty final determination (Exhibit IDN-1), recital 394.
[231] Countervailing duty final determination (Exhibit IDN-1), recital 395.
[232] Countervailing duty final determination (Exhibit IDN-1), recital 395.
[233] Countervailing duty final determination (Exhibit IDN-1), recital 439.
[234] Countervailing duty final determination (Exhibit IDN-1), recital 441.
[235] Countervailing duty final determination (Exhibit IDN-1), recital 442.
[236] Countervailing duty final determination (Exhibit IDN-1), recital 438.

mining companies show that nickel mining companies, rather than being normal market operators, simply implement the framework set out by the GOID in the exercise of governmental functions with respect to the SSCR industry. The sustained and systemic nature of all measures enacted by the GOID cover all aspects of the production and processing, sale, restrictions to export, and market pricing of nickel ore, as well as strict control over foreign companies via divestment obligations and the formal designation of National strategic objects of domestic miners.

The Commission thus concluded that the GOID provides a financial contribution in the form of provision of nickel ore to smelters related to stainless steel producers via domestic mining companies acting as public bodies within the meaning of Article 3(1)(a)(iii) of the basic Regulation. [237]

7.5.2.3 Requirements under Article 1.1(a)(1) of the SCM Agreement

7.130. Article 1.1 of the SCM Agreement reads as follows:

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

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.[238]

7.131. Article 1.1 of the SCM Agreement provides that a subsidy will exist where two elements are satisfied: first, "a financial contribution by a government or any public body" (i.e. "financial contribution") must be found to have been made; and second, that contribution must be found to confer a "benefit".[239] Article 1.1(a)(1) and its subordinate clauses define the "financial contribution" element "both by listing the relevant *conduct*, and by identifying certain *entities* and the circumstances in which the conduct of those *entities* will be considered to be conduct of … the

[237] Countervailing duty final determination (Exhibit IDN-1), recitals 443-445.
[238] Fn omitted.
[239] See e.g. Appellate Body Reports, *Canada – Aircraft,* para. 150; *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

relevant WTO Member".[240] The types of *conduct* that may amount to a "financial contribution" include, for example, the direct transfer of funds (Article 1.1(a)(1)(i)) and the provision of goods or services (Article 1.1(a)(1)(iii)).

7.132. Article 1.1(a)(1) of the SCM Agreement identifies different types of *entities* that are capable of providing financial contributions.[241] These entities include "a government" or "any public body within the territory of a Member" (which the SCM Agreement collectively refers to as "government"). Thus, if the entity is "governmental" (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of either subparagraphs (i)-(iii) or the first clause of subparagraph (iv), then there is a "financial contribution". The second clause of subparagraph (iv) concerns the situation in which a "private body" has been "entrusted or directed" by the government to make a financial contribution. A prior Appellate Body report, with which we agree, has observed that, in the event that an entity is a private body, and its conduct falls within the scope of subparagraphs (i)-(iii), then a financial contribution will only be established pursuant to subparagraph (iv) where there is a "requisite link" between the government and the conduct in which the entity has engaged (i.e. such that the "private body" can be shown to have been "entrusted or directed" to carry out "one or more of the type of functions illustrated in (i) to (iii)").[242]

7.133. The additional showing of "entrustment or direction" that is required under subparagraph (iv) in cases involving the conduct of private bodies is not required where the entity at issue is a "government" or "public body". This highlights an important distinction between the circumstance in which a government indirectly provides a financial contribution through a private body, on the one hand, and the circumstance in which the government acts directly, either on its own initiative or through a public body, on the other hand. In the former scenario, subparagraph (iv) "requires an affirmative demonstration of the link between the government and the *specific conduct*", whereas, in the latter situation, "all conduct of a governmental *entity* constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)".[243]

7.5.2.4 Evaluation

7.134. As part of its Article 1.1(a)(1) claim, Indonesia presents a "cross-cutting" or "horizontal" argument that "the Commission manifestly disregarded the case-by-case nature of public body determinations" and, as a result, improperly determined that all nickel ore mining companies in Indonesia are public bodies.[244] Indonesia also challenges discrete aspects of the Commission's "public body" analysis of the: (a) ownership and formal indicia of control by the GOID; (b) core characteristics and functions of nickel ore mining companies in Indonesia; (c) government authority and the exercise of meaningful control by the GOID; and (d) designation of nickel ore mining companies as "national vital objects".[245]

7.135. We begin by examining Indonesia's "cross-cutting" argument insofar as it relates to the Commission's overall public body analysis.

7.5.2.4.1 "Cross-cutting" issue

7.136. Indonesia challenges the Commission's determination that "all mining companies providing nickel ore in Indonesia are '*public bodies*'"[246], and asserts that "in order to establish that a particular entity is acting as a public body, that entity has to be analyzed on an individual or case-by-case basis".[247] Specifically, Indonesia asserts that, by "manifestly disregarding the case-by-case nature of the public body analyses, the Commission incorrectly extended its findings relating to certain

[240] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis added)
[241] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 8.54.
[242] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[243] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis added)
[244] Indonesia's first written submission, paras. 461-462.
[245] Indonesia's first written submission, para. 458.
[246] Indonesia's first written submission, para. 462. (italics and underlining original)
[247] Indonesia's first written submission, para. 466 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

nickel ore mining companies to all nickel ore mining companies in Indonesia".[248] Indonesia supports this assertion by stating that the Commission's sector-wide public body finding that mining companies "representing a substantial production of nickel ore" are: (a) "fully or partially State-owned", was improperly based on an analysis of only "six companies out of more than 290 (i.e., a little over 2% of the total number of existing companies)"; and (b) "managed and/or controlled by the State, in a close relationship with the GOID", was improperly based on an analysis of only "three companies out of more than 290 (i.e., a little over 1% of the total number of existing companies)".[249] Indonesia asserts that, apart from this "analysis", the remainder of the Commission's "public body" enquiry "was of a general nature, not targeting any specific mining company, but rather summarizing (oftentimes incorrectly) the regulation of mining activities in Indonesia".[250] Indonesia asserts that the Commission's flawed ownership and control analysis "was at the core" of its public body determination resulting in an inconsistency with Article 1.1(a)(1) of the SCM Agreement.[251]

7.137. The European Union counters that the Commission: (a) did, in fact, "carr[y] out an entity-by-entity" public body analysis "where it was legally required"[252] to do so; and (b) "made a clear distinction" in its analysis between its consideration of the "ownership and indicia of control" element and its consideration of other elements that were "based on Indonesia's regulatory framework"[253] (such as the "government authority and the exercise of meaningful control" element).[254] Given this, the European Union asserts that "no individual assessment of companies was required for the elements relating to the regulatory framework" because the regulatory measures that the Commission examined "applie[d] equally to all Indonesian nickel ore mining companies".[255] As regards "ownership and indicia of control" (as well as "national vital objects"), the European Union states that 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'".[256] The European Union submits that the Commission's assessment of ownership and control pertained, in any event, only to its intermediate conclusion that the six state-owned companies that the Commission individually examined had a "substantial share" of the domestic production of nickel ore, and not to the Commission's determination that all nickel ore mining companies are public bodies.[257] The European Union maintains that the Commission's determination for all mining companies is "evidently not based on the ownership and control indicia (which concern only 'a substantial production') but on the regulatory framework which is applicable to all mining companies".[258]

7.138. We begin by reviewing the factors that Article 1.1(a)(1) of the SCM Agreement requires an investigating authority to consider when conducting a public body analysis and the analytical framework that the Commission adopted when it undertook this analysis. We then examine whether the Commission erred in its application of Article 1.1(a)(1) to the facts of the investigation, focusing on the manner in which the Commission assessed the evidence on the record concerning: first, the extent of the GOID's ownership and "formal indicia" of control over the nickel ore mining companies; and, second, the domestic regulatory framework.

7.5.2.4.1.1 An investigating authority's public body analysis

Requirements under Article 1.1(a)(1) of the SCM Agreement

7.139. We note that the SCM Agreement does not define the term "public body", nor prescribe the specific steps that an investigating authority must take, nor the factors that must be weighed when evaluating whether an entity can be considered to be a "public body" for the purposes of Article 1.1(a)(1). We also note that these issues have been the subject of prior dispute settlement

[248] Indonesia's first written submission, para. 469.
[249] Indonesia's first written submission, para. 470. (emphasis omitted)
[250] Indonesia's first written submission, para. 471.
[251] Indonesia's second written submission, paras. 334-335.
[252] European Union's first written submission, para. 312.
[253] European Union's first written submission, para. 312.
[254] European Union's first written submission, para. 312.
[255] European Union's first written submission, para. 313.
[256] European Union's first written submission, para. 313.
[257] European Union's second written submission, para. 83.
[258] European Union's response to Panel question No. 44, para. 137.

proceedings that have sought to clarify the circumstances in which an entity can be considered to be a "public body".

7.140. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body observed that the term "government" is used in Article 1.1(a)(1) of the SCM Agreement in two senses: first, "in the narrow sense" within the phrase "a government or any public body"; and second, in a parenthetical in "the collective sense" by referring "collectively to 'a government or any public body'".[259] The Appellate Body reasoned that the juxtaposition of these two uses of the term suggested "certain commonalities in the meaning of the term 'government' in the narrow sense and the term 'public body'", and that a "nexus" existed "between these two concepts".[260] As such, the Appellate Body report in that dispute observed that:

> Joining together the two terms under the collective term "government" … implies a sufficient degree of commonality or overlap in their *essential characteristics that the entity* in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a "financial contribution" for purposes of the SCM Agreement.[261]

7.141. The nature of the inquiry[262] to be undertaken by an authority for evaluating whether an entity is a "public body" was also considered in subsequent disputes.[263] In *US – Countervailing Measures (China) (Article 21.5 – China)*, the Appellate Body was asked to consider whether an authority, in addition to establishing that an entity had "a sufficiently close relationship with government", also had to establish that the entity was "exercising a governmental function when engaged in the specific investigated conduct under subparagraphs (i)–(iii) or the first clause of subparagraph (iv) of Article 1.1(a)(1)"[264] before the entity could be considered to be a public body. The Appellate Body report answered this question in the negative, observing:

> [T]he central focus of a public body inquiry under Article 1.1(a)(1) is not … whether the *conduct* that is alleged to give rise to a financial contribution under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) – i.e. the particular transaction at issue – is logically connected to an identified "government function". Rather, the relevant inquiry hinges on the *entity* engaging in that conduct, its core characteristics, and its relationship with government. This focus on the entity, as opposed to the conduct alleged to give rise to a financial contribution, comports with the fact that a "government" (in the narrow sense) and a "public body" share a "degree of commonality or overlap in their essential characteristics" – i.e. they are both "governmental" in nature.[265]

7.142. In light of our review of the text of Article 1.1(a)(1) of the SCM Agreement above[266], we agree with the view that the determination of whether an entity is a "public body" requires an authority to engage in an entity-focused – rather than a conduct-focused – examination of the "core" or "essential" characteristics of the entity in question and its "relationship" with government.[267] This focus on the core characteristics of an entity "comports with the fact that a 'government' (in the

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[259] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 286.
[260] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288.
[261] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288. (emphasis added)
[262] We note that the parties agree that a "public body" is an "entity that possesses, exercises, and is vested with governmental authority" and thus do not contest the meaning of the term "public body" as it appears in Article 1.1(a)(1) of the SCM Agreement. (Indonesia's second written submission, para. 315 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310; Countervailing duty final determination (Exhibit IDN-1), recital 225); Indonesia's first written submission, para. 451; and European Union's first written submission, para. 249).
[263] See e.g. Appellate Body Reports, *US – Carbon Steel (India)*; *US – Countervailing Measures (China) (Article 21.5 – China)*; and Panel Report, *US – Pipes and Tubes (Turkey)*, appealed 25 January 2019.
[264] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.99.
[265] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.100. (emphasis original; fns omitted)
[266] See paras. 7.130-7.133 above.
[267] Appellate Body Reports, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.100; *US – Anti-Dumping and Countervailing Duties (China)*, para. 288.

narrow sense) and a 'public body' share a 'degree of commonality or overlap in their essential characteristics' – i.e. they are both 'governmental' in nature."[268]

7.143. We also note the observations that "just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case"[269], and that when an authority undertakes a public body analysis it should: (a) attempt to engage in a "careful evaluation" of the entity at issue and "identify its common features and relationship with government in the narrow sense"[270]; and (b) seek to "evaluate and give due consideration to all relevant characteristics of the entity and … avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[271]

7.144. A public-body analysis is a fact-specific exercise, and different kinds of evidence may therefore be relevant for demonstrating that an entity is a public body.[272] Such evidence may commonly include evidence relating to the existence of state ownership and the involvement of the government in the management and governance of an entity.[273] This evidence is important for a public body analysis insofar as it relates to the "*existence* of control by a government over an entity"[274] and speaks directly to the core characteristics of the entity at issue such as its "organizational features, chains of decision-making authority, and overall relationship" with the government.[275]

7.145. Authorities, of course, need not consider an entity's core characteristics in a vacuum. Depending on the circumstances, as part of its public body analysis, an authority may also consider evidence that describes the nature of the activities or "conduct" in which an entity engages. For example, evidence that "an entity is, *in fact, exercising* governmental functions"[276] or evidence that "a government *exercises* meaningful control over an entity and *its conduct*"[277] could be relevant for the public body analysis.[278] In addition to evidence concerning the existence of control by a government over an entity, such as evidence of state ownership and the involvement of the government in the management and governance of an entity, evidence of "meaningful control" may demonstrate that the government "in fact exercise[s]" control over an entity and its conduct.[279]

7.146. Importantly, however, while an investigating authority may consider conduct-related evidence in its public body inquiry, it may do so only "within the framework of its inquiry into *the core characteristics of those entities and their relationship* with the" government.[280] The possibility that an investigating authority may consider evidence relating to an entity's conduct when performing a public body analysis – including, for example, evidence that an entity actually performs a government function in pursuance of government policy, or evidence that the government, in fact, exercises meaningful control over an entity's conduct – does not change the essential nature of the public body analysis under Article 1.1(a)(1) of the SCM Agreement which always "hinges on the

[268] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.100. (fn omitted)
[269] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[270] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.
[271] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.
[272] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[273] We understand the reference to "formal indicia of control" in the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* as relating to these aspects. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318).
[274] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37. (emphasis original)
[275] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104.
[276] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. (emphasis added)
[277] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. (emphasis added)
[278] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[279] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37. (emphasis omitted) See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 (noting that "where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is" a public body).
[280] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104. (emphasis added)

entity engaging in that conduct, its core characteristics, and its relationship with government … as opposed to the conduct alleged to give rise to a financial contribution".[281]

7.147. We recall, in this regard, that, Article 1.1(a)(1) of the SCM Agreement is concerned principally with financial contributions made *by a government*.[282] Specifically, subparagraphs (i)-(iii) refer to a "financial contribution that is provided *directly* by the government through the direct transfer of funds, the foregoing of revenue, the provision of goods or services, or the purchase of goods"[283]. Subparagraph (iv) contemplates the circumstance wherein a "financial contribution may also be provided *indirectly* by a government where it 'makes payments to a funding mechanism', or … where a government 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) … which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments'".[284] Subparagraph (iv) thus "covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii)".[285] The provision may therefore be seen as an anti-circumvention provision inasmuch as it seeks "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 the scope of Article 1.1(a)(1), were they to be taken by the government itself".[286]

7.148. The additional showing of "entrustment or direction" that is required under subparagraph (iv) in circumstances involving the conduct of private bodies is not required where the entity at issue is a "public body". In contrast to a "public body" analysis, which focuses primarily on the core characteristics of an entity and its relationship with the government, an inquiry into the existence of entrustment or direction of a private body focuses primarily on the *conduct* in which the entity at issue is alleged to have engaged. The entrustment or direction analysis "requires an affirmative demonstration of the link between the government and the specific conduct".[287] By contrast, once it is established that an entity is a public body, then all of that entity's conduct can be "attributed directly to the State, provided that such conduct falls within the scope of subparagraphs (i)-(iii), or the first clause of subparagraph (iv)".[288]

7.149. As to the requirements under subparagraph (iv), we note that the parties agree that "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body.[289] The context provided by Article 1.1(a)(1)(iv) of the SCM Agreement suggests that the relevance of evidence concerning the conduct of an entity for purposes of the public body inquiry is limited insofar as it sheds light on the core characteristics of an entity and its relationship with the government.[290] This

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[281] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.100-5.101 (noting that "the conduct of an entity … is *one* of the various types of evidence that, depending on the circumstances of each investigation, may shed light on the core characteristics of an entity and its relationship with government in the narrow sense"). (emphasis original)

[282] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 5.143 and fn 403 (stating that "the term 'government' in the introductory clause of Article 1.1(a)(1) refers to a government or any public body within the territory of a Member. Furthermore, Article 1.1(a)(1)(iv) refers to a situation where a government 'entrusts or directs a private body to carry out one or more of the types of functions' illustrated in Article 1.1(a)(1)(i)-(iii). However, this does not change the requirement of a link between a financial contribution and a government.")

[283] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108. (emphasis original)

[284] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108. (emphasis original)

[285] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108.

[286] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 327. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 52; Panel Reports, *US – Export Restraints,* para. 8.53 (noting that the "intention of subparagraph (iv) is to avoid circumvention of subparagraphs (i)-(iii) by a government simply by acting through a private body"); and *Korea – Commercial Vessels,* fn 209 (noting that it is a "catch-all, so that indirect government action does not fall outside the scope of the SCM Agreement.")

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

[288] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 309.

[289] Indonesia's first written submission, para. 598 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116); European Union's first written submission, para. 379 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116).

[290] See Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.101 (noting that "the conduct of an entity … is *one* of the various types of evidence that, depending on the

is because, in the case of the direction of a private body, the government may be seen as exercising its authority and control over that entity's conduct. A government's entrustment of a private body to engage in certain conduct may also involve the government giving responsibility to a private body to act in pursuance of governmental policy and functions.

7.150. If evidence showing that a government, in fact, exercises control over an entity's conduct were, by itself, to be considered sufficient for establishing that the entity is a public body, then private bodies that are "directed" by the government could potentially be found to be public bodies based on a finding of "direction". Similarly, if evidence showing that an entity has engaged in conduct that supports or advances governmental policies and functions were, standing alone, to be considered as being sufficient for establishing that an entity is a public body, then private bodies that do not share any core characteristics with a government could nonetheless be classified as public bodies based simply on a finding of entrustment by the government to engage in certain conduct in pursuance of governmental policies.[291] Given this, an authority must exercise care when considering conduct-related evidence as part of its public body analysis, as "focusing exclusively or unduly on"[292] an entity's conduct could potentially have the effects of denying meaning to Article 1.1(a)(1)(iv) of the SCM Agreement and "unduly blur[ring] the distinction between, on the one hand, a public body inquiry and, on the other hand, an 'entrustment or direction' inquiry".[293] For these reasons, we are of the view that an entity cannot be found to be a public body based solely on conduct-related evidence indicating that the entity actually performs a government function in pursuance of government policy, or that the government, in fact, exercises meaningful control over the entity's conduct.

7.151. Referring to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, the European Union argues that, when an authority conducts a public body analysis, "the relevance of State-ownership and other indicia of control decreases to the extent that a government is able to carry out or achieve its policy objectives directly through governmental regulations."[294] As such, the European Union asserts that where the government "meaningfully control[s] the mining companies, *inter alia*, with respect to all business decisions (prices, exports *etc.*)" through its "regulatory powers", the regulatory framework showing "the scope and content of government policies" and the "exercise of meaningful control" is the "main tool for the government to control and direct the companies in question, and evidence of "ownership and control indicia are less relevant … [and] in fact not even necessary at all to establish the public body nature of the mining companies".[295]

7.152. An investigating authority may, as part of its public body analysis, take into account – and, depending on the specific facts and circumstances, may even be expected to evaluate – evidence relating to a Member's domestic legal order and the economic environment in which an investigated entity operates.[296] That said, while investigating authorities enjoy a degree of flexibility to consider evidence from different sources, this does not change the essential nature of the public body inquiry which remains focused at all times on identifying the core characteristics of an entity and delineating its relationship with government.[297]

7.153. To illustrate this point, we note that the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* upheld the United States Department of Commerce (USDOC)'s determination that the state-owned commercial banks (SOCBs) at issue in that dispute were "public bodies". In that instance, the authority's determination considered, amongst others: (a) "a provision in China's Commercial Banking Law stipulating that banks are required to 'carry out

circumstances of each investigation, may shed light on the core characteristics of an entity and its relationship with government in the narrow sense"). (emphasis original)

[291] See e.g. Panel Report, *Korea – Commercial Vessels*, para. 7.55 (noting that "the fact that a private philanthropist may pursue public policy objectives should probably not cause that person to be treated as a 'public body'").

[292] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

[293] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.103.

[294] European Union's first written submission, para. 369; second written submission, para. 74. See also e.g. European Union's response to Panel question No. 39, paras. 118-125.

[295] European Union's second written submission, para. 74.

[296] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350; *US – Carbon Steel (India)*, para. 4.40.

[297] See also Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.101.

their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies'"[298]; (b) "an excerpt from the Bank of China's Global Offering, which states that the 'Chinese Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions", and that accordingly "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies"[299]; and (c) a "statement by a Chinese municipal government official" and an International Monetary Fund working paper supporting "the proposition that SOCBs are required to support China's industrial policies."[300] In finding that "the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs *exercise governmental functions* on behalf of the Chinese Government"[301], the Appellate Body report thus considered relevant the fact that the "USDOC also referred to certain other evidence on the record of that investigation demonstrating that SOCBs are required to support China's industrial policies."[302]

7.154. The Appellate Body report in *US – Countervailing Measures (China) (Article 21.5 – China)* observed that the conclusion in *US – Anti-Dumping and Countervailing Duties (China)* that the USDOC properly determined that the SOCBs were public bodies was not based solely on evidence demonstrating that the government of China "meaningfully controlled" the SOCB's conduct of "making loans" in support of governmental policy.[303] Instead, while noting that the USDOC considered evidence relating to the SOCB's lending activity (i.e. their conduct) as part of its public body analysis[304], the Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* considered it important that the USDOC's determination also relied upon other "extensive evidence" that "spoke to" the SOCB's "organizational features, chains of decision-making authority, and overall relationship with the GOC."[305] As noted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, this included evidence indicating "near complete state-ownership of the banking sector in China"[306], as well as "a 2005 OECD report, stating that '[t]he chief executives of the head offices of the SOCBs are government appointed and [that] the party retains significant influence in their choice'".[307]

7.155. The above discussion accords with our understanding of the nature of a public body analysis as set out in paragraphs 7.142-7.150 above. Investigating authorities *may* take into account, as part of a public body analysis, evidence that demonstrates that a government actually exercises meaningful control over an entity's conduct and requires them to act in pursuance of governmental policies. However, this type of conduct-related evidence, standing alone, is not sufficient to support a public body finding. We note that an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity and … avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".[308] In particular, the focus of the public body inquiry on the core characteristics of an entity and its relationship with government requires an authority to evaluate evidence relating to an entity's "organizational features, chains of decision-making authority, and [its] overall relationship

[298] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.
[299] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.
[300] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 351.
[301] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355. (emphasis added)
[302] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.
[303] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104. (emphasis added)
[304] See Appellate Body Report, *US – Countervailing Measures (Article 21.5 – China)*, para. 5.104 (noting that "while the USDOC did take into account evidence relating to the conduct of SOCBs, it did so within the framework of its inquiry into the core characteristics of those *entities* and their relationship with the GOC" (emphasis original)).
[305] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104 (stating that this evidence included "information showing that: (i) '[t]he chief executives of the head offices of the SOCBs are government appointed and the [CCP] retains significant influence in their choice'; and (ii) SOCBs 'still lack adequate risk management and analytical skills'").
[306] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349.
[307] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.
[308] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

[with the government]"[309], which may include evidence of state ownership and the extent to which the government may be involved in an entity's management, control, and governance.

7.156. While an authority is not precluded from determining that a group of entities, including all the entities in a particular sector of the economy, are public bodies, an authority cannot arrive at such a sector-wide public body finding based solely on evidence relating to the nature of the conduct in which the entities at issue may be required to engage pursuant to the domestic regulatory framework. Instead, an authority's assessment that a group of entities are public bodies ought to be based on an examination of the entities' shared core characteristics and their relationship with government.[310]

Commission's analytical framework

7.157. The Commission's understanding of the nature of the "public body" analysis appears to largely comport with the above observations.[311] We note, in this regard, that the Commission's final determination states that a "public body inquiry must be conducted on a case-by-case basis, having due regard to 'the core characteristics and functions of the relevant entity', that entity's 'relationship with the government', and 'the legal and economic environment prevailing in the country in which the investigated entity operates'".[312] The final determination also states that there "are many different ways in which government in the narrow sense could provide entities with authority" and, accordingly, "different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity"[313], and that relevant evidence for the public body analysis may include: "(i) evidence that 'an entity is, in fact, exercising governmental functions', especially where such evidence 'points to a sustained and systematic practice'; (ii) evidence regarding 'the scope and content of government policies relating to the sector in which the investigated entity operates'; and (iii) evidence that a government exercises 'meaningful control over an entity and its conduct'".[314]

7.158. While we generally agree with the Commission that these types of evidence may be "relevant" to a public body analysis, we recall our discussion above that a public body determination cannot be based solely on evidence relating to an entity's conduct (e.g. evidence demonstrating that a government exercises "meaningful control" over an entity's activities or indicating that the government requires an entity to act in pursuance of particular governmental policies). In this regard we consider important the Commission's observation that:

> The central focus of a public body inquiry is not whether the conduct that is alleged to give rise to a financial contribution is logically connected to an identified 'government function'…. Rather, the relevant inquiry hinges on the entity engaging in that conduct, its core characteristics, and its relationship with government. This focus on the entity, as opposed to the conduct alleged to give rise to a financial contribution, comports with the fact that a 'government' (in the narrow sense) and a 'public body' share a 'degree of commonality or overlap in their essential characteristics' – i.e. they are both 'governmental' in nature.[315]

We also note the Commission's observation that, in *US – Anti-Dumping and Countervailing Duties (China)*, "while the USDOC did take into account evidence relating to the conduct of SOCBs ['making loans'], it did so within the framework of its inquiry into the core characteristics of those entities and their relationship with the GOC" and that this "evidence was not limited to SOCBs' lending activity

[309] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104 (noting that, for the purposes of the USDOC's analysis, this evidence included "information showing that: (i) '[t]he chief executives of the head offices of the SOCBs are government appointed and the [CCP] retains significant influence in their choice'; and (ii) SOCBs 'still lack adequate risk management and analytical skills'").
[310] Appellate Body Report, *Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104.
[311] See paras. 7.121-7.129 above (summarizing the Commission's understanding of the relevant European Union legal standard for conducting a public body inquiry and noting that this standard "stem[med] from the WTO jurisprudence on 'public body'").
[312] Countervailing duty final determination (Exhibit IDN-1), recital 225.
[313] Countervailing duty final determination (Exhibit IDN-1), recital 227.
[314] Countervailing duty final determination (Exhibit IDN-1), recital 225.
[315] Countervailing duty final determination (Exhibit IDN-1), recital 229.

per se, but rather spoke to their organizational features, chains of decision making authority, and overall relationship with the GOC".[316]

7.159. With this background, we now consider the manner in which the Commission applied what it understood to be the "relevant legal standard"[317] to the facts in the underlying investigation with a view to considering whether the Commission's public body analysis comports with the requirements of Article 1.1(a)(1) of the SCM Agreement.

7.5.2.4.1.2 Commission's assessment of ownership and "formal indicia" of control

7.160. The parties disagree as to the extent to which the Commission's "ownership and formal indicia of control by the GOID" analysis formed the basis for its ultimate finding that all nickel ore mining companies in Indonesia are public bodies. Indonesia argues that the Commission's (flawed) ownership and control analysis was "at the core" of its public body determination.[318] The European Union, by contrast, maintains that the Commission's sector-wide determination was "not based on the ownership and control indicia (which concern only a 'substantial production') but on the regulatory framework which is applicable to all mining companies".[319]

7.161. We recall that the Commission conducted its public body analysis by examining evidence under the following four headings: (a) "Core characteristics and functions of the mining companies in Indonesia"[320]; (b) "Relationship with the GOID: ownership and formal indicia of control by the GOID"[321]; (c) "Government authority and exercise of meaningful control by the GOID"[322]; and (d) "Designation of mining companies as 'National vital objects'".[323] As part of this analysis, the Commission examined two broad categories of evidence: evidence concerning the state ownership and management of the mining companies; and evidence relating to certain domestic regulatory measures in Indonesia that allegedly apply to all nickel ore mining companies (the "domestic regulatory framework"). The Commission examined evidence concerning the ownership and management of the mining companies under the section entitled "Relationship with the GOID: ownership and formal indicia of control by the GOID".[324] The other sections of the Commission's analysis evaluated evidence relating to the domestic legal framework.[325]

7.162. With respect to the "ownership and formal indicia of control by the GOID", the Commission noted that it "sought information about the State ownership as well as other formal indicia of government control in the State-owned nickel miners", but "had to rely almost entirely on facts available … due to the refusal by the GOID and the nickel miners to provide evidence on the ownership, control, and decision-making process that led to the provision of nickel ore at less than adequate remuneration".[326] The Commission also stated that the total number of mining companies reported by the GOID was "more than 290".[327] As part of its "ownership and formal indicia of control by the GOID" analysis, the Commission made findings concerning the ownership[328] of certain mining companies and their "management and control".[329]

7.163. After noting that the information that the GOID provided about "State ownership and the exercise of control in the nickel ore mining companies" was "limited and inconsistent"[330], the Commission individually examined and made specific findings about the extent of the GOID's involvement in the ownership of six mining entities, namely: PT Aneka Tambang (Antam)[331],

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[316] Countervailing duty final determination (Exhibit IDN-1), recital 230.
[317] Countervailing duty final determination (Exhibit IDN-1), recital 224.
[318] Indonesia's second written submission, para. 334; response to Panel question No. 253.
[319] European Union's response to Panel question No. 44, para. 137.
[320] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[321] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[322] Countervailing duty final determination (Exhibit IDN-1), p. 73.
[323] Countervailing duty final determination (Exhibit IDN-1), p. 80.
[324] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[325] See e.g. European Union's response to Panel question No. 255.
[326] Countervailing duty final determination (Exhibit IDN-1), recital 377. We discuss Indonesia's challenges to the Commission's application of facts available at section 7.7.3 below.
[327] Countervailing duty final determination (Exhibit IDN-1), recital 389.
[328] See e.g. Countervailing duty final determination (Exhibit IDN-1), recital 389.
[329] See e.g. Countervailing duty final determination (Exhibit IDN-1), recital 390.
[330] Countervailing duty final determination (Exhibit IDN-1), recital 387.
[331] Countervailing duty final determination (Exhibit IDN-1), recital 378.

Gag Nikel[332], PT Vale Indonesia Tbk (Vale)[333], PT Weda Bay Nickel[334], PT Tonia Mitra Sejahtera[335], and PT Tim Nikel Sejahtera.[336] On this basis, the Commission concluded that:

> Even taking into account the public information available for the very limited number of companies (five) compared to the total number of mining companies reported by the GOID (more than 290), it could be concluded that the share of the State-owned companies in the total production in 2020 was more than 27% (the shares of PT Vale and PT Tim Nikel Sejahtera were not included in the information provided by the GOID). This alone already represents a substantial market share of companies owned by the State and should be considered as underestimated, as it is very likely that among the numerous other mining companies for which public information was not available there are other State-owned ones.[337]

The Commission thus acknowledged that it examined the GOID's ownership involvement in a "very limited number of companies (five)" out of the "more than 290" mining companies reported by the GOID. The Commission also made a finding as to the production of three mining companies as a share of the total production of nickel ore in Indonesia.

7.164. In its analysis of the "management and control of the mining companies", the Commission again observed that it "had to rely on its own research … due to the lack of cooperation of GOID" and the fact that only "limited information was publicly available".[338] The Commission examined the management and governance structure of three companies, namely: Antam[339]; Gag Nikel[340]; and Vale.[341] Ultimately, with respect to "ownership and formal indicia of control by the GOID", the Commission concluded that:

> Based on the information on file and on its own research due to the widespread non-cooperation by the GOID… mining companies representing a substantial production of nickel ore are fully or partially State-owned, and also managed and/or controlled by the State in a close relationship with the GOID.[342]

7.165. The above discussion reveals that, having examined a small subset of the "more than 290" nickel ore mining companies, the Commission reached the intermediate conclusion – based largely on the use of facts available – that "the mining companies representing a substantial production of nickel ore are fully or partially State-owned, and also managed and/or controlled by the State in a close relationship with the GOID".[343] Importantly, we note that the Commission does not appear to have made any findings, including based on facts available, about the extent of either the GOID's ownership of or management and control over the other mining companies that it did not individually examine. Setting aside Indonesia's arguments challenging discrete aspects of the Commission's analysis of ownership and indicia of control, we note that the Commission's analysis was: (a) based on an examination of a few of the "more than 290" nickel ore mining companies in Indonesia; and (b) was limited to describing the production of *those* allegedly state-owned/managed/controlled nickel ore mining companies as a "substantial" share of the total production of nickel ore in Indonesia.

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[332] Countervailing duty final determination (Exhibit IDN-1), recital 384.
[333] Countervailing duty final determination (Exhibit IDN-1), recital 385.
[334] Countervailing duty final determination (Exhibit IDN-1), recital 387.
[335] Countervailing duty final determination (Exhibit IDN-1), recital 388.
[336] Countervailing duty final determination (Exhibit IDN-1), recital 388. As the production volume data of PT Tim Nikel Sejahtera was not provided by the GOID or publicly available, PT Tim Nikel Sejahtera was not included in the Commission's calculation of the 27% figure.
[337] Countervailing duty final determination (Exhibit IDN-1), recital 389.
[338] Countervailing duty final determination (Exhibit IDN-1), recital 390.
[339] Countervailing duty final determination (Exhibit IDN-1), recital 390.
[340] Countervailing duty final determination (Exhibit IDN-1), recital 391.
[341] Countervailing duty final determination (Exhibit IDN-1), recital 392.
[342] Countervailing duty final determination (Exhibit IDN-1), recital 393.
[343] Countervailing duty final determination (Exhibit IDN-1), recital 393. With respect to ownership, the Commission found that the market share of the state-owned companies (excluding PT Tim Nikel Sejahtera) was "substantial" as it was "more than 27%" of the total production in 2020. (Countervailing duty final determination (Exhibit IDN-1), recital 389.)

7.166. While the Commission's ownership and control analysis and the resulting intermediate finding concerned the production share of a small subset of the "more than 290" mining companies, the Commission's overall conclusion for its public body analysis was considerably broader in scope. Specifically, we note that in the "conclusion" section of its public body analysis the Commission stated that its review of the "overall legal environment and assessment shows that the mining companies providing nickel ore are 'public bodies'".[344] While this overall conclusion does not expressly state that it applies to "all" nickel ore mining companies in Indonesia, we note that the parties agree that the Commission's public body finding was, in fact, made with respect to "*all* mining companies".[345]

7.167. The Commission's sector-wide public body finding appears to have been based primarily on the Commission's consideration of evidence relating to the domestic regulatory framework governing the production and sale of nickel ore in Indonesia, i.e. the "legal and economic environment prevailing in Indonesia"[346] and the "complete normative framework [that] mining companies have to adhere to".[347] We note that, as part of its overall conclusion, the Commission recalled its intermediate finding that "a number of mining companies representing a substantial domestic production of nickel ore are fully or partially State-owned, and/or that they are managed and/or controlled by the GOID".[348] However, we also note that neither the Commission's overall conclusion, nor the remainder of its public body analysis, appears to explain how findings related to the *production share* of *some* allegedly state-owned/managed/controlled nickel ore mining companies support the Commission's finding that *all* nickel ore mining companies in Indonesia share a "degree of commonality or overlap"[349] in their core characteristics with the GOID.[350] In the absence of any such discussion, it is not entirely clear to us how an analysis of evidence of state ownership and management for a *few* mining companies with a view to ascertaining their *production share* necessarily sheds light on the *core characteristics* of those mining companies that were not examined by the Commission and which, the European Union acknowledges, may not be state-owned.[351]

7.168. The fact that the Commission based its sector-wide public body finding on an evaluation of the evidence relating to the regulatory framework by which the GOID regulates nickel ore mining companies is also reflected in various parts of the Commission's determination. For example, at the beginning of its analysis of the GOID's "authority and exercise of meaningful control" over the nickel ore mining companies, the Commission stated that "*all mining companies, regardless of their ownership*, are subject to and must implement a number of government-prescribed measures concerning the provision of nickel ore".[352] This is an important statement as it both (a) indicates that the Commission's analysis of Indonesia's regulatory framework covers "all" mining companies[353] and (b) suggests that the question of whether or not an entity is owned by the GOID was not the conclusive factor for the Commission's sector-wide public body finding, which was based instead on Indonesia's regulatory framework that applied to all mining companies regardless of ownership. We similarly observe that, as part of its examination of the "designation of mining companies as 'National vital objects'", the Commission stated that "the fact that mining companies active in the nickel ore business – *whether public or private* – are entitled to be formally recognised as 'National vital objects', shows once more that they possess, exercise or are vested with governmental authority".[354] This too is an important statement as the phrase "whether public or private" again indicates the

[344] Countervailing duty final determination (Exhibit IDN-1), recital 443.
[345] See European Union's second written submission, para. 83; Indonesia's first written submission, fn 594 (quoting and referring to Countervailing duty final determination (Exhibit IDN-1), recitals 443 and 446).
[346] Countervailing duty final determination (Exhibit IDN-1), recital 443.
[347] Countervailing duty final determination (Exhibit IDN-1), recital 444.
[348] Countervailing duty final determination (Exhibit IDN-1), recital 443.
[349] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.100.
[350] The current circumstance thus contrasts with the situation in *US – Anti-Dumping and Countervailing Duties (China)*, where the investigating authority determined that the relevant SOCBs were public bodies based, *inter alia*, on the fact that there was "near complete state-ownership of the banking sector in China". (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349).
[351] European Union's second written submission, para. 99 (noting that, "by finding that a share of 27% of mining companies was GOID-owned or controlled, the Commission acknowledged that the remaining companies were not public bodies and hence privately owned."). See also European Union's response to Panel question No. 44, para. 139.
[352] Countervailing duty final determination (Exhibit IDN-1), recital 395. (emphasis added)
[353] See European Union's response to Panel question No. 53(b), para. 170 (noting that "the regulatory framework covers all mining companies").
[354] Countervailing duty final determination (Exhibit IDN-1), recital 442. (emphasis added)

limited relevance of evidence concerning ownership and formal indicia of control for the Commission's public body finding for all mining companies.

7.169. The above discussion suggests that the Commission's analysis of the GOID's ownership and control of the nickel ore mining companies was not at the "core" of its public body determination.[355] Rather, the Commission's overall finding that *all* nickel ore mining companies in Indonesia are public bodies appears to have been based primarily on an assessment of evidence relating to the domestic regulatory framework governing the nickel ore mining companies in Indonesia.[356] This is confirmed by the European Union's statement during these proceedings that "the assessment of ownership and control indicia could not support the [Commission's] finding that *all* mining companies are public bodies[, which] necessarily was based on the regulatory framework because only the regulatory framework applies to all companies".[357] Stated differently, the European Union acknowledges that the Commission's intermediate finding on ownership and control, which concerned *some* of the "more than 290" mining companies, cannot – and did not – form the basis for the Commission's sector-wide finding that *all* nickel ore mining companies are public bodies. Instead of constituting an "*ex post* facto rationalization[]" by the European Union[358], these arguments[359] align with the Commission's public body determination which, as we have discussed above, was: (a) made with respect to *all* mining companies; (b) based on an assessment of evidence relating to the domestic regulatory framework that applies to *all* companies; and (c) not dependent on whether the mining companies are owned or formally controlled by the government.

7.170. With this in mind, we now consider whether the Commission's assessment of the evidence relating to the domestic regulatory framework supported its "finding that *all* mining companies are public bodies – independently of the ownership analysis"[360].

7.5.2.4.1.3 Commission's assessment of the domestic regulatory framework

7.171. As discussed above, the Commission examined evidence relating to the domestic regulatory framework governing the activities of Indonesia's nickel ore mining companies as part of its analysis of the: "Core characteristics and functions of the mining companies in Indonesia"[361]; "Government authority and exercise of meaningful control by the GOID"[362]; and "Designation of mining companies as 'National vital objects'".[363] We review this evidence, and the conclusions that the Commission drew from this material, for each of these elements in turn.

Commission's analysis of the "core characteristics and functions" of the mining companies

7.172. In the section of its final determination in which it reviewed the "Core characteristics and functions of the mining companies in Indonesia", the Commission observed that the "GOID has set up a regulatory mechanism which bestows nickel ore mining companies with authority to exercise governmental functions".[364] Having examined provisions of the Indonesian constitution and the 2009 Mining Law[365], the Commission concluded that:

> [T]he legal and economic environment prevailing in Indonesia, as also further elaborated in recitals (396) to (400), show that the mining companies extracting nickel ore are closely linked to the government in performing governmental functions. In

[355] Indonesia's second written submission, para. 334.
[356] See European Union's response to Panel question No. 44, paras. 137 and 141.
[357] European Union's second written submission, para. 83. (underlining and italics original)
[358] Indonesia's second written submission, paras. 330 and 333 (noting, *inter alia*, that "the EU's *ex post* justifications that do not appear in the Commission's determination, such as the explanation regarding the '*non-determinative*' nature of the analysis on '*ownership and formal indicia of control*', and '*determinative*' nature of its regulatory framework analysis must be disregarded by the Panel." (emphasis original)).
[359] See European Union's response to Panel question No. 53(d), para. 175 (noting that a sector-wide "public body" finding can be made for a sector that consists entirely of privately-owned entities that are all privately owned based only on the domestic regulatory framework).
[360] European Union's response to Panel question No. 44, para. 138. (emphasis original)
[361] Countervailing duty final determination (Exhibit IDN-1), p. 70.
[362] Countervailing duty final determination (Exhibit IDN-1), p. 73.
[363] Countervailing duty final determination (Exhibit IDN-1), p. 80.
[364] Countervailing duty final determination (Exhibit IDN-1), recital 373.
[365] Countervailing duty final determination (Exhibit IDN-1), recitals 374 and 375.

> particular, the purpose of the mining companies, often owned by the State, is to put in effect Indonesian policies as to how to manage natural resources in a manner which best serves and contributes to national development.[366]

7.173. The Commission's analysis of the "core characteristics and functions of the mining companies in Indonesia" was thus based largely on the "regulatory mechanism" and "legal and economic environment prevailing in Indonesia" that applied to *all* mining companies.[367] While we note that the Commission's conclusion above states that the mining companies are "often owned by the State", the Commission does not appear to have provided any additional reasoning in support of this statement as part of its assessment of "core characteristics and functions". Instead, as discussed above, the Commission's analysis of state-ownership was conducted separately and was limited to a small subset of the more than 290 mining companies and related to their alleged share of total production of nickel ore. That analysis does not, without more, indicate how "often" mining companies are "owned by the State".

7.174. Moreover, the Commission's conclusion with respect to the core characteristics and functions generally appears to concern the mining companies' conduct insofar as it finds that the nickel ore mining companies are in fact performing governmental functions in the sense of "put[ting] in effect Indonesian policies as to how to manage natural resources in a manner which best serves and contributes to national development".[368] Stated differently, the Commission appears to conclude, based on its assessment of the evidence concerning the domestic regulatory framework, that the mining companies *actually perform* governmental functions by pursuing the government's policy objectives. Importantly, and contrary to what the European Union suggests[369], as part of its assessment of the "core characteristics and functions", the Commission thus does not appear to have considered or evaluated evidence or made findings relating to, e.g., the ownership, "organizational features", or "chains of decision-making authority" of *all* the mining companies.

Commission's analysis of "government authority and the exercise of meaningful control"

7.175. The Commission's assessment of the evidence relating to the domestic regulatory framework as part of its analysis of the scope of the "government['s] authority and the exercise of meaningful control" over the nickel ore miners, indicates that the Commission analysed five domestic measures that apply to "all mining companies, regardless of their ownership", namely: the (a) "domestic processing obligation ('DPO')"; (b) "export restrictions and/or export ban"; (c) "mandatory annual working plan and budget ('RKAB')"; (d) "divestment obligations"; and (e) "mandatory pricing mechanism".[370] At the outset of this analysis, the Commission stated that these "obligations clearly show that the mining companies are *performing governmental functions*".[371] As discussed in greater detail below, this statement suggests that the Commission examined these measures with a view to evaluating the manner and extent to which they regulated the activities and conduct of the mining companies for the purpose of determining whether the companies actually perform governmental functions.[372]

Domestic processing obligation (DPO)

7.176. The Commission determined that several provisions of the 2009 Mining Law established an "obligation to conduct processing and refining domestically"[373], noting that:

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[366] Countervailing duty final determination (Exhibit IDN-1), recital 376.
[367] Countervailing duty final determination (Exhibit IDN-1), recitals 373 and 376.
[368] Countervailing duty final determination (Exhibit IDN-1), recital 376.
[369] European Union's response to Panel question No. 255.
[370] Countervailing duty final determination (Exhibit IDN-1), recital 395.
[371] Countervailing duty final determination (Exhibit IDN-1), recital 395. (emphasis added)
[372] See also Countervailing duty final determination (Exhibit IDN-1), recital 400 (stating that the 2009 Mining Law and its implementing legislations "show the strong interference and central government control in the mining sector including the nickel ore [sector], *inter alia*, with regard to production and sales target, price controls, and a bias in favour of domestic needs for minerals extracted in Indonesia" and that these measures established a "framework in which mining companies are given authority which has enabled them to develop governmental functions relating to the marketing and supply of mining products so as to achieve the relevant government objectives").
[373] Countervailing duty final determination (Exhibit IDN-1), recital 402.

> Pursuant to Article 102 of the 2009 Mining Law, 'the holder of an IUP and an IUPK are obligated to increase the value-add of mineral and/or coal resources in the implementation of development, processing, and purification, as well as in the exploitation of minerals and coal'. Furthermore, pursuant to Article 103(1) 'The holder of a Production Operations IUP and an IUPK is obligated to undertake processing and purification activities on domestic mine products' and pursuant to Article 103(2) 'The holder of an IUP and an IUPK as stated in paragraph (1) can process and purify the mine products of other IUP and IUPK holders'.[374]

7.177. Having examined the evidence relating to the DPO, the Commission concluded that "[t]hese obligations show that mining companies are not free to organise their production and processing activities according to business considerations. Rather, they must follow these obligations to produce and process the ore domestically in order to increase the added value in Indonesia."[375] According to the Commission, the DPO thus demonstrates that the mining companies "perform government-mandated activities".[376] The Commission's analysis of evidence relating to the DPO thus suggests, at best, that Indonesian mining companies perform certain activities and engage in conduct, such as "production and processing activities", in pursuance of governmental policy and, in that sense, may be seen as actually performing governmental functions.

Export restrictions and export ban

7.178. The Commission observed that, pursuant to the Minister of Energy and Mineral Resources (MEMR) Regulation 1/2014, "11 metal minerals … were banned from export as of January 2014" and that "[s]ix metals, including nickel, could only be exported in a processed form".[377] According to the Commission, in an "attempt to alleviate the impact on miners and the country's export revenues from the ban on export of unprocessed or insufficiently processed minerals the GOID issued [Government Regulation] 1/2017 allowing mining companies to continue exporting semi-processed product and certain types of ores for a five year period from 11 January 2017".[378] The Commission found that nickel ore with content below 1.7% Ni could be exported until 31 December 2019 if it complied with certain "minimum processing and/or refining requirement" under the relevant Indonesian domestic measures.[379] The Commission also stated that, "as of 1 January 2020, all types of nickel ore are forbidden from being exported".[380]

7.179. The Commission's assessment of "[t]hese export restrictions and the export ban of nickel ore" indicates that this examination again assessed evidence relating to the mining companies' conduct (such as their ability to export nickel ore, and the requirement that they undertake "minimum processing and/or refining") and, as such, establishes that the companies, at most, "effectively perform[] governmental activities"[381].

Annual working plans and budget (RKAB)

7.180. The Commission observed that "MEMR 11/2018 (as amended by MEMR 22/2018 and MEMR 51/2018) defines the annual RKAB as [an] 'annual work and budget plan in the business of minerals and coal mining, covering the aspects of business, technical and environment'" and that the legislation "obliges holders of mining business licence to prepare and convey the annual RKAB to the Minister or Governor in accordance with their authority for obtaining approval (Article 61 paragraph (1) point b)". The Commission noted that, in addition to these reporting obligations, "MEMR 11/2018 prohibits holders of a mining business licence from conducting construction, mining, processing and/or refining as well as transporting and selling activities before their annual RKAB is approved".[382]

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[374] Countervailing duty final determination (Exhibit IDN-1), recital 401.
[375] Countervailing duty final determination (Exhibit IDN-1), recital 404.
[376] Countervailing duty final determination (Exhibit IDN-1), recital 404.
[377] Countervailing duty final determination (Exhibit IDN-1), recital 406.
[378] Countervailing duty final determination (Exhibit IDN-1), recital 407.
[379] Countervailing duty final determination (Exhibit IDN-1), recitals 407-411.
[380] Countervailing duty final determination (Exhibit IDN-1), recital 412.
[381] Countervailing duty final determination (Exhibit IDN-1), recital 413.
[382] Countervailing duty final determination (Exhibit IDN-1), recital 415. (fn omitted)

7.181. Based on its examination of four RKABs for nickel ore miners submitted by the GOID, the Commission noted that an "RKAB includes detailed quantitative, qualitative and financial information regarding the exploration activity, resources and reserves, mining operations, processing and refining volumes, marketing and shipment on export as well as domestic markets, environment, safety, workforce, estimated financials (sales, royalties, income, income tax)".[383] Indonesia states that these RKABs are based on "feasibility studies" undertaken by the mining companies "that indicate how much nickel ore they can feasibly extract" and these studies are "provided" to the GOID.[384] Noting that "the GOID failed to provide actual feasibility studies and avoided to engage in discussions concerning how the production targets are set for each company, and then how the GOID monitors and act[s] afterwards with regard to production actually achieved for the period covered by the feasibility study", the Commission stated that it had to rely on "inferences" based on facts available for this aspect of its analysis.[385]

7.182. The Commission also observed that, "in addition to the annual RKAB submission requirement" MEMR Regulation 11/2018 also "requires IUP holders to submit three additional reports: (a) a Periodic Report; (b) a Final Report; and (c) a Special Report, with various levels of requirements, depending on the type of IUP holder". The Commission noted that "[a]mong the type of information required to be submitted, the IUP holders have to submit information on [their] production and sales activities".[386] Ultimately, the Commission found, based on facts available, that the "rules on the RKAB show one more aspect of the meaningful and strict control the GOID holds in particular over production targets of each mining company each year".[387] The Commission concluded that "as a result of these rules on RKABs, mining companies' core characteristics and functions are to provide nickel ore in line with the government objective to support the downstream stainless steel industry".[388]

7.183. In light of the above, we are of the view that the Commission's analysis of the RKABs did not ultimately consider the companies' "core characteristics", such as their "organizational features, chains of decision-making authority" and "overall relationship" with the government.[389] Instead, the Commission's analysis suggests that its assessment of the evidence relating to the RKABs was limited to considering whether the GOID, in fact, exercises "meaningful and strict control" over the mining companies' conduct, e.g. their production and sales activities, such that it, at best, establishes that the mining companies actually "provide nickel ore in line with the government objective".[390]

Divestment obligation

7.184. The Commission noted that, under the 2009 Mining Law, "foreign owned mining companies are required to divest their shares to Indonesian parties in order to promote domestic investment in the mining sector".[391] The Commission observed that the "Central Government has gradually changed the minimum percentage of divestment requirement since the issuance of the 2009 Mining Law" and "[c]urrently, the prevailing minimum divestment requirement is 51 %, as applied by the fourth amendment to [Government Regulation] 23/2010 in 2017 ([Government Regulation] 1/2017) and MEMR 9/2017(as amended by MEMR 43/2018)".[392] The Commission also identified a right of first refusal by the government and stated that the "shares owned by the foreign investors can be sold to Indonesian private companies only if the Government, the provincial governments, or the district/city governments, State-Owned Entities, Region-Owned Entities have refused first to buy the shares".[393]

7.185. The Commission concluded that these "provisions show that the GOID seeks to increase its meaningful control over the mining companies by increasing its presence and displacing

[383] Countervailing duty final determination (Exhibit IDN-1), recital 419.
[384] Indonesia's response to Panel question No. 51(c) (referring to GOID's response to countervailing duty deficiency letter (Exhibit IDN-83 (BCI))).
[385] Countervailing duty final determination (Exhibit IDN-1), recital 420.
[386] Countervailing duty final determination (Exhibit IDN-1), recital 422.
[387] Countervailing duty final determination (Exhibit IDN-1), recital 424.
[388] Countervailing duty final determination (Exhibit IDN-1), recital 424.
[389] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104.
[390] Countervailing duty final determination (Exhibit IDN-1), recital 424.
[391] Countervailing duty final determination (Exhibit IDN-1), recital 425.
[392] Countervailing duty final determination (Exhibit IDN-1), recital 426.
[393] Countervailing duty final determination (Exhibit IDN-1), recital 428.

foreign-owned mining companies".[394] For the Commission, in "order to ensure that its overarching objective to provide nickel ore for the domestic downstream industry, these entities are obliged after a relatively short period to relinquish ownership with a first right of acquisition conferred on the GOID and other public companies".[395] The Commission observed that "[t]here are also specific rules on the share valuations which do not appear to be in line with normal market negotiations that would take place between operators absent these provisions". For these reasons, the Commission concluded that the "divestment obligations showed how the GOID keeps a meaningful control on the ownership and management of mining companies to ensure that they continue performing governmental functions in line with the GOID's policy objectives".[396]

7.186. We note the Commission's statement that its analysis and conclusion of the divestment obligation concerns the GOID's alleged "meaningful control on the ownership and management of mining companies".[397] However, we also note the European Union's acknowledgment that the Commission's conclusion identified above "was made with respect to the divestment obligation in general" and was not limited to the "actual divestment" of specific or individual mining companies.[398] This suggests that the Commission's assessment of the evidence relating to the "divestment obligation in general" was of limited relevance for examining the shared core characteristics of all mining companies, such as their ownership, management, and control structures. Instead, the Commission's consideration of the divestment obligation again appears to have assessed the mining companies' conduct and, at most, establishes that "the GOID keeps a meaningful control on the … mining companies to ensure that they continue performing governmental functions in line with the GOID's" "overarching objective to provide nickel ore for the domestic downstream industry" (i.e. meaningful control over the specific action – conduct – of providing nickel ore).[399]

7.187. Furthermore, as the Commission appears to have found and Indonesia points out in these proceedings, "the divestment obligation applies to not all nickel ore producers but only to those mining companies in which Indonesians hold less than 51% of the shares".[400] The Commission's determination does not appear to indicate how many mining companies are actually "foreign owned" and are therefore, in fact, subject to the divestment obligation. If the divestment obligation does not apply to all mining companies, but only to an unspecified number of companies that are actually "foreign owned", we consider this obligation to be of limited value in drawing conclusions about the shared core characteristics of *all* mining companies.

Mandatory pricing mechanism

7.188. The Commission found that the evidence "showed that the pricing of nickel ore was subject to a government mechanism that prevented the normal market dynamics of supply and demand to determine the price". According to the Commission, "[t]hroughout the years, and significantly as of 2017, this mechanism was always meant to set the price at a significant discount in comparison to the prevailing international market price, in order to favour the development of the stainless steel industry as per the agreement and bilateral cooperation with the GOC".[401] The Commission ultimately found that "via the regulated price the GOID specifically intended to ensure that the price of nickel ore would yield a significant discount as compared to international market prices to the benefit of the stainless steel industry".[402] For the Commission, the mandatory pricing mechanism thus demonstrated that "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".[403]

7.189. We are of the view that the Commission's assessment of the evidence of the mandatory pricing mechanism thus also evaluated another element of the mining companies' conduct, i.e. their "ability to [] set prices". We note that this appears to be confirmed by the fact that the Commission

[394] Countervailing duty final determination (Exhibit IDN-1), recital 434.
[395] Countervailing duty final determination (Exhibit IDN-1), recital 434.
[396] Countervailing duty final determination (Exhibit IDN-1), recital 434.
[397] Countervailing duty final determination (Exhibit IDN-1), recital 434.
[398] European Union's response to Panel question No. 57(a), para. 180.
[399] Countervailing duty final determination (Exhibit IDN-1), recital 434.
[400] Indonesia's second written submission, para. 440.
[401] Countervailing duty final determination (Exhibit IDN-1), recital 435.
[402] Countervailing duty final determination (Exhibit IDN-1), recital 437.
[403] Countervailing duty final determination (Exhibit IDN-1), recital 437.

– based on the evidence of the mandatory pricing mechanism – concluded that the GOID, in fact, exercises "meaningful control" over the *pricing conduct* of the mining companies.

Conclusion with respect to the Commission's analysis of "government authority and the exercise of meaningful control" based on the regulatory framework

7.190. The above discussion indicates that the Commission's examination of the evidence concerning the domestic regulatory framework as part of its "government authority and the exercise of meaningful control" analysis focused exclusively on different aspects of the mining companies' conduct. The utility of this evidence is thus limited to demonstrating, at most, that the GOID, in fact, exercises meaningful control over specific aspects of the conduct of the mining companies[404], and that the mining companies act in pursuance of governmental policy and therefore actually perform governmental functions.[405]

7.191. As such, by focusing "exclusively or unduly"[406] on the GOID's meaningful control of the conduct of mining companies in pursuance of governmental policies, the Commission's examination of the evidence of the domestic regulatory framework does not speak to the shared core characteristics of the mining companies, such as their "organizational features", the "chains of decision-making authority" within an entity, and an entity's "overall relationship" with the government in the narrow sense.[407] Given this, we disagree with the European Union that the Commission's analysis speaks to the "chains of decision making authority" because "the GOID decides" and the "mining companies implement".[408] While it may well be that the mining companies act in accordance with the domestic regulatory framework and in pursuance of governmental objectives, in our view, these actions speak more to manner in which the GOID actually exercises control over the mining companies' activities and conduct, and not to the nature of the government's involvement in the companies' chains of decision-making authority, such as their ownership, governance, and management.

Commission's analysis of the "[d]esignation of mining companies as 'National vital objects'"

7.192. Under the heading "[d]esignation of mining companies as 'National vital objects'", the Commission observed that three nickel mining companies (Antam, PT Ceria Nugraha Indotama (Ceria), and Vale) are "formally recognized as National Vital Object in the Mineral and Coal Sector"[409] and concluded that this recognition, together with the accompanying benefits[410], shows that "mining companies active in the nickel ore business – whether public or private – … possess, exercise, or are vested with governmental authority".[411] The Commission described this as "additional piece of evidence showing that mining companies are vested with government authority".[412]

7.193. As with its analysis of ownership and formal indicia of control, the Commission's assessment of evidence concerning designation of mining companies as national vital objects under the relevant domestic Indonesian legislation relates to three of the "more than 290" nickel ore mining companies in Indonesia. It is not entirely clear to us, and the Commission does not explain, how designating a few mining companies as national vital objects sheds light on the core characteristics of those companies that are not designated as such. Moreover, the Commission does not explain how the

[404] The Commission found that the GOID, in fact, exercised "meaningful control" over specific aspects of the conduct of mining companies based on the evidence relating to the: (a) RKABs; (b) divestment obligation; and (c) the mandatory pricing mechanism. See paras. 7.183, 7.186, and 7.189 above.

[405] The Commission found that, with respect to specific aspects of their conduct, the mining companies actually performed governmental functions based on the evidence relating to: (a) the 2009 Mining Law and its implementing legislations; (b) the DPO; (c) the export restrictions and/or export ban; (d) the RKABs; and (e) the divestment obligation. See paras. 7.177, 7.179, 7.183, and 7.186 above.

[406] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

[407] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104.

[408] European Union's response to Panel question No. 255, para. 86.

[409] Countervailing duty final determination (Exhibit IDN-1), recital 439.

[410] See Countervailing duty final determination (Exhibit IDN-1), recital 441 (stating that "[t]he companies entitled to this recognition are businesses vital to the economic development of the country or sources of State income of a strategic nature" and that these companies "have the first priority from the Indonesian National Police Force in terms of security assistance when there is any disruption to operations or threat").

[411] Countervailing duty final determination (Exhibit IDN-1), recital 442.

[412] Countervailing duty final determination (Exhibit IDN-1), recital 438.

"recognition" of national vital objects as "businesses vital to the economic development of the country or sources of State income of a strategic nature", or the fact that they are entitled to receive "security assistance" on a priority basis[413], establishes that all mining companies "possess, exercise, or are vested with governmental authority".[414] We therefore do not consider the Commission's examination of the evidence of the domestic regulatory framework in the context of the designation of certain mining companies as national vital objects to be relevant for its finding that all nickel ore mining companies are public bodies.[415]

7.5.2.4.1.4 Overall conclusion with respect to the "cross-cutting" issue

7.194. As noted above, the Commission's investigation into the scope of the GOID's ownership and formal indicia of control of Indonesia's nickel ore mining companies determined that "mining companies representing a substantial production of nickel ore are partially State-owned, and also managed and/or controlled by the State in a close relationship with the GOID".[416] The Commission reached this conclusion based on evidence relating to the production share of a small subset of the "more than 290" nickel ore mining companies in Indonesia. By contrast, the Commission's overall public body finding determined that *all* nickel ore mining companies in Indonesia are public bodies. We recall that the European Union acknowledges that the Commission's ownership and control analysis "only appl[ies] to a limited number of companies", and thus cannot "logically … cover the Commission's overall finding that all mining companies are public bodies".[417] We also recall that the Commission's final determination does not explain how its analysis of the ownership, management, and production share of a limited subset of mining companies establishes that all non-examined companies share the same core characteristics and relationship with the government such that all mining companies can be considered to be "public bodies". We therefore agree with the European Union that the Commission's sector-wide public body finding was based on an assessment of the evidence relating to the manner in which Indonesia's domestic regulatory framework governs the operations of all mining companies in the country.[418]

7.195. The Commission examined evidence regarding the nature of the domestic regulatory framework governing the mining of nickel ore as part of its analysis into the "core characteristics and functions of the mining companies" and the scope of the GOID's "government authority" and "exercise of meaningful control" over these companies. As we have discussed above, and setting aside Indonesia's arguments challenging discrete aspects of these parts of the Commission's analysis, the Commission's analysis: (a) focused entirely on the *conduct* in which the mining companies were required to engage under Indonesia's regulatory framework; and (b) demonstrates, at most, that all mining companies in Indonesia *actually perform* governmental functions by acting in pursuance of the GOID's policies, and that the GOID, *in fact, meaningfully controls* specific aspects of the nickel ore mining companies activities and conduct.[419]

7.196. As discussed above, we are of the view that a public body inquiry under Article 1.1(a)(1) of the SCM Agreement requires an authority to evaluate an entity's core characteristics and its relationship with government. While evidence demonstrating that an entity actually performs a government function in pursuance of government policy, or that the government, in fact, exercises meaningful control over an entity's conduct may be relevant to a public body analysis[420], a public body finding may not be based on such conduct-related evidence alone. As the Commission noted, the public body inquiry under Article 1.1(a)(1) "focus[es] on the entity, as opposed to the conduct alleged to give rise to a financial contribution".[421]

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[413] Countervailing duty final determination (Exhibit IDN-1), recital 441.
[414] Countervailing duty final determination (Exhibit IDN-1), recital 442.
[415] See e.g. European Union's first written submission, para. 372 (noting that "the element of national vital objects only concerned three companies and … [was] clearly not determinative for the Commission's public body finding").
[416] Countervailing duty final determination (Exhibit IDN-1), recital 393.
[417] European Union's response to Panel question No. 53(a), para. 169.
[418] We also agree that the Commission's sector-wide public body finding was thus "independent" of the Commission's ownership and formal indicia of control analysis. (European Union's response to Panel question No. 44, para. 138).
[419] See paras. 7.190-7.191 above.
[420] See para. 7.146 above.
[421] Countervailing duty final determination (Exhibit IDN-1), recital 229.

7.197. In the present dispute, however, the Commission's analysis does not reveal how its assessment of the domestic regulatory framework speaks to the shared, core characteristics of the mining companies, including their "organizational features", the "chains of decision-making authority" within an entity, and their "overall relationship" with the government in the narrow sense.[422] Instead of establishing the shared core characteristics of all mining companies that focus on the existence of government control by virtue of, e.g., the GOID's involvement in the management, governance, and ownership of all the mining companies, the Commission's assessment of the evidence concerning Indonesia's domestic regulatory framework is limited to demonstrating that the GOID *actually exercised* control over the mining companies' activities (i.e. their conduct) and that the companies, *in fact, performed* governmental functions in pursuance of government policy. In our view, such a conduct-based assessment cannot, without more, support the Commission's sector-wide finding that all nickel ore mining companies in Indonesia are public bodies.[423]

7.198. We note that the European Union cites the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* to support its position that the Commission properly found that all nickel ore mining companies are public bodies. Specifically, the European Union notes that the Appellate Body in that proceeding "accepted that Chinese lending banks were carrying out government functions on the basis of a provision in China's Commercial Banking Law".[424] The European Union submits that "the control of GOID over the mining companies and the impact of its policies is at least as strong as the influence of the government of China was over the lending banks, which was already pervasive".[425] As discussed above, however, in that dispute, the Appellate Body noted that while the investigating authority did take into account evidence relating to Chinese SOCB's lending activity, i.e., their conduct, in light of the Chinese Commercial Banking Law, it also relied upon other "extensive evidence" that "spoke to their organizational features, chains of decision-making authority, and overall relationship with the GOC".[426] Among other things, we note that the investigating authority's finding of "near complete state-ownership of the banking sector in China"[427] remained undisputed. Thus, in contrast to the underlying investigation in the present dispute, the investigating authority took into account evidence relating to the conduct of the entities, as well as evidence relating to the other, shared core characteristics of the entities themselves. Given these differences, we do not consider that the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* supports the European Union's position in these proceedings.

7.199. For these reasons, we find that Indonesia has established that the Commission acted inconsistently with the European Union's obligation under Article 1.1(a)(1) of the SCM Agreement by concluding that all nickel ore mining companies in Indonesia are "public bodies".

7.5.2.4.2 Other arguments presented by Indonesia

7.200. As noted above, in addition to its cross-cutting claim, Indonesia also presents separate arguments that challenge discrete factual and legal aspects of the Commission's analysis of the: (a) ownership and formal indicia of control by the GOID; (b) core characteristics and functions of nickel ore mining companies in Indonesia; (c) government authority and the exercise of meaningful

[422] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104.
[423] See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319 (noting that an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity and … avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant").
[424] European Union's response to Panel question No. 39, para. 121.
[425] European Union's response to Panel question No. 39, para. 122.
[426] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.104. (emphasis added) The Appellate Body stated that this included "information showing that: (i) '[t]he chief executives of the head offices of the SOCBs are government appointed and the [CCP] retains significant influence in their choice'; and (ii) SOCBs 'still lack adequate risk management and analytical skills'". We note that even the Commission expressly recognizes that, in *US – Anti-Dumping and Countervailing Duties (China)*, "while the USDOC did take into account evidence relating to the conduct of SOCBs ['making loans'], it did so within the framework of its inquiry into the core characteristics of those entities and their relationship with the GOC." We note that the Commission also explicitly observed in its final determination that the evidence taken into account by the USDOC in *US – Anti-Dumping and Countervailing Duties (China)* "was not limited to SOCBs' lending activity per se, but rather spoke to their organizational features, chains of decision making authority, and overall relationship with the GOC". (Countervailing duty final determination (Exhibit IDN-1), recital 230).
[427] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349.

control by the GOID; and (d) designation of nickel ore mining companies as "national vital objects".[428]

7.201. As we agree with Indonesia's "cross cutting" argument and conclude that the Commission's determination that all nickel ore mining companies in Indonesia are public bodies is inconsistent with Article 1.1(a)(1) of the SCM Agreement, we do not consider it necessary to make additional findings with respect to these additional arguments in order to provide a positive resolution to the present dispute.

7.5.3 Claim under Article 1.1(a)(1)(iv) of the SCM Agreement: entrustment or direction

7.5.3.1 Introduction

7.202. Indonesia challenges the Commission's determination that "the GOID entrusted or directed nickel ore mining companies to provide nickel ore to the stainless steel industry".[429] Specifically, Indonesia argues that the "regulatory measures" that formed the basis for the Commission's determination of "entrustment or direction" – i.e. the "export restrictions coupled with the DPO and the minimum pricing mechanism"[430] – do not demonstrate that the GOID "exercised authority" over or "gave responsibility" to the mining companies to provide nickel ore "to the stainless steel industry".[431]

7.203. We begin by briefly reviewing the relevant facts of the underlying investigation as they relate to the Commission's analysis of entrustment or direction. Subsequently, we examine Indonesia's claim that the Commission's determination of entrustment or direction is inconsistent Article 1.1(a)(1)(iv) of the SCM Agreement.

7.5.3.2 Brief overview of the Commission's determination

7.204. Having determined that the nickel ore mining companies in Indonesia are public bodies, the Commission "also examined in the alternative whether 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".[432]

7.205. As to the "Legal Standard" that it understood when conducting an analysis of entrustment or direction, the Commission observed that the relevant provisions under EU law "mirror paragraphs (iii) and (iv) of Article 1.1(a)(1) of the SCM Agreement and should be interpreted and applied in the light of the relevant WTO case law".[433] In this regard, the Commission stated that, for the purposes of its investigation, a "finding of entrustment or direction requires that the government gives responsibility to a private body or exercises its authority over a private body in order to effectuate a financial contribution".[434]

7.206. The Commission's analysis of entrustment or direction examined evidence concerning three domestic regulatory measures adopted by Indonesia which "apply to all mining companies" irrespective of their ownership status, namely: (a) the "Domestic processing obligation" (DPO); (b) "Export restrictions until 2019 and a full export ban as of 1 January 2020"; and (c) the "Mandatory pricing mechanism".[435] The Commission's analysis recalled its discussion of these measures in its examination of whether the nickel ore mining companies could be considered to be public bodies.[436]

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[428] Indonesia's first written submission, para. 458.
[429] Indonesia's second written submission, para. 454.
[430] Indonesia's first written submission, para. 615; second written submission, para. 454. We note that while Indonesia refers to the "minimum pricing mechanism", the Commission's final determination uses the term "mandatory pricing mechanism". See e.g. Countervailing duty final determination (Exhibit IDN-1), recital 455. For the purposes of our analysis, we use the terminology used by the Commission.
[431] Indonesia's second written submission, para. 458.
[432] Countervailing duty final determination (Exhibit IDN-1), recital 446.
[433] Countervailing duty final determination (Exhibit IDN-1), recital 447.
[434] Countervailing duty final determination (Exhibit IDN-1), recital 450(iii).
[435] Countervailing duty final determination (Exhibit IDN-1), recital 455.
[436] Countervailing duty final determination (Exhibit IDN-1), recital 455.

7.207. Referring to its analysis of the DPO in the context of its "public body" determination, the Commission found that, "[i]n a nutshell, the mandatory processing obligation required smelters to process nickel ore domestically, showing that the GOID intended to ensure that nickel ore would be produced and processed domestically, and not exported".[437] Having found that "the mandatory processing obligation required smelters to process nickel ore domestically", the Commission stated that the "subsequent *de facto* or *de jure* export restrictions and bans on the export of nickel ore effective as of 2014, after the transitional period starting in 2009, and notably the full export ban as of 1 January 2020, were specifically intended to ensure that the nickel ore, in addition to having to be processed domestically, could not be exported" and, instead, had "to be kept in the domestic market for the benefit of the stainless steel industry and resulted in lower domestic nickel ore prices".[438]

7.208. The Commission found that the "low nickel ore prices resulting from the export restrictions (and domestic processing requirement) were further supported by a mandatory pricing mechanism introduced in 2020".[439] According to the Commission, the "GOID set the actual mechanism to fix the reference prices for transactions between mining companies and smelters via its specific regulations to achieve a significant discount on the price of the nickel ore in international markets".[440]

7.209. Observing that nickel ore miners are "deprived of a rational commercial choice, and are induced to comply with the GOID's policy objective to favour the stainless steel industry", the Commission found that:

> By subjecting mining companies to export restrictions for nickel ore, in combination with other government measures including in particular (i) a price regulation that kept nickel ore prices artificially low, and (ii) domestic processing requirements resulting in oversupply and depressed prices, the GOID put the nickel miners into an economically irrational situation, forcing them to sell the nickel ore domestically for artificially depressed prices as compared to the substantially higher prices they could have obtained otherwise from many more potential customers in the absence of the licencing obligations and of the pricing mechanism.[441]

7.210. The Commission connected its factual findings to its understanding of the requirements for entrustment or direction by reasoning that:

> [T]hese measures taken together constitute an explicit and affirmative action by the GOID of delegation or command over nickel ore mining companies to the effect of providing nickel ore to smelters for less than adequate remuneration. The role of the GOID went well beyond an ordinary intervention as a market regulator in the mining sector. The relevant measures not only regulated general aspects of the market, but imposed a specific behaviour on mining companies by obliging them to process the ore domestically, by closing the export markets, and by regulating a price at a significant discount to the international market. All these measures were undertaken in order for mining companies to provide nickel ore for less than adequate remuneration for the benefit of the downstream industry. That intention was made clear through numerous policy statements and actions.
>
> By obliging mining companies to comply with these measures (including through penalties and revocation of the licenses, see recitals (337) - (375)), the GOID deprived them of the ability to freely choose their production and selling strategies according to market considerations. In other words, these measures clearly constitute a 'demonstrable link' between the government act and the conduct of the private mining companies. The GOID used the mining companies as a proxy to support the smelters and stainless steel producers. Moreover, the Commission already noted that the GOID

[437] Countervailing duty final determination (Exhibit IDN-1), recital 456.
[438] Countervailing duty final determination (Exhibit IDN-1), recital 456.
[439] Countervailing duty final determination (Exhibit IDN-1), recital 457.
[440] Countervailing duty final determination (Exhibit IDN-1), recital 459. See also ibid. recital 460 (stating that "[w]hile indeed the formula for calculating the regulated HPM for the nickel ore is linked to international price of nickel ore, this formula includes a significant correction factor that ensures that the Indonesian domestic nickel ore price is significantly below international prices.").
[441] Countervailing duty final determination (Exhibit IDN-1), recital 464.

> manages and controls the mining of natural resources, including nickel ore, as part of its governmental functions (see recital (374)). The provision of nickel ore may therefore be treated as a function normally vested in the government pursuant to the exercise of its regulatory powers.
>
> Indeed, rather than providing nickel ore at less than adequate remuneration directly to the stainless steel industry in order to achieve the GOID's public policy objectives of attracting smelting capacity through low nickel ore prices, the GOID induced the mining companies, through a set of carefully targeted laws and regulations, to do so on its behalf.[442]

7.5.3.3 Evaluation

7.211. Indonesia and the European Union appear to agree with the understanding that "entrustment" occurs where a government *gives responsibility* to a private body, while "direction" refers to situations where the government *exercises its authority* over a private body.[443] The parties' disagreement thus focuses on whether sufficient record evidence existed to support the Commission's finding that the GOID entrusted or directed the nickel ore mining companies to provide nickel ore for LTAR to Indonesia's SSCRFP producers.

7.212. While agreeing that "entrustment and direction requires a case-by-case analysis of all relevant circumstances", Indonesia asserts that "even such a case-by-case analysis in this case does not support a finding of entrustment or direction".[444] Indonesia presents two main arguments in support of its position. First, Indonesia argues that the Commission's analysis of Indonesia's export restrictions and the DPO does not show that the GOID entrusted or directed mining companies in Indonesia to provide nickel ore "to the stainless steel industry".[445] Second, Indonesia asserts that the Commission failed to establish that, through the mandatory price mechanism, the GOID "induced" or "directed" mining companies "to sell nickel ore at low prices".[446] The European Union responds that, "by regulating the provision of nickel ore to processors through the domestic processing obligation, by regulating the below-market price of nickel ore through the mandatory price mechanism and by publicly stating that its objective was to support the downstream industries (smelters and stainless steel [producers]) through low prices of nickel ore", Indonesia "undertook several important government actions with the explicit objective of ensuring that the export ban would result in nickel ore being provided to the downstream industries".[447]

7.213. We evaluate Indonesia's arguments by first reviewing the factors that Article 1.1(a)(1)(iv) of the SCM Agreement requires an investigating authority to consider when conducting an entrustment or direction analysis. We then consider whether the Commission erred in its application of Article 1.1(a)(1)(iv) to the facts of the investigation, focusing on its assessment of the evidence concerning, first, the export restrictions and the DPO, and second, the mandatory pricing mechanism.

7.5.3.3.1 Requirements for entrustment or direction

7.214. Article 1.1, in relevant part, reads as follows:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

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[442] Countervailing duty final determination (Exhibit IDN-1), recitals 466-468.

[443] See Indonesia's first written submission, para. 598 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116); European Union's first written submission, para. 379 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116); and Countervailing duty final determination (Exhibit IDN-1), recital 450(iii).

[444] Indonesia's response to Panel question No. 82(a).

[445] Indonesia's second written submission, p. 115.

[446] Indonesia's second written submission, para. 501.

[447] European Union's response to Panel question No. 264, para. 131.

…

> (iv) a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.215. As noted in paragraph 7.131 above, Article 1.1(a)(1) of the SCM Agreement is concerned with the existence of a financial contribution.[448] Subparagraphs (i)-(iii) of Article 1.1(a)(1) concern situations where a government provides a financial contribution *directly* by transferring funds, foregoing revenue, providing goods or services, or purchasing goods.[449] Subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement concerns, *inter alia*, the situation where a government entrusts or directs a "private body to carry out one or more of the type of functions illustrated" in subparagraphs (i) to (iii). Subparagraph (iv) therefore contemplates that a financial contribution – of the type identified under subparagraphs (i)-(iii) – may be provided *indirectly* by a government.

7.216. Prior dispute settlement reports have understood the term "entrust" as referring to situations where a government "gives responsibility to" a private body and the term "direct" to refer to situations where the government "exercises its authority over" a private body.[450] In both instances, a government relies on a private body as a "proxy" to carry out one of the types of financial contributions listed in subparagraphs (i) through (iii) of Article 1.1(a)(1) of the SCM Agreement.[451] We agree with this understanding and the view that a finding of entrustment or direction under subparagraph (iv) requires that "the government give *responsibility* to a private body — or exercise its *authority* over a private body — in order to effectuate a financial contribution" that falls within the scope of subparagraphs (i)-(iii) of Article 1.1(a)(1).[452]

7.217. A government may exercise authority over or give responsibility to private bodies in many ways.[453] However, the mere fact that the government either "exercises authority over" or "gives responsibility to" a private body is not, standing alone, sufficient to establish the existence of a financial contribution for purposes of Article 1.1(a)(1)(iv) of the SCM Agreement.[454] Rather, subparagraph (iv) requires an additional showing be made – that the exercise of authority over or the giving of responsibility to a private body has as its object one of the "types of functions" or actions that are specifically enumerated in subparagraphs (i)-(iii) of Article 1.1(a)(1). For this reason, we agree with prior dispute settlement reports that have concluded that "[g]overnment entrustment or direction is thus very different from the situation in which the government [directly] 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".[455]

7.218. A corollary of the above is that an evaluation of whether a government entrusts or directs a private body to effectuate a financial contribution focuses primarily on evidence relating to a "government's actions, and not a private party's reactions to a government measure, which would essentially be the effect of a government measure rather than necessarily a case of entrustment or

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

[449] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108.

[450] See e.g. Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110-111. We note that the parties agree with this understanding of "entrustment" or "direction". (See Indonesia's first written submission, para. 598 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116); European Union's first written submission, para. 379 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116)).

[451] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116. See also Panel Reports, *US – Export Restraints*, paras. 8.29-8.34; *Korea – Commercial Vessels*, paras. 7.368-7.372.

[452] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113. (emphasis added)

[453] See e.g. Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606 (noting that "government regulations of different types could affect private-party behaviour").

[454] See e.g. Panel Report, *US – Export Restraints*, para. 8.38 (noting that "by introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of any government action that resulted in a benefit as a subsidy").

[455] Panel Report, *US – Export Restraints*, para. 8.31; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

direction".[456] This is because determining whether a financial contribution exists under subparagraph (iv) solely by reference to affected entities' reactions to a government measure could have the "far-reaching implication[] … that any government measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a government-entrusted or government-directed provision of goods, and hence a financial contribution".[457] We note, in this regard, the panel's observation in *US – Softwood Lumber VII* that:

> [G]overnment regulations of different types could affect private-party behaviour. However, just because a governmental regulation has such an effect does not mean that the government gives responsibility to, or the government exercises authority over, a private body to provide goods. In particular, we do not consider that a government entrusts or directs a private party to provide goods, or provide them at a particular price, just because that private party's behaviour, in terms of sale and pricing of its goods, is affected by the regulatory framework in which it operates.[458]

Thus, evidence that a government either exercises authority over or gives responsibility to a private body, or that a private body actually engages in the actions contemplated under subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement is not sufficient, by itself, to demonstrate the existence of a financial contribution within the meaning of Article 1.1(a)(1)(iv). Rather, that provision also requires that there also be a "demonstrable link" between the exercise of authority by a government and the conduct of the private body that is alleged to fall within the scope of subparagraphs (i)-(iii) of Article 1.1(a)(1).[459]

7.219. We agree that it "may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not"[460] and that the "particular label used to describe the governmental action is not necessarily dispositive".[461] The entrustment or direction of a private body may not be "formal" or "explicit" such that there is no "direct and conclusive evidence", or a "smoking gun" that "demonstrates a government had explicitly 'told' a private body to provide [a] financial contribution".[462] Given this, the determination of whether a "demonstrable link" exists between the exercise of authority by a government and the conduct of the private body that is alleged to fall within the scope of subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement will hinge on the particular facts of a given case.[463] Different types of evidence may be relevant in this regard, including evidence that: is "circumstantial" in nature[464]; relates to the discretion or choices available to private bodies under a government measure[465]; relates to non-commercial conduct of a private body[466]; or concerns "form[s] of threat or inducement".[467]

7.220. One area of disagreement between the parties relates to the extent to which evidence concerning the choices or the discretion that private bodies may have under a governmental measure to effectuate a given financial contribution is relevant to the analysis of entrustment or direction. The European Union asserts that such evidence is "not relevant" to an entrustment or direction analysis as it concerns "the reactions of the mining companies to the government actions".[468] For

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[456] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.600. See also Panel Report, *US – Export Restraints*, paras. 8.34 and 8.38 (noting, *inter alia*, that to "hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the [SCM] Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the [SCM] Agreement").

[457] Panel Report, *US – Export Restraints*, para. 8.35.

[458] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606.

[459] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112.

[460] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

[461] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

[462] Panel Report, *Japan – DRAMs (Korea)*, paras. 7.72 and 7.73.

[463] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

[464] Panel Report, *Japan – DRAMs (Korea)*, para. 7.73; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150.

[465] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.38.

[466] Panel Reports, *Japan – DRAMs (Korea)*, para. 7.70; *EC – Countervailing Measures on DRAM Chips*, para. 7.105.

[467] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

[468] European Union's closing statement at the second substantive meeting, para. 37 (noting that "the reactions of the mining companies to the government actions are not relevant. This applies to questions such as, … whether the mining companies had 'the choice' of exporting intermediate products, whether mining

Indonesia, "a consideration of choices that the mining companies have does not go" to their "reactions".[469]

7.221. We note, in this regard, the panel's observation in *US – Countervailing Duty Investigation on DRAMs* that the fact that a private body may have a degree of discretion to act in the face of a measure is not "necessarily at odds" with, and as such does not preclude, an entrustment or direction finding. Recognizing that "there may be cases where the breadth of discretion left to the private body is such that it becomes impossible to properly conclude that that private body has been entrusted or directed (to carry out a particular task)", the panel in that dispute emphasized that it is, ultimately, "a factual/evidentiary matter to be addressed on a case-by-case basis".[470]

7.222. Given this, while we agree that a finding of entrustment or direction is not necessarily precluded in cases where a government measure leaves discretion to private bodies by allowing them choices other than effectuating a given financial contribution[471], such as the provision of goods, we disagree with the European Union to the extent that it suggests that evidence demonstrating that private bodies may have a degree of choice or discretion in the face of governmental action is wholly irrelevant for an analysis of entrustment or direction as it "only speak[s] to the [private bodies'] *reactions* to government actions".[472] As such, we agree with prior dispute settlement reports that an entrustment or direction analysis requires an authority to consider evidence relating to the breadth of discretion left to the private body *by the government action*[473] or the choices available to a private body *under the government measure*.[474]

7.223. With this in mind, we now turn to consider the Commission's examination of the evidence relating to the export restrictions and the DPO as part of its entrustment or direction analysis.

7.5.3.3.2 Export restrictions and the DPO

7.224. Indonesia argues that the GOID did not "entrust or direct the mining companies to provide nickel ore to the stainless steel industry domestically" because the "export restrictions and the DPO merely determined the conditions under which nickel ore could be exported from Indonesia (*i.e.*, after minimal purification, which they could do themselves or by cooperating with smelters)".[475] According to Indonesia, any provision of nickel ore to the stainless steel industry "was solely a business decision of the mining companies, as commercial and profit-oriented entities, which is not sufficient to establish entrustment or direction".[476] The European Union responds that, through the DPO, "the GOID regulated that nickel ore would have to be provided by the mining companies to downstream industries, notably the stainless [steel] industry"[477] and that the "export restrictions ensured that the mining companies could not circumvent the domestic processing obligation … in Indonesia by exporting nickel ore abroad".[478]

7.225. We note that at the outset of its entrustment or direction analysis, the Commission stated that the question before it was "whether 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*

companies had the 'choice' of processing themselves or whether they had the 'choice' of supplying pure smelters instead of stainless steel producers").

[469] Indonesia's comments on European Union's response to Panel question No. 261(c).

[470] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.38.

[471] See e.g. European Union's second written submission, paras. 182-183 (noting, *inter alia*, that "the 'no choice' legal standard for entrustment or direction … does not exist"). As discussed in paragraph 7.228 below, the alleged financial contribution at issue in this case consists of the provision of goods in the form of the sale of nickel ore by the mining companies to the stainless steel producers in Indonesia.

[472] European Union's response to Panel question No. 261(c), para. 120. (emphasis original) See also European Union's closing statement at the second substantive meeting, para. 37.

[473] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.38.

[474] See e.g. Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.607. See also Indonesia's response to Panel question No. 268 (noting that the European Union "appears to conflate two concepts – the choices *available* to the mining companies, and the choices *exercised* by the mining companies. The former would … would be perfectly acceptable and consistent with the legal standard for entrustment or direction. The latter would not.").

[475] Indonesia's second written submission, para. 458.

[476] Indonesia's second written submission, para. 458.

[477] European Union's first written submission, para. 410.

[478] European Union's first written submission, para. 413.

producers".[479] As part of its "Conclusion" on entrustment or direction, the Commission ultimately found that "there was ample evidence that the measures taken by the GOID were specifically intended to entrust or direct nickel mining companies to comply with the policy objectives to benefit *the stainless steel industry* in a manner amounting to a countervailable subsidy".[480] These statements suggest that the Commission sought to determine whether the GOID entrusted or directed the nickel ore mining companies in Indonesia to provide goods, i.e. "sell nickel ore", to the "stainless steel producers" or to the "stainless steel industry" – the type of function contemplated under paragraph (iii) of Article 1.1(a)(1) of the SCM Agreement ("a government provides goods or services other than general infrastructure").[481]

7.226. The above observations by the Commission appear to contrast with other statements in the Commission's entrustment or direction analysis which refer to recipients other than the "stainless steel industry" and steel "producers". For example, we note that in one instance in its final determination, the Commission stated that the entrustment or direction inquiry required it to consider whether the GOID entrusted or directed nickel ore producers to provide nickel ore to "the Indonesian smelters".[482] In another instance, the Commission stated that the "overarching objective" of the GOID control over the mining sector was to develop "the domestic processing industry" by "controlling the production and sales prices of nickel ore".[483]

7.227. Indonesia challenges the Commission's "erroneous equation of smelters with the stainless steel industry", arguing that while some nickel ore smelters are "vertically integrated with stainless steel producers"[484], "many smelters in Indonesia are not integrated into the stainless steel industry".[485] As such, Indonesia specifically asserts that, "even if the Commission was able to show that the mining companies were entrusted or directed to provide nickel ore to the smelting industry (which it has not), this would not show that there was also entrustment or direction to provide nickel ore to the stainless steel industry".[486] The European Union responds that the Commission's "interchangeable use of the terms 'smelters', 'stainless steel industry' or 'downstream industries'… is the result of the wording of the relevant provisions under Indonesian law which do not make a distinction between those terms".[487] The European Union asserts that the DPO "necessarily covered both smelters and stainless steel producers and so did the Commission's finding of entrustment or direction".[488]

7.228. Before examining the relevant provisions of Indonesian law, we recall that Article 1.1(a)(1)(iv) of the SCM Agreement covers situations where the government entrusts or directs a private body to "effectuate a financial contribution".[489] While nothing prevents an investigating authority from finding that a government entrusts or directs a private body to provide goods to "two different … groups of customers"[490], the focus of the analysis under subparagraph (iv) remains at all times on the financial contribution that is alleged to exist. As the parties acknowledge and the Commission found, the alleged financial contribution at issue consists of the provision of goods in the form of the sale of nickel ore by the mining companies to the stainless steel producers.[491] Given this, the issue before the Panel is to consider whether an unbiased and objective investigating authority could, based on the underlying evidence, have found that the GOID entrusted or directed the nickel ore mining companies in Indonesia – acting as private bodies – to sell – i.e. provide – nickel ore to the stainless steel producers in Indonesia. We recall in this regard that a finding of financial contribution under Article 1.1(a)(1)(iv) requires a demonstrable causal link between the actions of the government (i.e. the domestic regulatory measures enacted by the GOID)

[479] Countervailing duty final determination (Exhibit IDN-1), recital 446. (emphasis added)
[480] Countervailing duty final determination (Exhibit IDN-1), recital 499.
[481] See Countervailing duty final determination (Exhibit IDN-1), recital 447.
[482] Countervailing duty final determination (Exhibit IDN-1), recital 451.
[483] Countervailing duty final determination (Exhibit IDN-1), recital 476.
[484] Indonesia's response to Panel question No. 260(a).
[485] Indonesia's response to Panel question No. 259.
[486] Indonesia's response to Panel question No. 259.
[487] European Union's response to Panel question No. 259, para. 111.
[488] European Union's response to Panel question No. 262, para. 123.
[489] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113; Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.604. See also Countervailing duty final determination (Exhibit IDN-1), recital 448 (stating that, in cases of entrustment or direction, the "government uses a private body as a proxy to effectuate the financial contribution").
[490] European Union's second written submission, para. 180.
[491] European Union's first written submission, para. 235; Countervailing duty final determination (Exhibit IDN-1), recital 446.

and the conduct of the private bodies (i.e. the sale of nickel ore by the mining companies to the stainless steel producers).[492] As discussed above[493], an assessment of whether such a link exists will necessarily hinge on the particular facts of a given case.[494]

7.229. Turning to the domestic regulatory framework in Indonesia, we consider it useful to review the licensing regime that the Commission determined governed mining activities in Indonesia pursuant to the 2009 Mining Law. The Commission's determination observed that the 2009 Mining Law "granted licensing powers to both the Central Government and the regional governments, depending upon the location of the mining area, the origin of the license, and the nature of the investment made by the mining company".[495] Specifically, the Commission observed that the legislation established a licensing system whereby the GOID could grant "two types of commercially important mining permits": (a) a "mining business license" (IUP license), which is required to conduct mining activities within a designated mining business license area; and (b) a "special mining business license" (IUPK license), which is required to conduct mining activities within areas that have been designated as "State Reserve Areas" by the Minister of Energy and Mineral Resources.[496]

7.230. The Commission observed that both of these types of licenses were further subdivided into "exploration" and "production operation" licenses.[497] An exploration IUP/IUPK license permits a mining company to "undertake stages of general surveys, explorations, and feasibility studies".[498] A production operation IUP/IUPK license is only issued after a mining company completes its exploration activities and permits the company to engage in production operations (i.e. the mining of nickel ore).[499] Indonesia confirms that nickel ore mining companies in Indonesia need to have both licenses to conduct mining operations, that is, both the "exploration IUP/IUPK" and the "production operation IUP/IUPK".[500]

7.231. We note that Article 1(17) of the 2009 Mining Law defines "Production Operation" as a stage in the "mining business that includes construction, min[ing], processing, refining/smelting, including transportation and sale…."[501] We also note that the parties agree that a production operation IUP/IUPK covers, inter alia, both mining and processing/purification activities, such that once nickel ore mining companies obtain a production operation IUP/IUPK that allows them to mine nickel ore, they do not need any additional licenses or approvals to subsequently purify the ore by, e.g., building their own smelters.[502]

7.232. In 2013, the GOID introduced a new type of "IUP Operation Production for Processing and Refining (Smelter)" license (IUPOPK license), which, the Commission noted, provides for the "development and operation of smelter facilities and is issued under the authority of MEMR".[503] We understand that this license is used by entities that purify nickel ore, and that do not otherwise

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[492] See e.g. Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.604 (noting that "Article 1.1(a)(1)(iv) of the SCM Agreement covers situations where the government must give responsibility to, or exercise authority over, a private body *to provide goods* (i.e. effectuate a financial contribution under Article 1.1(a)(1)(iii) of the SCM Agreement)" (emphasis original)).

[493] See para. 7.219 above.

[494] See e.g. Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

[495] Countervailing duty final determination (Exhibit IDN-1), recital 333. See also Indonesia's first written submission, para. 381.

[496] Countervailing duty final determination (Exhibit IDN-1), recital 334. See also Indonesia's first written submission, para. 381. In addition to the mining licenses, the Commission noted that, pursuant to Indonesia's "industrial regulations", an "Industry Business License" (the IUI license), issued and administered by the Ministry of Industry, was "generally accepted as the main license for industrial businesses with the production of any type of products." (Countervailing duty final determination (Exhibit IDN-1), recital 336).

[497] Countervailing duty final determination (Exhibit IDN-1), recital 334. See also Indonesia's first written submission, para. 382.

[498] 2009 Mining Law (Exhibit IDN-62 (English translation)), Articles 1(8) and (12).

[499] 2009 Mining Law (Exhibit IDN-62 (English translation)), Articles 1(9) and (13). See also Indonesia's response to Panel question No. 261(b).

[500] Indonesia's response to Panel question No. 261(b).

[501] 2009 Mining Law (Exhibit IDN-62 (English translation)), Article 1(17).

[502] Indonesia's response to Panel question No. 261(b); European Union's response to Panel question No. 261(b). See also 2009 Mining Law (Exhibit IDN-62 (English translation)), Articles 1(9) and 36(1)(b); Countervailing duty final determination (Exhibit IDN-1), recital 335 (observing that the 2009 Mining Law does "not differentiate between Operation Production IUPs/IUPKs which are integrated with smelter/processing facilities, and the Operation Production IUPs which are not integrated with such facilities").

[503] Countervailing duty final determination (Exhibit IDN-1), recital 336.

engage in any mining activities, such as independent or stand-alone smelters and vertically integrated stainless steel producers that have their own smelters (such as IRNC).[504]

7.233. Turning to the export restrictions and the DPO, referring to its analysis of the relevant Indonesian measures as part of its public body determination[505], the Commission stated that:

> In a nutshell, the mandatory processing obligation required smelters to process nickel ore domestically, showing that the GOID intended to ensure that nickel ore would be produced and processed domestically, and not exported. The subsequent *de facto* or *de jure* export restrictions and bans on the export of nickel ore effective as of 2014, after the transitional period starting in 2009, and notably the full export ban as of 1 January 2020, were specifically intended to ensure that the nickel ore, in addition to having to be processed domestically, could not be exported. Instead it had to be kept in the domestic market for the benefit of the stainless steel industry and resulted in lower domestic nickel ore prices.[506]

7.234. With respect to the export restrictions, we note that, until 31 December 2019[507], Indonesia prohibited the export of nickel ore with nickel content above 1.7%, but allowed the exportation of nickel ore with nickel content of less than 1.7%[508], subject to the specific rules for the exportation of such nickel ore contained in MEMR Regulation 25/2018[509] and the payment of the applicable export duties.[510] Subsequently, as of 1 January 2020, Indonesia prohibited the export of all types of nickel ore (including ore with nickel content below 1.7%).[511]

7.235. As discussed above, the Commission noted that the restrictions on the export of nickel ore were accompanied by a DPO. The Commission's analysis of the DPO as part of its public body determination considered several provisions of the 2009 Mining Law and Government Regulation 23/2010 as amended by Government Regulation 24/2012.[512] Based on its analysis of the relevant provisions of the domestic regulatory framework, the Commission concluded that the "mining companies are not free to organise their production and processing activities according to business considerations. Rather, they must follow these obligations to produce and process the ore domestically in order to increase the added value in Indonesia."[513]

7.236. Elsewhere in its public body analysis, the Commission stated that, pursuant to Articles 102-104 of the 2009 Mining Law, the "GOID also requires the mining companies to increase the added-value of minerals by requiring further processing and purification of the nickel ore, and *determines to whom the mining companies can sell the nickel ore [to] for such further processing*".[514] In these proceedings, the European Union similarly argues that, besides the export restrictions, the GOID "took *additional* measures specifically regulating to which customers the mining companies

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[504] See e.g. Facility agreement (Exhibit EU-138 (BCI) (English translation)), schedule 3, clause 2(3), p. 116.

[505] Countervailing duty final determination (Exhibit IDN-1), recital 455.

[506] Countervailing duty final determination (Exhibit IDN-1), recital 456.

[507] The Commission's review determined that Indonesia initially allowed "mining companies to continue exporting semi-processed product and certain types of ores for a five-year period from 11 January 2017". (Countervailing duty final determination (Exhibit IDN-1), recital 407). See also MEMR Regulation 25/2018 (Exhibit IDN-69), Article 46(1). The Commission stated that Indonesia subsequently "accelerated" the "ban on nickel ore export with content below 1.7% Ni", pursuant to MEMR Regulation 11/2019, to 1 January 2020. (Countervailing duty final determination (Exhibit IDN-1), recital 411). See also Indonesia's first written submission, fn 486 (referring to MEMR Regulation 11/2019 (Exhibit IDN-70), Article 62A).

[508] Countervailing duty final determination (Exhibit IDN-1), recitals 407 and 411. See also MOT Regulation 1/2017 (Exhibit IDN-67), Article 4; MEMR Regulation 25/2018 (Exhibit IDN-69), Article 46.

[509] Countervailing duty final determination (Exhibit IDN-1), recitals 408-409; Indonesia's first written submission, paras. 384 and 388.

[510] Countervailing duty final determination (Exhibit IDN-1), recital 410 (noting that, for nickel ore with a concentration of less than 1.7% of nickel, the "export tax was 10%"). See also MEMR Regulation 25/2018 (Exhibit IDN-69), Article 46(2).

[511] Countervailing duty final determination (Exhibit IDN-1), recitals 411-412; Indonesia's first written submission, fn 486 (referring to MEMR Regulation 11/2019 (Exhibit IDN-70), Article 62A).

[512] Countervailing duty final determination (Exhibit IDN-1), recitals 401-403. We also note Indonesia's arguments that the DPO is implemented through MEMR Regulation 25/2018. (Indonesia's first written submission, para. 391).

[513] Countervailing duty final determination (Exhibit IDN-1), recital 404.

[514] Countervailing duty final determination (Exhibit IDN-1), recital 375. (emphasis added)

may sell their nickel ore domestically".[515] In particular, the European Union argues that the GOID entrusted or directed nickel ore mining companies to provide "nickel ore to the stainless steel industry through the domestic processing obligation (under threat of sanctions) in combination with the export restrictions."[516] Indonesia, for its part, acknowledges that the DPO required the nickel ore mining companies "to minimally purify nickel ore themselves or cooperate with entities with smelting capacity to undertake such purification", but asserts that the DPO did not impose a "requirement for the mining companies to provide their nickel ore to downstream industries, or to smelters that were integrated with the stainless steel industry."[517]

7.237. We note, first, that the DPO does not only apply to nickel ore mining companies. Rather, as Indonesia points out, the DPO requires "all mining companies in Indonesia to increase the added value of various mineral and coal resources, including nickel ore".[518] We also note that Article 102 of the 2009 Mining Law similarly requires IUP and IUPK license holders to "increase added value to mineral and/or coal resources in undertaking min[ing], processing and refining/smelting as well as [in] utilizing minerals and coal"[519], and that Article 95(1) of Government Regulation 23/2010, as amended by Government Regulation 24/2012, confirms that metal minerals, nonmetal minerals, rock, and coal ("covered commodities") are all subject to the DPO.[520]

7.238. As to how the requirement to "increase added value" of covered commodities is to be achieved, Article 103(1) of the 2009 Mining Law states that IUP and IUPK license holders "must process and refine/smelt mining products domestically".[521] The explanatory note to Article 103(1) states that this is intended to "inter alia, increase and optimize the mine value of products, supply of industrial raw materials, worker absorption, and state revenues". We also note that Article 95(2) of Government Regulation 23/2010 states that, in the case of metal minerals (such as nickel ore), the "[i]ncrease in added value … shall be made through the activities of: a. metal processing; or b. metal refining/smelting".[522]

7.239. The 2009 Mining Law defines "processing and refining/smelting" as "a mining business activity to improve the quality of minerals and/or coal as well as to find and utilize associated minerals."[523] MEMR Regulation 25/2018, which implements the DPO, draws a distinction between "mineral processing" and "mineral purification".[524] In light of Indonesia's explanations, we understand "purification" as having the same meaning as "refining/smelting".[525] MEMR Regulation 25/2018 defines "mineral processing" as an "effort to increase the quality of Minerals that produce products with the same physical and chemical properties as the origin Minerals".[526] In contrast, MEMR Regulation 25/2018 defines "mineral purification" (in the sense of refining/smelting), as an "effort to improve the quality of metallic Minerals through extraction process and also a process to improve further purity to produce products with different physical and chemical properties from the origin Minerals".[527]

7.240. With respect to minerals generally, therefore, mining companies can fulfil the DPO requirement to "increase added value" either via processing or purification. With respect to nickel ore specifically, we note Indonesia's assertion that "once nickel ore is purified, it ceases to be nickel ore and becomes a different product, such as [] NPI, ferro nickel and nickel matte, which are

[515] European Union's first written submission, para. 409. (emphasis original)
[516] European Union's first written submission, para. 420.
[517] Indonesia's second written submission, para. 462.
[518] Indonesia's first written submission, para. 628.
[519] 2009 Mining Law (Exhibit IDN-62 (English translation)), Article 102. See also MEMR Regulation 25/2018 (Exhibit IDN-69), Article 16(1).
[520] Government Regulation 23/2010 as amended by Government Regulation 24/2012 (Exhibit IDN-63 (English translation)), Article 95(1). See also Indonesia's first written submission, para. 390.
[521] 2009 Mining Law (Exhibit IDN-62 (English translation)), Article 103(1).
[522] Government Regulation 23/2010 as amended by Government Regulation 24/2012 (Exhibit IDN-63 (English translation)), Article 95(2). See also MEMR Regulation 25/2018 (Exhibit IDN-69), Article 16(2).
[523] 2009 Mining Law (Exhibit IDN-62 (English translation)), Article 1(20). See also MEMR Regulation 25/2018 (Exhibit IDN-69), Article 1(19).
[524] MEMR Regulation 25/2018 (Exhibit IDN-69), Articles 1(19), (20), and (21).
[525] See Indonesia's first written submission, fn 492 (stating that "the relevant term in Bahasa Indonesian ('*pemurnian*') is translated as both 'refining' and 'purifying'" and that in "English translations of certain Exhibits submitted by Indonesia, the terms 'refining' and 'purifying' are used interchangeably").
[526] MEMR Regulation 25/2018 (Exhibit IDN-69), Article 1(20).
[527] MEMR Regulation 25/2018 (Exhibit IDN-69), Article 1(21).

classified under different codes in the Harmonized System".[528] Insofar as MEMR Regulation 25/2018 defines processing as an effort that increases the quality of minerals *without changing* their physical and chemical characteristics, we understand that, under Indonesia's domestic regulatory framework, nickel ore as a mineral cannot be "processed" but can only be "purified", as the purification of nickel ore creates a new product that is not considered to be nickel ore. Thus, with respect to nickel ore, the DPO requirement to increase added value can only be achieved through purification (i.e. refining/smelting).[529]

7.241. As to how nickel ore can be purified, we note that the domestic regulatory framework contemplates several different possibilities. Article 93 of Government Regulation 23/2010, as amended by Government Regulation 24/2012, states that nickel ore mining companies with IUP/IUPK production operation licenses may undertake purification to "increase added value to minerals they produce *either directly or in cooperation with other companies*, Mining Permit holders and Special Mining Permit holders".[530] Thus, one option available to nickel ore mining companies to comply with the DPO is to purify the nickel ore that they produce themselves ("directly"), insofar as they possess or build the appropriate purification (i.e. refining/smelting) facility. In such instances, the parties agree that mining companies do not require any additional licenses or approvals to conduct such purification activity.[531] Alternatively, nickel ore mining companies can comply with the DPO by cooperating with other entities, including IUP holders for "Production Operation specifically for the processing and/or purification"[532] (i.e. IUPOPK licence holders) and other IUP/IUPK holders for "Production Operation which build the facility of … Purification".[533] This cooperation can take the "form" of purifying ore at a facility that is "jointly built" or at a facility built by other IUP/IUPK holders through the "[s]ale and purchase of ore…" to the designated license holders.[534]

7.242. The above discussion indicates that the DPO requires the nickel ore mining companies to increase the added value of the nickel ore that they mine through purification (i.e. refining/smelting). Such purification can be accomplished either by the mining companies themselves, or through cooperation between the mining companies and other entities that have purification capabilities (such that a mining company that either does not have a smelter or is unable to purify its ore could elect to sell its nickel ore to: (a) a mining company that has a smelting operation, (b) an independent smelter, or (c) a vertically integrated stainless steel producer that has a smelter). This understanding is confirmed by the Commission's observation that the DPO "imposed an obligation on all nickel ore mining companies to build their own nickel processing/purification facility *or* to sell their product to such a domestic facility".[535] It is also confirmed by the parties' agreement that nickel ore mining companies can comply with the DPO either by "purifying the nickel ore themselves" or by selling their nickel ore to other license holders with purification facilities (including "independent smelters" and "vertically integrated stainless steel producers with their own smelters").[536]

7.243. The fact that nickel ore miners thus appear to have a range of options to comply with the DPO undercuts the European Union's assertion that the "only 'business choice' that nickel ore mining companies have in Indonesia is to sell nickel ore either to the stainless steel producers (many of which, such as the exporting producer IRNC, have their own smelters) or to smelters."[537] We also disagree with the European Union's suggestion that the evidence on the record of the underlying proceeding demonstrates that mining companies are "not free to refuse to sell nickel ore" to "processors" (i.e. "independent smelters and integrated stainless steel producers").[538] This suggestion appears to be inaccurate given that, as the European Union acknowledges, nickel ore mining companies "could process [nickel ore] themselves".[539] Insofar as nickel ore mining companies

[528] Indonesia's first written submission, para. 393.
[529] Indonesia's first written submission, para. 392.
[530] Government Regulation 23/2010 as amended by Government Regulation 24/2012 (Exhibit IDN-63 (English translation)), Article 93. (emphasis added)
[531] Indonesia's response to Panel question No. 261(b); European Union's response to Panel question No. 261(b).
[532] MEMR Regulation 25/2018 (Exhibit IDN-69), Article 16(4)(a).
[533] MEMR Regulation 25/2018 (Exhibit IDN-69), Article 16(4)(b).
[534] MEMR Regulation 25/2018 (Exhibit IDN-69), Article 16(5).
[535] Countervailing duty final determination (Exhibit IDN-1), recital 402. (emphasis added)
[536] Indonesia's response to Panel question No. 261(a) (noting further that nickel ore mining companies could also jointly "establish a smelter with other nickel ore miners (in which case several mines share a smelter and process the nickel ore themselves)"); European Union's response to Panel question No. 261(a).
[537] European Union's second written submission, para. 180.
[538] European Union's response to Panel question No. 269, para. 138.
[539] European Union's second written submission, para. 187.

can purify their own nickel ore without having to obtain any additional licenses or approvals, they can potentially comply with the DPO without having to provide or sell their nickel ore to any other downstream entity, including independent smelters or smelters integrated with stainless steel producers.

7.244. We disagree with the European Union's argument that the fact that "mining companies would choose to self-process or to build smelters" is "irrelevant" to a finding of entrustment or direction because this would be a "company reaction", whereas Article 1.1(a)(1)(iv) of the SCM Agreement requires the assessment of a government's actions and not a private entity's reaction to the government measure.[540] As we have discussed above, the focus of an entrustment or direction analysis on a government's actions may involve the consideration of evidence relating to the breadth of discretion left to the private body *by the government action*[541] as well as the choices available to a private body *under a government measure*.[542] The point therefore is not that the mining companies *would*, in fact, choose to self-process or build their own smelters, but that the record before us indicates that, *under* the domestic regulatory framework, the mining companies *could* comply with the DPO by purifying nickel ore themselves without having to provide or sell it to another entity. The fact that the nickel ore mining companies could comply with the DPO by purifying their own nickel ore thus undercuts the European Union's assertion that the primary object of the GOID's exercise of authority over the nickel ore mining companies was to provide nickel ore to the stainless steel producers. Rather, we are of the view that the record evidence suggests that the object of the domestic regulatory measures relates more broadly to "increas[ing] the added value of nickel ore" by purifying it domestically.[543]

7.245. We also note that, once nickel ore is purified, the resulting intermediate products (such as nickel pig iron (NPI), ferronickel, and nickel matte) are not subject to an export ban and can therefore be exported outside Indonesia.[544] Article 19 of MEMR Regulation 25/2018 states in this regard that IUP and IUPK holders, as well as other parties who purify minerals, may "conduct sales abroad" of the specified metallic minerals if they meet the "minimum limits of purification" set out in appendix 1 thereto.

7.246. The fact that intermediate products resulting from the purification of nickel ore, such as NPI, ferronickel and nickel matte, could be – and, in fact, were[545] – exported outside Indonesia is relevant because nickel ore is not a "direct raw material for SSCR"; rather, nickel ore is a "raw material for NPI and hot-rolled stainless products, which are in turn upstream inputs for SSCR".[546] While IRNC is a "vertically integrated company" and "starts manufacturing SSCR from nickel ore and therefore has its own smelters", we note that not all stainless steel producers in Indonesia are vertically integrated and that some steel producers in Indonesia produce SSCRFP from "intermediate products" and therefore "do not start their production process from nickel ore".[547] For example, the Commission noted that PT Jindal Stainless Indonesia (Jindal Indonesia) is "not vertically integrated" and "starts manufacturing SSCR from stainless steel coils".[548] We also note Indonesia's argument that the "Commission did not establish that all smelters in Indonesia were integrated into the stainless steel industry", as well as its submission that "that smelters are not necessarily related to the stainless steel producers", offering the example of [[***]] as "one of the smelters not owned by or related to any stainless steel company".[549] Finally, we note the European Union's acknowledgment that the Commission did not examine and make findings about the extent to which intermediate nickel products resulting from the purification of nickel ore, such as NPI, ferronickel, and nickel matte, could be or were sold only or predominantly to the stainless steel industry in Indonesia.[550]

7.247. As Indonesia argues, the fact that purified nickel ore derivatives, such as NPI, ferronickel, and nickel matte, could be exported indicates that nickel ore mining companies had "choices" other

[540] European Union's response to Panel question No. 261(a).
[541] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.38.
[542] See e.g. Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.607.
[543] Indonesia's response to Panel question No. 260.
[544] See e.g. Indonesia's first written submission, para. 393.
[545] Indonesia's first written submission, para. 394.
[546] Countervailing duty final determination (Exhibit IDN-1), recital 532.
[547] Indonesia's first written submission, para. 645.
[548] Countervailing duty final determination (Exhibit IDN-1), recital 37.
[549] Indonesia's first written submission, para. 644 (referring to List of nickel smelters in Indonesia (Exhibit IDN-102 (BCI))).
[550] European Union's response to Panel question No. 265, paras. 132 and 134.

than selling to the stainless steel industry.[551] They could, for example, purify nickel ore themselves, or sell nickel ore to independent smelters that could undertake purification, and the resulting intermediate product, such as NPI, ferronickel, or nickel matte, could be exported. Importantly, the European Union also appears to acknowledge this fact, noting that Vale – an Indonesian nickel ore mining company – "only produces nickel ore for captive use, notably for the production of nickel matte (a processed product), which it is able to export".[552]

7.248. The above discussion indicates that not only could the mining companies comply with the DPO by purifying nickel ore themselves or selling it to independent smelters not related to steel companies, but that the intermediate nickel products resulting from such purification could be exported outside Indonesia and did not have to be sold to the stainless steel producers in Indonesia. The domestic regulatory framework thus contemplates that the mining companies could enhance the added value of nickel ore and comply with the DPO in different ways that did not necessarily involve the transfer, sale, or provision – either directly or indirectly – of nickel ore or its purified derivatives to the stainless steel producers. In particular, in the absence of an examination by the Commission as to the viability of the different options available to the nickel ore mining companies for complying with the DPO, it is difficult to sustain the Commission's finding that "the GOID's policy objective" was to "favour the stainless steel industry".[553]

7.249. We note, in this regard, the Commission's finding that, because "the main use for nickel ore is stainless steel production, it is clear that exporting producers are the key beneficiaries of the 2009 Mining Law".[554] Based on this finding, the European Union asserts in its first written submission that the "supply of nickel ore by mining companies to the stainless steel industry hence is not a mere 'by-product' of government regulation but it is an intended objective of the GOID in light of its overall economic policy objectives and is reflected, e.g. in Articles 102 and 103 of the 2009 Mining Law and in Article 92 of GR 23/2020".[555] Subsequently, however, in its comments on Indonesia's response to a question by the Panel at the second substantive meeting, the European Union appears to take a different position in asserting that "it is legally irrelevant for entrustment or direction in the present case whether the stainless steel industry was 'the main user' or 'a main user' or just 'a user' of nickel ore in Indonesia".[556]

7.250. As discussed above, the Commission's analysis does not appear to have examined the viability of the different options available to the nickel ore mining companies to comply with the DPO. We note, in this regard, that the Commission's determination also does not appear to provide any additional reasoning or references to record evidence that might support the Commission's finding that the "main use" of nickel ore in Indonesia is stainless steel production.[557] In response to questioning by the Panel, the European Union states that the Commission based this finding on information contained in the complaint in the underlying investigation.[558] Leaving aside the questions of whether the Commission referred to the complaint as the basis of this finding[559] and whether information in the complaint can form the sole basis for such a finding[560], we note that many of the statements in the complaint that the European Union cites concern the "global" or

[551] Indonesia's response to Panel question No. 86.
[552] European Union's response to Panel question No. 40(b), para. 134.
[553] Countervailing duty final determination (Exhibit IDN-1), recital 464.
[554] Countervailing duty final determination (Exhibit IDN-1), recital 454. See also European Union's first written submission, para. 390.
[555] European Union's first written submission, para. 390.
[556] European Union's comment on Indonesia's response to Panel question No. 267, para. 69.
[557] Countervailing duty final determination (Exhibit IDN-1), para. 454.
[558] European Union's response to Panel question No. 84, para. 199.
[559] The European Union refers in this regard to recital 325 of the Commission's final determination, which states that: "The complainant contended that the GOID controls the nickel ore sector and that nickel ore prices are distorted in Indonesia because of the GOID's intervention. Nickel contained in the nickel ore is the key component in stainless steel and its main price driver." (Countervailing duty final determination (Exhibit IDN-1), recital 325). While these statements observe that nickel ore is "the key component in stainless steel and its main price driver", we note that this general statement does not – as Indonesia observes – appear to assert that "the stainless steel industry in Indonesia is the main user of nickel ore". (Indonesia's second written submission, fn 552).
[560] Indonesia argues that "the complaint is not sufficient for an investigating authority to make findings" (Indonesia's second written submission, para. 466 (referring to Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.185)).

"worldwide" situation that most of the "nickel" in the world is used to produce stainless steel.[561] Given their focus on the "global" or "worldwide" situation concerning the use of "nickel", these statements do not appear to establish that the stainless steel industry is, in fact, the "main user" of "nickel ore" in Indonesia.[562]

7.251. Noting that "Indonesian mining companies were also under a legal obligation to provide nickel ore to 'processors' (i.e. smelters or integrated stainless steel producers) if they could not process nickel ore themselves – under the threat of sanctions", the European Union asserts that "the penalty threat in the present case concerns precisely the behaviour sought by the Indonesian government – the provision of nickel ore to processors".[563] We note, however, that pursuant to Article 151 of the 2009 Mining Law, "administrative sanctions" do not apply in cases where mining companies do not provide nickel ore to the downstream industries[564], but choose to purify it themselves. Thus, the existence of such sanctions to ensure overall compliance with the requirement to increase added value domestically does not, in our view, bear upon the viability of the various options available to the mining companies to achieve this end.

7.252. Noting that "Indonesia's regulatory restrictions have turned Indonesia from an importer of stainless steel to the world's largest exporter of stainless steel and have increased more than 20-fold the number of smelters in Indonesia", the European Union also asserts that the "development of the downstream industries, notably smelters and the stainless steel industry (the main user of nickel ore) was the key objective of the regulatory measures adopted by the GOID".[565] While we acknowledge that regulatory measures of the kind adopted by Indonesia may "create[] market conditions favourable to or resulting in the increased supply of a product in the domestic market"[566] and may affect the behaviour of a private body in terms of the sale and pricing of its goods[567], we recall that the Article 1.1(a)(1) of the SCM Agreement defines the notion of financial contribution by reference to the *actions* of a government and not by reference to the *effects* of the governmental action.

7.253. As discussed above, determining whether a financial contribution exists under subparagraph (iv) solely by reference to the reaction of affected entities or the effects of a government measure could have the "far-reaching implication[] … that any government measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a government-entrusted or government-directed provision of goods, and hence a financial contribution".[568] We also agree that "just because [a] private [body]'s behaviour, in terms of *sale and pricing of its goods*, is affected by the regulatory framework in which it operates" does not, without more, mean that a "government entrusts or directs a private [body] to provide goods".[569] Importantly, the existence of a financial contribution pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement requires that there be a "demonstrable link" between

[561] EUROFER's anti-subsidy complaint (Exhibit IDN-105), paras. 22, 74, 210, and 298 (noting, *inter alia*, that: "…more than two-thirds of the global nickel production is used to produce stainless steel"; "… most of the nickel consumed worldwide is used to manufacture stainless steel"; "stainless steel is overwhelmingly the primary user of nickel worldwide…"; and "…nickel is overwhelmingly used by the stainless steel industry and the SSCR industry in particular").

[562] We note that one statement in the complaint that specifically addresses the situation in Indonesia asserts that "the downstream stainless steel industry is by far the main purchaser of *intermediate nickel products*, and the overwhelming majority of the production of *intermediate nickel products* such as NPI is geared toward the supply of the stainless steel industry". (EUROFER's anti-subsidy complaint (Exhibit IDN-105), para. 299). This statement, although focused on Indonesia, states that the stainless steel industry is the main purchaser of "intermediate nickel products such as NPI". This, however, differs from the Commission's statement that the "main use of *nickel ore* is stainless steel production". (See e.g. European Union's response to question No. 264, para. 129).

[563] European Union's comment on Indonesia's response to Panel question No. 260(c), para. 56.

[564] 2009 Mining Law (Exhibit IDN-62 (English translation)), Article 105. See also Indonesia's second written submission, para. 462 (noting that there "were no sanctions for mining companies that chose not to provide nickel ore to the stainless steel industry. The Commission did not make any such finding either" (underlining original)).

[565] European Union's second written submission, para. 188.

[566] Panel Report, *US – Export Restraints*, para. 8.35

[567] See Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606.

[568] Panel Report, *US – Export Restraints*, para. 8.35.

[569] Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.606. (emphasis added) We note that that dispute concerned certain restrictions that the governments of British Columbia and Canada applied to the export of logs.

the exercise of authority by a government and the conduct of the private body that is alleged to fall within the scope of subparagraphs (i)-(iii) of Article 1.1(a)(1).[570]

7.254. It may well be that Indonesia's regulatory measures encourage the "development of downstream industries" by, for example, increasing the number of smelters in Indonesia and increasing stainless steel production in the country. However, in our view, these developments appear to describe the *effects* of the GOID's regulatory measures and, as such, are of limited value in establishing the existence of a financial contribution pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement. We are also of the view that the fact that certain nickel ore mining companies may have sold nickel ore to vertically integrated stainless steel producers, such as IRNC, reflects the mining companies' *reaction* to the DPO and the GOID's export restrictions rather than serving as evidence of a financial contribution. This is because the text of the challenged measure appears to permit nickel ore mining companies to comply with the requirement to enhance the value of nickel ore by either purifying the ore themselves or by selling it to other entities for purification, including independent smelters or vertically integrated stainless steel producers.

7.255. In the absence of an examination by the Commission as to the viability of the different choices available to the mining companies to comply with the DPO, we are unable to conclude that the sale of nickel ore by mining companies to stainless steel producers is an outcome that is demonstrably linked to the regulatory measures at issue. Rather, we are of the view that the information on the record of the underlying investigation indicates that the sale of nickel ore by the mining companies to the stainless steel industry/producers appears to reflect the exercise of a choice by the nickel ore mining companies in response to market considerations that may include regulatory constraints imposed by Indonesia.

7.256. For these reasons, we find that Indonesia has established that the Commission acted inconsistently with the European Union's obligation under Article 1.1(a)(1)(iv) of the SCM Agreement in concluding that record evidence in the underlying investigation established that the GOID entrusted or directed nickel ore mining companies – as private bodies – to provide nickel ore to the stainless steel producers in Indonesia.

7.5.3.4 Mandatory pricing mechanism

7.257. Our conclusion that the Commission erred in finding that the GOID entrusted or directed the nickel mining companies to provide or sell nickel ore to the stainless steel industry is independent of whether the GOID, through the alleged mandatory pricing mechanism, regulated the price at which nickel ore was provided to the stainless steel industry.

7.258. We note in this regard the Commission's finding that the "GOID set the actual mechanism to fix the reference prices for transactions between mining companies and smelters via its specific regulations to achieve a significant discount on the price of the nickel ore in international markets".[571] Thus, according to the Commission, any alleged "mechanism to fix the reference prices" applies only to "transactions between mining companies and smelters". Insofar as our conclusion on entrustment or direction is based on the fact that mining companies could comply with the DPO by purifying their nickel ore themselves (i.e. without selling it to the downstream purifiers), we do not see how the alleged mandatory pricing mechanism would apply in such a case (i.e. in the absence of any "transactions"). We also note the European Union's understanding that "intermediate products were not subject to any pricing regulation" and its acknowledgment that the Commission did not make any findings in this regard.[572]

7.259. For these reasons, we do not consider it necessary to evaluate Indonesia's arguments challenging separately the Commission's assessment of evidence relating to the mandatory pricing mechanism in order to provide a positive resolution to the dispute between the parties.

7.5.4 Claims under Articles 1.1, 10, 14, 19, and 32.1 of the SCM Agreement

7.260. Indonesia claims that the Commission's determination is inconsistent with Articles 1.1, 10, 14, 19, and 32.1 of the SCM Agreement because: (a) the Commission used a flawed benchmark for

[570] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112.
[571] Countervailing duty final determination (Exhibit IDN-1), recital 459.
[572] European Union's response to Panel question No. 265(b), para. 133.

its benefit analysis; and (b) the Commission erred in determining the duty rate for the sole non-sampled cooperating steel producer.[573] We consider these claims in turn.

7.5.4.1 The benchmark used by the Commission for its benefit analysis

7.261. With respect to Indonesia's first claim, we recall that, as part of its benefit analysis, the Commission "first assessed whether prices set by mining companies in Indonesia could amount to an appropriate benchmark".[574] Referring, inter alia, to its earlier discussion of the mandatory pricing mechanism as part of its entrustment or direction analysis[575], the Commission concluded, for purposes of its benefit analysis, that:

> [T]he GOID intervenes in the nickel ore market by specifically regulating the transaction price for nickel ore between mining companies and smelters. This price is therefore not a market price but a price set by the government with its specific policy objectives in mind. For that reason alone, the Commission considers that the nickel ore prices in Indonesia are distorted and cannot be used as benchmark for the purpose of determining benefit.[576]

7.262. Having thus found that "there were no domestic prices which could be used as an appropriate benchmark"[577], the Commission "look[ed] for an appropriate out-of-country benchmark" and concluded that the "export price from the Philippines constitutes an appropriate benchmark to assess whether or not the Indonesian nickel ore prices were made for less than adequate remuneration".[578]

7.263. Indonesia challenges the Commission's use of export prices of nickel ore from the Philippines as an appropriate benchmark[579], alleging that the Philippine prices "did not reflect the prevailing market conditions in Indonesia" on two grounds.[580] First, Indonesia submits that the Commission used a benchmark based on a market which differed significantly from Indonesia regarding the "availability" of nickel ore – "one of the market factors explicitly mentioned in Article 14(d)" of the SCM Agreement.[581] Second, Indonesia alleges that the Commission failed to take into account the effect of the GOID's regulatory measures on Philippine prices.[582]

7.264. We recall that we have upheld Indonesia's claims challenging the Commission's determination that the GOID, "through the mining companies acting as public bodies or entrusted/directed by the GOID, provide nickel ore to the stainless steel industry"[583]. Having thus found the Commission's financial contribution determination to be inconsistent with Article 1.1(a)(1) of the SCM Agreement, we do not consider it necessary to evaluate Indonesia's claim challenging the Commission's selection of the external benchmark as part of its benefit analysis to resolve the dispute between the parties.[584]

7.5.4.2 Duty rate for the non-sampled stainless steel producer

7.265. The final overall definitive countervailing duty rate determined by the Commission for IRNC was 21.4%. For Jindal Indonesia, this rate was determined to be 0.02% (*de minimis*).[585] In reaching this determination, the Commission calculated a subsidy amount of 9.64% with regard to the provision of nickel ore for less than adequate remuneration during the investigation period for the IRNC Group.[586] With respect to Jindal Indonesia, the Commission noted that there was "not sufficient

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[573] Indonesia's first written submission, para. 689.
[574] Countervailing duty final determination (Exhibit IDN-1), recital 503.
[575] Countervailing duty final determination (Exhibit IDN-1), recital 505.
[576] Countervailing duty final determination (Exhibit IDN-1), recital 519.
[577] Countervailing duty final determination (Exhibit IDN-1), recital 521.
[578] Countervailing duty final determination (Exhibit IDN-1), recital 523.
[579] Indonesia's second written submission, p. 131 and para. 520.
[580] Indonesia's second written submission, p. 131 and para. 520.
[581] Indonesia's second written submission, para. 522.
[582] Indonesia's second written submission, para. 520.
[583] Countervailing duty final determination (Exhibit IDN-1), recital 540.
[584] We note, in this regard, that the Commission's benefit analysis refers to and builds upon the Commission's examination of the pricing mechanism as part of its entrustment or direction analysis, which we have found to be WTO-inconsistent.
[585] Countervailing duty final determination (Exhibit IDN-1), recital 1060.
[586] Countervailing duty final determination (Exhibit IDN-1), recital 542.

evidence to establish the extent to which Jindal Stainless Indonesia may benefit from this scheme, as Jindal Stainless Indonesia is not vertically integrated and starts its production process at the level of hot- rolled coils".[587] For preferential financing, the Commission calculated an overall rate of 7.92%[588] for IRNC. Noting that a "subsidy amount also had to be established for the sole cooperating non-sampled exporting producer in Indonesia" (i.e. PT Bina Niaga Multiusaha (BNM)), the Commission stated as follows:

> In view of the specific circumstances of the case, this could not be done according to the usual methodology, based on the weighted average amount of countervailing subsidies established for the cooperating exporting producers in the sample. Indeed, as mentioned above, the final subsidy amount for Jindal Indonesia was below the de minimis amount. Since there was only one remaining exporting producer, the Commission decided to apply the duty rate of this exporting producer to the sole cooperating non-sampled exporting producer, with the exclusion of the scheme related to preferential financing, for which there was no evidence on file that the company in question could have benefited from. Indeed, the company in question has no links with China, and could thus not have benefited from the preferential financing as provided to the IRNC Group.[589]

7.266. Thus, as both parties agree[590], the Commission determined the countervailing duty margin for BNM by excluding the rate (7.92%) for preferential financing for IRNC – for which there was no evidence that BNM could have benefitted from – from the overall margin of duty calculated for IRNC (21.4%). On this basis, the Commission determined the overall subsidy margin for BNM to be 13.5%.

7.267. Indonesia claims that the Commission acted inconsistently with Articles 1.1(b), 10, 19.4, and 32.1 of the SCM Agreement, and also Article VI:3 of the GATT 1994 in determining the 13.5% duty rate assigned to BNM[591] because it failed to "consider the non-vertical integration of BNM" and did not draw "a correct and rational conclusion when it knew, or should have known, what to do for the LTAR portion when BNM was not vertically integrated".[592]

7.268. We recall that we have upheld Indonesia's claims challenging the Commission's determination that the GOID, "through the mining companies acting as public bodies or entrusted/directed by the GOID, provide nickel ore to the stainless steel industry".[593] Having thus found the Commission's financial contribution determination to be inconsistent with Article 1.1(a)(1) of the SCM Agreement, we do not consider it necessary to evaluate Indonesia's claim challenging the manner in which the Commission determined the duty rate for the sole cooperating non-sampled exporting producer to resolve the dispute between the parties.

7.5.5 Claims under Articles 1.2, 2.1, and 2.4 of the SCM Agreement: Specificity

7.269. In its final determination, the Commission found that:

> The GOID's set of measures were directed to benefit certain industries, in particular the domestic stainless steel industry. Indeed, even though the distortions on nickel ore also benefit downstream products other than stainless steel (namely the producers of electric batteries used in new energy vehicles), the benefit is available only to certain industries in Indonesia, namely those active in the nickel value chain. The GOID's measures are therefore specific under Article 4(2)(a) of the basic Regulation. The inherent characteristics of nickel ore limit the possible use of the subsidy to a certain industry, but this does not mean that, in order to be specific, the subsidy must be further limited to a subset of this industry.[594]

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[587] Countervailing duty final determination (Exhibit IDN-1), recital 541.
[588] Countervailing duty final determination (Exhibit IDN-1), recitals 749, 768, and 801.
[589] Countervailing duty final determination (Exhibit IDN-1), recital 943.
[590] Indonesia's response to Panel question No. 106; European Union's response to Panel question No. 106, para. 247.
[591] Indonesia's first written submission, paras. 719 and 731.
[592] Indonesia's first written submission, para. 731.
[593] Countervailing duty final determination (Exhibit IDN-1), recital 540.
[594] Countervailing duty final determination (Exhibit IDN-1), recital 537.

7.270. Indonesia claims that the Commission acted inconsistently with Articles 1.2, 2.1(a), and 2.4 of the SCM Agreement in determining "that the alleged subsidies were specific to the stainless steel industry".[595] According to Indonesia, while the DPO and export restrictions prevented entities from selling nickel ore outside of Indonesia, these restrictions did not direct nickel ore to the stainless steel industries in a manner that established an "explicit limitation of access".[596] Pointing out that the Commission did not establish that all smelters in Indonesia were integrated in the stainless steel industry, such that the provision of nickel ore to smelters may necessarily be considered to be provision of nickel ore to the stainless steel industry, Indonesia argues that "smelters could take commercial decisions as to whether to keep the intermediate products in the Indonesian market or not" and therefore the provision of nickel ore "was not to smelters who later sold their intermediate products to the domestic market, but was accessible also to those who sold to the international market".[597]

7.271. Noting that Indonesia does not dispute that the provision of nickel ore for less than adequate remuneration was used by smelters, the European Union observes that the fact that the "buyers could keep the processed product internally (in the case of vertically integrated companies) 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".[598] In any event, the European Union notes "that the GOID's set of measures at issue (such as the mandatory processing obligation required smelters to process nickel ore domestically, the export restrictions, and the mandatory pricing mechanism) kept the nickel ore in the domestic market for the benefit of the stainless steel industry and resulted in lower domestic nickel ore prices".[599]

7.272. We note that the arguments by the parties concerning the Commission's specificity determination are similar to their arguments concerning the Commission's entrustment or direction analysis. In both contexts, Indonesia argues that the regulatory measures at issue did not relate to the provision of nickel ore to the stainless steel industry, but were wider in scope and allowed mining companies to either sell nickel ore to various types of smelters – including independent smelters and vertically integrated stainless steel producers – or to process the ore themselves. Indonesia also submits that the intermediate products that resulted from smelting nickel ore could be, and were, exported. The European Union also presents a similar rebuttal in the context of both the specificity and the entrustment or direction claim, arguing that it was immaterial that "the scheme benefited downstream products other than stainless steel", and that evidence in the complaint established that "nickel is overwhelmingly used by the stainless steel industry and the SSCR industry in particular, so that the subsidies targeted predominantly that industry".[600]

7.273. We recall that we have upheld Indonesia's claim that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement in finding that the GOID entrusts or directs nickel ore mining companies to provide nickel ore to the stainless steel producers. Given the similarities between the parties' arguments in the context of entrustment or direction, on the one hand, and specificity, on the other hand, we do not consider it necessary to evaluate Indonesia's claim challenging the Commission's specificity determination to resolve the dispute between the parties.

7.6 Claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged government revenue foregone that is otherwise due

7.6.1 Introduction

7.274. The Panel now turns to address the set of Indonesia's claims concerning three programmes that the Commission found to be subsidies on the basis of governmental revenue that was otherwise due but was foregone or not collected: (a) an import duty exemption scheme; (b) an income tax holiday; and (c) an income tax allowance facility. With respect to the import duty exemption programme, Indonesia advances three lines of argument: first, that the Commission's finding of a subsidy is contrary to the safe harbour afforded to such programmes in Footnote 1 of the SCM Agreement; second, that even if the programme was a subsidy only the amount of exempted

[595] Indonesia's first written submission, para. 748.
[596] Indonesia's first written submission, para. 745.
[597] Indonesia's first written submission, para. 745.
[598] European Union's first written submission, para. 466.
[599] European Union's first written submission, para. 466.
[600] European Union's response to Panel question No. 111, paras. 253 and 255.

import duties "in excess" of what is properly exempted can be countervailed; and third, the duty exemption programme is not specific. With respect to the income tax holiday and the income tax allowance facility, Indonesia challenges the Commission's findings that these programmes are specific within the meaning of Article 2 of the SCM Agreement.

7.275. Below, the claims with respect to each of the three programmes are addressed separately.

7.6.2 Import duty exemptions for raw materials imported into bonded zones

7.6.2.1 Introduction

7.276. The Commission's final determination found, *inter alia*, that the IRNC Group benefits from a full suspension from the payment of import duties payable on goods imported into bonded zones (e.g. machinery, spare parts, and raw materials) as long as those goods: (a) are used in the subsequent production activities of IRNC; and (b) the final goods produced with them are destined for the export market.[601] As a general matter, companies wishing to qualify for Indonesia's bonded zones programme are required to export more than 50% of their total yearly production, and pay import duties for imported raw materials used to manufacture products that are subsequently sold on the domestic market.[602] The Commission determined that (a) IRNC and its related companies did not have in place a proper system to monitor the accuracy of the content of the imported raw materials in the value of the products sold on the domestic market, and (b) IRNC's related companies were selling products between themselves which incorporated imported raw materials but did not report to the purchasing entity the value of the customs duties.[603] The Commission concluded that the exemptions were granted "entirely at the discretion of the GOID" and that such exemptions therefore constituted a financial contribution in the form of government revenue foregone that conferred a benefit and was specific. The Commission countervailed this programme as a result. The Commission's determination regarding the import duty exemptions, in relevant part, reads as follows:

> 4.12.3.3. Bonded Zone
>
> (912) Bonded zones are defined as areas within the customs territory of Indonesia where import duty for imported goods is suspended. The imported goods can be capital goods, raw materials and supporting material.
>
> …
>
> *(b) Findings of the investigation*
>
> (913) The investigation revealed that IRNC and its related companies (GCNS, ITSS, SMI and TSI) have been operating in a bonded zone since September 2018 and have availed of this programme since then.
>
> (914) Within the Bonded Zone, the importation process of [*sic*] suspended until the companies sells the finished goods within the territory of Indonesia. IRNC and its related companies benefit from a full (100 %) suspension from the payment of import duties payable on goods imported into their bonded zone (machinery, spare parts and raw materials) as long as those goods (i) are used in the subsequent production activities of IRNC; and (ii) the final goods produced with them are destined for the export market.
>
> (915) If a product remains in the bonded zone (such as machinery) or is directly exported the import duty is never due.
>
> (916) In accordance with Articles 3, 4, 16 and 20 of Regulation 131/2018, the following requirements apply: (1) to be an Indonesian company; (2) to be established in an industrial bonded zone in Indonesia; (3) to perform production activities in the bonded zone or to be a power plant in the bonded zone; (4) to import raw materials or (semi)

[601] Countervailing duty final determination (Exhibit IDN-1), recitals 913-914.
[602] Countervailing duty final determination (Exhibit IDN-1), recitals 917-918.
[603] Countervailing duty final determination (Exhibit IDN-1), recitals 918-919.

finished goods in order to further process them; (5) to export the final goods produced with the imported goods.

(917) During the RCC the GOID explained that there were no pre-defined areas of the territory of Indonesia identified as bonded zones, rather companies can apply and if the application is accepted their premises become a bonded zone. Furthermore, it was stated that there were approximatively 1 300 bonded zones. The GOID explained that Morowali Park was not a bonded zone, as the status of the bonded zone was not granted to an industrial park. Each company located in an industrial park has to apply separately for the status of a bonded zone. Furthermore, it was explained that in order to avail of this programme, more than 50 % of total yearly production must be exported outside of Indonesia.

(918) IRNC Group is export oriented. Nevertheless, small volumes of products were sold as well on the domestic market. The investigation revealed that the companies were paying import duties for dome [*sic*] of the imported raw materials used to manufacture products that were sold on the domestic market. The companies submitted the payment of these amounts. However, the companies did not have in place a proper system to check the correctness of the content of the imported raw materials in the value of the products sold on the domestic market. For example, IRNC submitted an excel file for the calculation of the custom duties due but was unable to explain the percentages of each raw materials used in the manufacturing process. It was stated that it was based on its own calculations, and the customs authorities had to judge whether the calculations made sense. In addition, the GOID explained that there were not guidelines for such calculations.

(919) Furthermore, the related companied [*sic*] were selling products between themselves which incorporated imported raw materials but did not report to the purchasing entity the value of the custom duties.

(920) The investigation also revealed that TSI, paid import duties for imported machinery used for power generation. During the RCC the GOID explained that the bonded zone is linked to the industrial business licence and that the company had two business license[s], one for its steel activity, and the other one for the power generation, with the bonded zone applying only to the first one. During the RCC TSI showed a document indicating the boundaries of the bonded zone and it confirmed that it only applied to machinery imported for ferronickel and not for the power generation.

(921) It was further explained that this scheme was available only for the companies that imported good [*sic*] into Indonesia for further processing. Hence, mere importers cannot apply to obtain a bonded zone status.

(c) Conclusion

(922) Based on the above, the Commission therefore concluded that the granting of the above-mentioned exemption is entirely at the discretion of the GOID.

(923) Furthermore, the Commission considered that the import duty exemption on inputs granted by the bonded zones scheme constitutes a financial contribution by the GOID to the exporting producers in the form of revenue forgone.

(924) Therefore, the Commission concluded that the exemption of import duties on inputs amounts to revenue foregone or not collected in sense of Article 3(1)(ii) of the basic Regulation.

(925) In light of the above, the Commission therefore considered that this scheme confers a benefit to the exporting producers as they are placed in a better financial position than they would be absent the scheme.

(926) The scheme is 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, in accordance with Articles 4(2)(a) and 4(3) of the basic Regulation.[604]

7.277. Indonesia makes three claims in relation to the Commission's determination that import duty exemptions granted by the GOID for raw materials imported into bonded zones were countervailable subsidies. First, Indonesia claims that its duty exemptions validly qualify to not be deemed a subsidy in accordance with Footnote 1, Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), and 14 of the SCM Agreement. Second, Indonesia claims that the Commission's decision to countervail the entire amount of exempted import duties rather than only the amounts of exemptions "in excess" of duties that were otherwise due, is contrary to Footnote 1, 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. Third, Indonesia claims that the Commission failed to appropriately establish that the import duty exemptions are specific, contrary to Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement.

7.278. The European Union submits that each of Indonesia's claims should be rejected.[605]

7.279. The Panel begins its analysis by examining whether the Commission properly determined that the import duty exemptions for raw materials imported into bonded zones were not covered by Footnote 1 of the SCM Agreement before proceeding to examine Indonesia's remaining claims concerning these exemptions.

7.6.2.2 Evaluation

7.6.2.2.1 Eligibility of Indonesia's import duty exemptions to "not be deemed to be a subsidy"

7.280. Indonesia contends that 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. Indonesia claims that, by establishing the existence of a financial contribution based on duty exemptions that should be covered under Footnote 1, the Commission violated Article 1.1(a)(1)(ii) of the SCM Agreement. As a consequence of this alleged violation, Indonesia also asserts violations of Articles VI:4 and VI:3 of the GATT 1994, and Articles 1.1(b), 3.1(a), and 14 of the SCM Agreement.

7.281. The European Union submits that Indonesia's Footnote 1 violation claim should be rejected because the Commission properly concluded that the import duty exemptions for raw materials imported into bonded zones were not covered by Footnote 1 of the SCM Agreement. The European Union further submits that all the other allegations (violation of Articles 1.1(b), 3.1(b), and 14 of the SCM Agreement, and Articles VI:3 and VI:4 of the GATT 1994) are consequential and should be equally rejected.[606]

7.282. The Panel first examines the parties' contentions with respect to the meaning of Footnote 1 to Article 1.1(a)(1)(ii). Article 1.1 of the SCM Agreement, in relevant part, provides that:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> > (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> >
> > …
> >
> > > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1];
> >
> > …

[604] Countervailing duty final determination (Exhibit IDN-1), recitals 912-926.
[605] European Union's first written submission, paras. 516-535.
[606] European Union's first written submission, paras. 516-535.

and

(b) a benefit is thereby conferred.

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[1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

7.283. The *Ad* Note to Article XVI of GATT 1994 reads as follows:

> The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

7.284. Annex I to the SCM Agreement contains an illustrative list of export subsidies labelled from (a) to (l). Items (g), (h), and (i) list, as export subsidies, the exemption, remission, deferral, or drawback of certain indirect taxes and import charges on exported products, in certain defined circumstances. In particular, item (i) identifies as a prohibited export subsidy:

> The remission or drawback of import charges[58] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

[58] For the purpose of this Agreement:

> …
>
> "Remission" of taxes includes the refund or rebate of taxes;
>
> "Remission or drawback" includes the full or partial exemption or deferral of import charges.

7.285. Annex II to the SCM Agreement sets forth "Guidelines on Consumption of Inputs in the Production Process". Footnote 61 is appended to the title of Annex II and provides that:

> Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

7.286. Annex II recalls that items (h) and (i) of Annex I refer to "inputs that are consumed in the production of the exported product" and sets forth guidelines for the examination of "whether inputs are consumed in the production of the exported product":

> In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:
>
> 1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the

investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

7.287. Annex III sets forth guidelines for the examination of "substitution drawback systems", which are a particular type of drawback system envisaged in Annex I(i).

7.288. Indonesia argues that the Commission erroneously imposed conditions on the eligibility of the import duty exemptions to qualify for the safe harbour afforded by Footnote 1 for the exemptions to "not be deemed to be a subsidy".[607]

7.289. Indonesia submits that the Commission failed to credit Indonesia's import duty exemptions as valid within the meaning of Footnote 1 of the SCM agreement because it determined that the granting of the import duty exemptions was "entirely at the discretion of the GOID".[608] Indonesia asserts that this determination was based on two Commission findings that: (a) "the companies did not have in place a proper system to check the correctness of the content of the imported raw materials in the value of the products sold on the domestic market"; and that (b) there were "no guidelines" for the calculation of the customs duties due and the percentages of each of the raw materials used in the manufacturing process.[609] Indonesia asserts that these findings are not relevant to the question of whether the import duty exemptions were eligible to "not be deemed to

[607] Indonesia's response to Panel question No. 188 (referring to Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.105–5.136).
[608] Indonesia's first written submission, para. 801 (quoting Countervailing duty final determination (Exhibit IDN-1), recital 922).
[609] Indonesia's first written submission, para. 801 (quoting Countervailing duty final determination (Exhibit IDN-1), recital 918).

be a subsidy" because the introductory clause of Footnote 1 does not make the applicability of Footnote 1 subject to conditions derived from the referenced Annexes of the SCM Agreement.[610]

7.290. The European Union argues that, by its terms, Footnote 1 must be read "[i]n accordance with" *inter alia* Annex II to the SCM Agreement, which sets forth "Guidelines on Consumption of Inputs in the Production Process". In the European Union's view, a harmonious reading of Footnote 1 in accordance with Annex II establishes that import duty exemptions will not be eligible to be deemed "not a subsidy" unless: (a) there exists a verification system that confirms which inputs are consumed in the production of the exported product and in what amounts; or (b) in the absence of such a system, there is a showing that in the particular case, the import duty exemptions did not lead to an exemption of import duties in excess of those actually exempted on the imported inputs consumed in the production of the exported product.[611]

7.291. The European Union asserts that the introductory clause to Footnote 1 "implies that the measure at issue must be examined in line with the requirements contained in those Annexes".[612] According to the European Union, duty exemptions and remissions are eligible to "not be deemed to be a subsidy" under Footnote 1, provided that the scheme pursuant to which they are granted is "in accordance with the [Ad] Note Article XVI and Annexes I to III".[613] In the absence of a satisfactory verification system or a further showing (referring to the procedure set forth in Annex II of the SCM Agreement), the European Union considers that Footnote 1 is not applicable. According to the European Union, the consequence of the Commission's findings, therefore, is that "the import duty exemption scheme granted to bonded zones was not covered by Footnote 1"[614] and so "does not fall under Footnote 1".[615]

7.292. The Panel considers that Footnote 1, including its introductory clause, Article 1.1(a)(1)(ii), and Annexes I-III of the SCM Agreement and the *Ad* Note Article XVI of GATT 1994 must be read together and in a harmonious manner. We note that prior dispute settlement reports have agreed with this understanding.[616] In our view, therefore, it is not inconsistent with Footnote 1 for an investigating authority to look to the contents of Annex II to inform its understanding of the circumstances in which an exemption or remission from duties would be eligible to "not be deemed to be a subsidy" pursuant to Footnote 1. Indeed, we note that Footnote 1 does not explicitly mention whether or not inputs consumed in the production process are eligible to be treated as "exports" within the meaning of Footnote 1 – which is the basis for the claim that the exemptions at issue here are covered by Footnote 1.

7.293. Having determined that Annex II of the SCM Agreement is relevant to the evaluation of whether import duty exemptions may or may not be eligible to "not be deemed to be a subsidy" pursuant to the safe harbour provision of Footnote 1, we next turn to examine whether the Commission properly took Annex II into account when it determined that the import duty exemptions were not covered by Footnote 1. With respect to the relevant Commission findings challenged by Indonesia, we note that Part II of Annex II provides that investigating authorities "should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts".

7.294. Indonesia submits that the Commission failed to make an objective examination of the evidence on the record and relied on an incorrect factual basis when it determined that a financial contribution (in the form of revenue foregone) was granted by Indonesia's import duty exemptions based on the fact that: (a) "the companies did not have in place a proper system to check the correctness of the content of the imported raw materials in the value of the products sold on the domestic market"; and (b) there were "no guidelines" for the calculation of the customs duties due

[610] Indonesia's response to Panel question No. 188 (referring to Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.105–5.136).
[611] European Union's first written submission, paras. 520-525.
[612] European Union's response to Panel question No. 118, para. 265.
[613] European Union's first written submission, para. 520. See also European Union's response to Panel question No. 118, para. 265.
[614] European Union's first written submission, para. 518. (emphasis original)
[615] European Union's first written submission, para. 534.
[616] See Panel Report, *India – Export Related Measures*, para. 7.171 ("[F]ootnote 1, the *Ad* Note, and the *Annexes* must be read together."); Appellate Body Report, *EU – PET (Pakistan)*, para. 5.138.

and the percentages of each of the raw materials used in the manufacturing process.[617] In addition to challenging the Commission's assessment of the record evidence, Indonesia argues that the Commission failed to properly develop the record because the Commission failed to notify Indonesia of the need for a further examination as provided for in Annex II(II)(2) of the SCM Agreement.[618] Indonesia argues that even if the Commission considered that the verification system was not satisfactory or effective, it could not properly have concluded that the exemptions were outside the application of Footnote 1 without having first informed the GOID of the need for the "further examination" required by Annex II(II)(2).[619]

7.295. The European Union responds that the Commission properly examined all the evidence on the record to come to the reasoned and reasonable conclusion that the import duty exemptions for raw materials imported into bonded zones were not covered by Footnote 1 of the SCM Agreement. With respect to the "further examination", the European Union argues that given the nature of the Commission's findings, which were based on the conclusion that the companies themselves were calculating the amounts of customs duties using their own usage rates absent any additional controls by the relevant authorities, a further examination by the GOID could not have rendered any result other than to confirm the calculations made by the companies themselves.[620] The European Union submits that a verification system "on paper" does not establish that a functioning system exists where the evidence on file showed the opposite.[621] The European Union further argues that the Commission was not required to notify the GOID about any obligation to conduct a further examination and that, in the event such an obligation were to apply, the final disclosure properly informed Indonesia of its findings about this system.[622] The European Union argues that on the basis of the disclosure, the GOID should itself have proceeded to a further examination had the GOID considered that the system was valid under Annex II(II)(2).[623]

7.296. The first sentence of Annex II(II)(2) of the SCM Agreement sets forth the circumstances under which a further examination "would need to be carried out". It is the investigating authority that must determine whether or not the circumstances that require a further examination exist, but it is the exporting Member that conducts the further examination. As a consequence of these shared responsibilities, the investigating authority is obligated to timely notify the exporting Member that the circumstances are such that a further examination "need[s] to be carried out". Prior dispute settlement reports align with this view as we note, for example, in *EU – PET (Pakistan)*, the Appellate Body reasoned that:

> Pursuant to the first sentence of Annex II(II)(2), the need for a "further examination by the exporting Member" prescribed therein does not arise in each countervailing duty investigation. Such need only arises in a situation where the investigating authority has determined, from its inquiry under Annex II(II)(1), that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member.
>
> Should an investigating authority determine that a "further examination" by the exporting Member needs to be carried out pursuant to the first sentence of Annex II(II)(2), it follows that the investigating authority has the responsibility of informing the exporting Member of this need. In our view, the investigating authority should inform the exporting Member of the need for a "further examination" in sufficient detail and in a timely manner. When an investigating authority provides this information to the exporting Member in a timely manner, it permits the exporting Member to carry out a "further examination", in accordance with the first sentence of Annex II(II)(2), before the conclusion of the authority's investigation. In so doing, this allows the

[617] Indonesia's first written submission, para. 801.
[618] Indonesia's opening statement at the first substantive meeting, paras. 92-95 (quoting Appellate Body Report, *EU – PET (Pakistan)*, para. 5.122 (stating that an investigating authority "has the responsibility of informing the exporting Member [of the need for a further examination] in sufficient detail and in a timely manner … before the conclusion of the investigation" (emphasis omitted))).
[619] Indonesia's second written submission, paras. 553 and 572-575.
[620] European Union's second written submission, para. 233.
[621] European Union's response to Panel question No. 126, para. 278.
[622] European Union's response to Panel question No. 126, para. 280 (noting that recitals 733-748 of the GDD are identical to recitals 910-926 of the final determination).
[623] European Union's response to Panel question No. 126, para. 280 (noting that the GOID did not provide any comments in this respect in its comments on the disclosure).

> exporting Member, and indeed the investigated company, the opportunity to defend effectively their interests in the remaining stages of the countervailing duty investigation. This is of particular importance bearing in mind that the further examination by the exporting Member is aimed at establishing whether "an excess payment occurred" – a crucial element in the investigating authority's determination of whether the duty drawback scheme under investigation "conveys a subsidy by reason of … excess drawback of … import charges on inputs".[624]

7.297. We agree with this interpretation of the obligation imposed on the investigating authority by the first sentence of Annex II(II)(2) of the SCM Agreement. The investigating authority is obligated to properly assess whether the circumstances that require a further examination exist, i.e. "[w]here there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively". If these circumstances are found to exist, then there is no discretion for the investigating authority to choose whether or not there is a need for a further examination, and there is an obligation to timely notify this need to the exporting Member. Accordingly, we are of the view that Annex II(II)(2) requires an investigating authority to prompt the "exporting Member" to carry out a further examination when it is found to be necessary.[625]

7.298. The second sentence of Annex II(II)(2) of the SCM Agreement does not concern whether or not a further examination is required. The second sentence instead addresses the methodology of the further examination and requires that this examination "be carried out in accordance with" the first paragraph of Annex II(II) "[i]f the investigating authorities deemed it necessary". We are of the view that the discretion afforded by the phrase "[i]f the investigating authorities deemed it necessary" in the second sentence of Annex II(II)(2) corresponds to the methodological choices that are present in the referenced paragraph 1 of Annex II(II). Paragraph 1 describes steps to be taken in the examination of a "system or procedure" relating to inputs consumed in the production process. Some of the described steps may not be applicable, for example in the circumstance where "there is no such system or procedure". Moreover, the last sentence of paragraph 1 describes "certain practical tests" that an investigating authority "may deem it necessary to carry out" as part of the examination of the "system or procedure". It is our view, therefore, that although the second sentence of Annex II(II)(2) provides an investigating authority a degree of discretion in determining the methodology for the further examination to be conducted by the exporting Member, authorities do not have discretion to avoid an examination by the exporting Member when the circumstances set forth in the first sentence of Annex II(II)(2) are present.

7.299. We now turn to assess whether, when the Commission determined that Footnote 1 of the SCM Agreement was inapplicable to the import duty exemptions, the Commission did so in conformity with Annex II(II)(2) of the SCM Agreement. We recall that the Commission determined that: (a) "the companies did not have in place a proper system to check the correctness of the content of the imported raw materials in the value of the products sold on the domestic market"; (b) "the percentages of each raw materials used in the manufacturing process … w[ere] based on [the company's] own calculations"; (c) "the customs authorities had to judge whether the calculations made sense"; (d) " there were not guidelines for such calculations"; and that (e) related companies "were selling products between themselves which incorporated imported raw materials but did not report to the purchasing entity the value of the custom duties". On this basis, the Commission concluded "that the granting of the above-mentioned exemption is entirely at the discretion of the GOID".[626] The Panel observes that the language describing the circumstances in which a further examination "would need to be carried out" is relatively expansive and includes the circumstance in which "there is no such system or procedure" or the system is "found not to be applied or not to be applied effectively". As such, the Panel considers that the Commission findings at issue fall within the circumstances described in the first sentence of Annex II(II)(2). We are of the view that these findings are within the ambit of the circumstances described in Annex II(II)(2) as a system that is "not reasonable" or that is either "not applied" or "not applied effectively". Accordingly, we consider that the Commission findings at issue lead to the conclusion that a further examination "would need to be carried out" within the meaning of Annex II(II)(2). We are therefore of the view that the Commission's findings do not justify a decision that a further examination into the functioning of Indonesia's duty exemption system was not necessary. The Panel, therefore,

[624] Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.121-5.122. (fns omitted)
[625] See Appellate Body Report, *EU – PET (Pakistan)*, para. 5.122.
[626] Countervailing duty final determination (Exhibit IDN-1), recitals 918-922.

concludes that the Commission did not properly develop the factual record to support its determination that the import duty exemptions at issue were not eligible to "not be deemed to be a subsidy" under Footnote 1.

7.300. We are not persuaded by the European Union's argument that a further examination would have been futile because it could not have accomplished any result other than to simply confirm the companies' calculations. We note that the first sentence of Annex II(II)(2) of the SCM Agreement provides that a further examination will be carried out on the basis of "actual inputs involved". This indicates to us that the further examination provides the exporting Member with an opportunity to demonstrate with evidence that, despite any defects found to exist with a system or its application or even its absence, no excess remission/drawback/exemption occurred in fact. In our view the further examination is intended to be and would have been an opportunity for the GOID to demonstrate, with evidence based on the actual inputs involved, the absence of excess exemptions or identify the precise amount of any excess exemptions. As such, we are unable to agree that the only result of a further examination would have been to confirm the companies' calculations.

7.301. We also disagree with the European Union's assertion that the final disclosure properly informed Indonesia of the need for a further examination consistent with the obligation in Annex II(II)(2) of the SCM Agreement. Considering that a further examination is to be "based on actual inputs involved", we are of the view that such an examination will necessarily require an authority to provide the exporting Member with an opportunity to submit additional factual information that the authority would be required to evaluate, ensure the veracity of, and make findings upon. As such, a timely notification of the need for a further examination would necessarily need to be provided early enough in the course of an investigation to provide sufficient time for the exporting Member to submit this information and to ensure that the authority's evaluation of this information could be reflected in the final disclosure.

7.302. The European Union additionally argues a separate basis for concluding that the import duty exemption scheme does not fall under Footnote 1 of the SCM Agreement. In particular, the European Union states that in addition to covering raw materials, Indonesia's import duty exemptions granted for imports into bonded zones also cover capital goods or equipment and argues that such exemptions do not fall under Footnote 1. The European Union thus asserts that the scheme for granting such exemptions, viewed as a whole, was not designed to fall under Footnote 1, and notes that no comments were received by the Commission in the course of the investigation suggesting that the operation of a part of the scheme (as it applies to raw materials) should be separately considered.[627] The European Union further asserts that "the Commission had to examine the scheme as a whole … [not] only as regards the inputs component".[628] The European Union cites prior dispute settlement reports in *India – Export Related Measures* and *Brazil – Taxation* in support of this contention.

7.303. Indonesia responds that its claim does not concern the duty exemption findings of the Commission with respect to capital goods or equipment.

7.304. The Panel observes that the Commission made note of the inclusion of capital goods or equipment in the scheme for import duty exemptions for imports into bonded zones in the descriptive part of it final determination, but did not reference this aspect in making its findings that the exemptions at issue constituted a financial contribution in the form of government revenue foregone. Instead, the Commission referred to its conclusion that "the granting of the above-mentioned exemption is entirely at the discretion of the GOID".[629] Accordingly, while we understand that the European Union asserts that the inclusion of capital goods and equipment within the scheme for granting exemptions constitutes a basis for excluding all such exemptions from the coverage of Footnote 1, we do not consider that the Commission rested its determination on that basis.

7.305. Even if we were to accept that the Commission had rested its determination on the above-mentioned basis, we would not agree that this basis supports the determination. We note that the panel in *India – Export Related Measures* interpreted Footnote 61 (appended to Annex II of the SCM Agreement) to mean that the three listed categories exhaust the scope of inputs consumed in the production process: (a) inputs physically incorporated; (b) energy, fuels, and oil used in the

[627] European Union's first written submission, para. 532.
[628] European Union's response to Panel Question No. 119.
[629] Countervailing duty final determination (Exhibit IDN-1), recital 922.

production process; and (c) catalysts which are consumed in the course of their use to obtain the exported product.[630] The panel went on to apply this understanding to find that such exemption programmes that covered capital goods or other goods not contained in the exhaustive list did not meet the condition of Footnote 1 requiring the duty exemption "of an exported product" to be eligible. In this regard, we take note that Footnote 61 states that:

> Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

7.306. The panel in *Brazil – Taxation* appears to have followed a similar approach to the panel in *India – Export Related Measures* where it concluded:

> [T]he measures at issue are not covered by [F]ootnote 1 of the SCM Agreement as they do not apply only to the purchase of raw materials, intermediate goods and packaging materials used in the production for export sales, but also to domestic sales, and thus give rise to excess exemption of taxes in the sense of item (g) of Annex I of the SCM Agreement. [631]

7.307. The Panel has considered this reasoning but does not find persuasive the conclusion that eligibility under Footnote 1 of the SCM Agreement is to be assessed at the programme level rather than at the exemption/remission/drawback level. We agree that Footnote 61 defines the "inputs consumed in the production process" by setting forth a list of such inputs with the implication that any other "inputs" are not included within the meaning of "inputs consumed in the production process". We do not agree, however, that the existence of exemptions for ineligible goods within the same programme as exemptions for eligible goods necessarily renders invalid the exemptions on eligible goods within the meaning of Footnote 1.

7.308. The Panel observes that the text of Footnote 1 of the SCM Agreement refers to the exemption or remission of duties or taxes that "shall not be deemed to be a subsidy" rather than referring to a programme or scheme pursuant to which such exemptions or remissions occur. Annex II provides that "drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in"[632] the production of the exported product. We are of the view that neither Footnote 1 nor Annex II imposes any requirement about the scope of the scheme pursuant to which the exemptions or remissions occur. Instead, the focus is on whether any exemptions or remissions are eligible to "not be deemed to be a subsidy". This eligibility for certain exemptions or remissions can be determined regardless of whether certain other exemptions or remissions made pursuant to the scheme are ineligible (such as those made "in excess" or those made not on inputs consumed in production of the exported product).

7.309. The Panel considers that, while exemptions for duties on capital goods or other goods not contained in the exhaustive list are not eligible for the safe harbour in Footnote 1 of the SCM Agreement, goods that are contained in the exhaustive list may be eligible for an exemption to the extent these eligible goods can be examined separately from non-eligible goods to determine whether and in what amounts excess exemptions of eligible goods have been made. We are of the view that "a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts" can be expected to allow for independently examining exemptions associated with inputs that are eligible under Footnote 1 from exemptions associated with goods ineligible under Footnote 1. Likewise, we are of the view that a further examination based on actual inputs involved can be similarly expected to allow for independent examination of exemptions associated with eligible and ineligible goods. The Panel finds, therefore, that an authority's obligation to prompt the "exporting Member" to carry out a further examination is not excused merely because some of the exempted goods covered by a programme may not be eligible. This is because the further examination may facilitate both a separation of the exemptions for eligible and non-eligible goods as well as determining whether and in what amount any excess exemption may have occurred with respect to eligible goods.

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[630] Panel Report, *India – Export Related Measures*, para. 7.199.
[631] Panel Reports, *Brazil – Taxation, para. 7.1222.*
[632] Emphasis added.

7.310. In conclusion, the Panel finds that the Commission did not provide Indonesia an appropriate opportunity to undertake a "further examination" pursuant to Annex II(II)(2) of the SCM Agreement despite the fact the findings relied upon by the Commission for its conclusion that Footnote 1 was inapplicable demonstrated the need for such a "further examination". Accordingly, we find that the Commission did not determine the existence of a financial contribution on the basis of government revenue foregone or not collected consistently with Article 1.1(a)(1)(ii) and Footnote 1. We consider Indonesia's claims of violation of Articles 1.1(b), 3.1(b), 10, 14, and 32.1 of the SCM Agreement, and Articles VI:3 and VI:4 of the GATT 1994 are consequential to its claim under Footnote 1 and Article 1.1(a)(1)(ii). As such, we do not consider that making additional findings with respect to these provisions is necessary to provide a positive resolution to this dispute.

7.6.2.2.2 Countervailing the entire amount of exempted import duties rather than only the amounts of exemptions "in excess" of duties that were otherwise due

7.311. Indonesia claims that by countervailing the entire amount of exempted import duties rather than only the amounts of exemptions "in excess" of duties that were otherwise due, the Commission's determination is contrary to Footnote 1, 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.[633] Indonesia submits that – even if the import duty exemptions were not eligible under Footnote 1 – the Commission should have determined whether Indonesia had provided excess exemptions. Indonesia argues that the text of Footnote 1 provides that a subsidy exists only insofar as an excess remission (including excess exemption) occurs, representing revenue foregone otherwise due.[634]

7.312. The European Union responds that it properly countervailed the entire amount of import duties exempted.[635]

7.313. The Panel notes that Indonesia's claim concerns the circumstance where the Commission is found to have properly determined that the import duty exemptions for raw materials imported into bonded zones were not eligible under Footnote 1 of the SCM Agreement. As we have discussed in section 7.6.2.2.1 above, the Panel has concluded that the Commission acted inconsistently with Footnote 1 to Article 1.1(a)(1)(ii) when it determined that the import duty exemptions were not covered by that provision. As the Panel has determined that the circumstance contemplated by Indonesia's "in excess" claim did not exist, we are of the view that we need not address this claim to provide a positive resolution to this dispute.

7.6.2.2.3 Specificity

7.314. Indonesia additionally claims that the Commission's determination that Indonesia's import duty exemptions for raw material imported into bonded zones were specific is inconsistent with Articles 1.2, 2.1, 2.2, 2.3 and 2.4 of the SCM Agreement.[636]

7.315. The Panel again notes, as we discuss in section 7.6.2.2.1 above, that we have concluded that the Commission acted inconsistently when it determined that Indonesia's import duty exemptions for raw materials imported into bonded zones were not covered by Footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement and therefore improperly found that the import duty exemption was a subsidy. Given this, the Panel is of the view that we need not separately address Indonesia's claim that the Commission improperly found this alleged subsidy to be specific in order to provide a positive resolution to this dispute.

[633] Indonesia's first written submission, paras. 808-824.
[634] Indonesia's first written submission, para. 819 (quoting Panel Report, *Korea – Commercial Vessels*, fn 117; Appellate Body Report, *EU – PET (Pakistan)*, para. 5.134).
[635] European Union's first written submission, paras. 536-543.
[636] Indonesia's first written submission, paras. 825-842.

7.6.3 Income tax holiday

7.6.3.1 Introduction

7.316. Indonesia claims that the Commission's determination that the income tax holiday scheme was specific is inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement.[637]

7.317. The European Union responds that the granting legislation demonstrates that the income tax holiday is *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement, and that the legislative criteria cited by Indonesia are not objective within the meaning of Article 2.1(b).[638] The European Union asserts that Indonesia's claim under Article 2.4 is consequential to its Article 2.1 claim and should be rejected for the same reasons. The European Union also argues that Indonesia has failed to demonstrate that the Commission's determination of *de jure* specificity was not based on positive evidence.

7.318. The Commission's determination regarding the income tax holiday, in relevant part, reads as follows:

> 4.12.1. *Income tax holiday*
>
> (b) *Findings of the investigation*
>
> …
>
> (873) This scheme is available to corporate taxpayers making new investments in 'pioneer industries'. Pursuant to Article 1 of MOF 150/2018 the 'pioneer industries' are industries characterised by large connectivity, creation of added-value and high externality, introduction of new technology, and of strategic value to the national economy. Under MOF 150/2018 Pioneer Industry includes, among other things, the upstream basic metal industry: (i) steel; or (ii) not steel, with or without its integrated derivatives product processing facilities.
>
> (874) In order to benefit from the reduction of its income tax, the taxpayers must: (1) have the status of an Indonesian legal entity; (2) make an investment that is a new investment and that has not been given/has not been rejected to receive a reduction of the CIT [corporate income tax]; (3) the investment must be made in an industry that qualifies as 'pioneer industry'; (4) the new investment is of minimum IDR 100 billion; and (5) the taxpayer satisfies the debt to equity ratio set out in the regulation.
>
> (c) *Conclusion*
>
> (875) The Commission considered that this scheme is a subsidy under Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation because there is a financial contribution in the form of revenue foregone by the GOID that confers a benefit to the company concerned. The benefit for the recipients is equal to the tax saving.
>
> (876) The scheme is specific because it is available only to certain companies active in certain sectors that are qualified as 'pioneer industries' in accordance with Articles 4(2)(a) of the basic Regulation.[639]

7.319. The granting legislation, the Regulation of the Minister of Finance Number 150/PMK.010/2018 (MOF Regulation 150/2018), in relevant part, reads as follows:

[637] Indonesia's first written submission, paras. 754-764.
[638] European Union's first written submission, paras. 478-494.
[639] Countervailing duty final determination (Exhibit IDN-1), pp. 145-146.

Article 2

(1) Corporate Taxpayers who establish a new investment in the Pioneer Industry may obtain a corporate Income-Tax deduction for the income gained or obtained from their Primary Business Activity.

(2) The value of the new investment as referred to in paragraph (1) shall amount to a minimum of IDR 100,000,000,000,- (one hundred billion rupiahs).

…

Article 3

(1) In order to be granted with corporate Income-Tax deduction as referred to in Article 2 paragraph (1) corporate Taxpayer shall fulfil the following criteria:

a. is a Pioneer Industry;

b. having the status as an Indonesia legal entity;

c. is a new investment, of which, a Decree regarding the granting or notice of rejection on corporate Income-Tax deduction has not yet been issued;

d. has a new investment plan value with a minimum amount of IDR 100,000,000,000,- (one [*sic*] billion rupiahs); and

e. fulfill the provisions on the comparison between the amount of debt-to-equity ratio as referred to in the Regulation of the Minister of Finance regarding the determination of the company's debt-to- equity ratio for the purpose of Income-Tax calculation.

(2) Pioneer Industry as referred to in paragraph (1) letter a include:

a. a. upstream base metal industry:

1. steel; or

2. non-steel,

with or without its integrated derivatives;

b. Oil-and-natural gas refining industry with or without its integrated derivatives;

c. Oil, natural gas or coal-based petrochemical industry with or without its integrated derivatives;

d. Organic basic chemical industry derived from agriculture, cultivation, or forestry products with or without its integrated derivatives;

e. inorganic basic chemical industry with or without its integrated derivatives;

f. pharmaceutical main raw material industry with or without is integrated derivatives;

g. irradiation, electro-medical, or electro-therapy devices manufacturing industry;

h. electronics or telematics devices main components manufacturing industry, such as semiconductor wafers, backlight for Liquid Crystal Display (LCD), electrical driver, or display;

i. machine or machine's main components manufacturing industry;

j. industry for manufacturing robotic components which support manufacture machines manufacturing industry;

k. power-plant machine main components manufacturing industry;

l. motor vehicle and motor vehicle's main components manufacturing industry;

m. ship main components manufacturing industry;

n. train main components manufacturing industry;

o. industry for manufacturing aircraft main components and aerospace industry supporting activities;

p. processing industry based on agriculture, cultivation, or forestry products which produce pulp with or without its derivatives;

q. economic infrastructures; or

r. digital economy which encompasses data processing, hosting, and other activities related to it.

…

Article 5

(1) In the event that a Taxpayer submitted a corporate Income-Tax deduction application for the scope of industry which have not been listed in the scope of Pioneer Industry as referred to in Article 3 paragraph (2) and have fulfilled the criteria as referred to in Article 3 paragraph (1) letter b until letter e, and the requirements as referred to in Article 3 paragraph (6), and the Taxpayer in question declares that his/her industry is a Pioneer Industry, an inter-ministerial discussion shall be undertaken to discuss said application.

(2) Inter-ministerial discussion as referred to in paragraph (1) shall be coordinated by the Investment Coordinating Board to determine the conformity of Taxpayer's business field to the criteria of a Pioneer Industry, which shall involve at least the Ministry of Finance and sector development ministries/agencies.

(3) In the event that the inter-ministerial discussion as referred to in paragraph (2) decides that Taxpayer's scope of industry fulfill the criteria as Pioneer Industry, the Head of the Investment Coordinating Board shall submit a corporate Income-Tax deduction application as referred to in paragraph (1) to the Minister of Finance through the Director-General of Tax.

(4) Submission of the Head of the Investment Coordinating Board's application as referred to in paragraph (3) shall be undertaken through the [Online Single Submission] system.[640]

[640] MOF Regulation 150/2018 (Exhibit IDN-112).

7.6.3.2 Evaluation

7.320. Indonesia submits that the Commission failed to establish that the country's income tax holiday programme was limited to certain enterprises within the meaning of Article 2.1(a) of the SCM Agreement. Specifically, Indonesia asserts that the Commission did not establish that the "pioneer industries" eligibility criterion imposes a sufficiently explicit limitation on access to the alleged subsidy within the meaning of Article 2.1(a). Instead, Indonesia argues that the provision in the granting legislation defining the scope of the companies that are eligible to be designated as "pioneer industries" extends the tax benefit broadly across the Indonesian economy. Indonesia submits that the legislation provides an illustrative list of 18 diverse sectors to which the tax benefit is available. Indonesia contends that the Commission's determination relied solely on the conclusion that the income tax holiday applies to "pioneer industries" with the implication that this language in the legislation allegedly demonstrates that the scheme is specific.

7.321. The European Union submits that the granting legislation defines the term "pioneer industry" as "characterised by large connectivity, creation of added-value and high externality, introduction of new technology, and of strategic value to the national economy".[641] According to the European Union, this definition demonstrates that access to the income tax holiday is necessarily limited to only a certain group of industries which qualify as "pioneer industries". Accordingly, the European Union asserts that this scheme cannot be considered to be broadly accessible across the Indonesian economy, regardless of whether the term "pioneer industries" includes industries from 18 sectors of the economy, or potentially even more than 18 sectors. The European Union makes note of the additional criteria for "activities in the pioneer industries" and the non-negligible minimum investment amount and argues that Indonesia's claims that the scheme is broadly available does not account for these criteria. The European Union submits that other companies in the IRNC Group did not participate in the tax holiday. The European Union asserts that this fact demonstrates that the eligibility criteria result in a limitation on the use of the subsidy such that the programme is properly considered to be specific within the meaning of Article 2.1(a).[642]

7.322. The Panel takes note that the various eligibility criteria mentioned by the parties are both present in the granting legislation and referenced as eligibility criteria in the Commission's determination. The Panel considers that it is appropriate to examine the whole of the Commission's determination regarding the income tax holiday to discern the content of the Commission's determination on specificity. The Panel observes the eligibility criteria described by the Commission in recitals 873 and 874 of the determination. The Panel considers that these recitals inform the Commission's reference to "certain companies" in the Commission's conclusion on specificity. The Panel also observes the explicit reference to the granting legislation in recitals 869 and 873. The Panel agrees that the Commission determined that the programme is *de jure* specific within the meaning of Article 2.1(a) of the SCM Agreement. We note that the Commission's description of the legal basis and its conclusion on specificity explains that the specificity decision was primarily based on the fact that access to the programme is limited to "only to certain companies active in certain sectors that are qualified as 'pioneer industries'". We also consider that this language incorporates the eligibility criteria referenced in recitals 873 and 874, and that these criteria are also described in the text of the granting legislation. The Panel, therefore, disagrees with Indonesia's contention that the Commission's determination relied solely on the conclusion that the income tax holiday applies to "pioneer industries". The Commission's determination read as a whole together with the referenced granting legislation feature several additional eligibility criteria that work in combination with the designation of 18 industries that qualify as "pioneer industries" to limit access to the subsidy program. Accordingly, we are of view that the requirement to make a "new investment" of at least one hundred billion rupiahs in a pioneer industry was among the factors that the Commission considered when it determined that the income tax holiday programme is specific.

7.323. Given this, the Panel finds that the Commission's determination offered the granting legislation as positive evidence substantiating its *de jure* finding of specificity. Accordingly, the Panel finds that Indonesia has not established that the determination was not based on positive evidence within the meaning of Article 2.4 of the SCM Agreement.

[641] European Union's first written submission, para. 486.
[642] European Union's first written submission, paras. 483-488.

7.324. In relation to Indonesia's assertion that the 18 industries listed in the granting legislation as "pioneer industries" are sufficiently diverse that the programme should be considered to be broadly available, the Panel is of the view that neither the mere number of industries listed nor the observation of diversity among the listed number of industries is sufficient to establish that a program is broadly available.[643]

7.325. In that respect the Panel notes that the Commission's final determination states that industries can be designated as "pioneer industries" based on an understanding that the "'pioneer industries' are industries characterised by large connectivity, creation of added-value and high externality, introduction of new technology, and of strategic value to the national economy." We understand the Commission's determination on specificity to have taken this additional rationale into account.

7.326. Indonesia additionally submits that the illustrative list of pioneer industries is non-exhaustive, as the legislation also extends the tax benefit to any industry in any sector of the economy as long as it meets the other eligibility criteria set forth in Article 5 of the granting legislation. Indonesia argues that these criteria are economic in nature and that the one hundred billion rupiahs minimum investment criterion is analogous to a criterion relating to the size of an enterprise which is the example of an endorsed criterion noted in Footnote 2 to Article 2.1(b) of the SCM Agreement. Indonesia argues that to the extent that enterprises which avail of the application procedure meet the stipulated criteria, they are not disadvantaged vis-à-vis those active in industries listed as pioneer industries.[644]

7.327. The European Union responds that the definition of the "pioneer industries" still applies in the context of an application procedure under the granting legislation.[645] The criteria that apply in the context of the application procedure thus include the requirement that industries "need to have a strategic value for national economy", and this provides the granting authority the discretion to decide whether a certain industry has a strategic value. The European Union states that there is a difference between companies which automatically qualify for the preferential tax treatment from the text of the law, by virtue of being designated as pioneer industries, and those that have to go through (and be approved by) a special qualification procedure before they may be considered to be eligible to participate in the program.[646] The European Union also submits that the legislation provides for an inter-ministerial discussion "to discuss said application" to decide whether an applicant fulfils all the requirements.

7.328. We are of the view that the "pioneer industry" criteria and the other eligibility criteria apply regardless of whether the eligibility is determined on the basis of the legislatively-designated list of industries or through the application process. Therefore, the Commission's reference to the "pioneer industry" criteria in its conclusion and the description of the additional criteria in the findings address both of these avenues for accessing the programme. Accordingly, the Panel does not find the existence of the application process in addition to a legislatively-designated list of industries expands access to the program in a way that renders examination of the eligibility criteria as described in the Commission's determination an improper assessment of specificity within the meaning of Article 2.1(a) of the SCM Agreement.

7.329. The Commission's determination set forth sufficient information, explanation and detail to demonstrate the extent to which the "pioneer industries" limitation operating in combination with the additional limiting criteria prevents the programme from being considered as broadly available within the economy. Accordingly, the Panel finds that the Commission has provided sufficient information and explanation to reveal why it considered the criteria operating in combination to be sufficiently limited to justify its determination that the subsidy limits access to certain enterprises or industries. For this reason, the Panel finds that the Commission has provided a reasoned and adequate explanation sufficient to justify its determination that the income tax holiday is specific. The Panel finds that the "pioneer industries" limitation in combination with the other limitations described in the Commission's determination and appearing in the text of the legislation are capable

[643] See Panel report, *US – Anti-Dumping and Countervailing Duties (China)*, paras 9.38-9.40 (noting that "we do not consider that the sheer diversity of economic activities supported by a given subsidy is sufficient by itself to preclude that subsidy from being specific").
[644] Indonesia's response to Panel question No. 114.
[645] European Union's second written submission, para. 235.
[646] European Union's second written submission, para. 235.

of supporting a finding of *de jure* specificity. The Panel finds, accordingly, that Indonesia has not demonstrated that the Commission's determination that the income tax holiday is specific is inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.

7.6.4 Income tax allowance facility

7.6.4.1 Introduction

7.330. Indonesia claims that the Commission's determination that the income tax allowance facility was specific is inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement.[647]

7.331. The European Union requests the Panel to reject Indonesia's claim and states that the granting legislation that establishes the programme demonstrates that the income tax allowance facility is *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement, and that the criteria from the legislation cited by Indonesia are not objective within the meaning of Article 2.1(b).[648] Specifically, the European Union asserts that the text of the granting legislation contains certain discretionary criteria and limits access to the facility to certain enterprises or industries so that it is therefore properly considered to be *de jure* specific.[649]

7.332. The Commission's determination regarding the income tax allowance facility, in relevant part, reads as follows:

> 4.12.2. *Income tax allowance facility*
>
> …
>
> (b) *Findings of the investigation*
>
> (881) In order to benefit from the scheme, beneficiaries must submit an investment plan including the details of the investment and the total investment amount, subject to approval and monitoring by the GOID.
>
> (882) The investigation revealed that SMI, a related company to IRNC that provides raw materials to IRNC for the manufacturing of the SSCR, benefited from this scheme. On July 24, 2017 SMI has obtained tax allowance for specific capital investment and/or specific area facility based on Minister of Finance Decision Letter No. 170/KM.3/2017 for sales of stainless steel, since the Company commercially produced stainless steel on August 31, 2018. Based on that letter, the Company is eligible to, among others: (a) a. obtain reduction of net taxable income of 30 % from investment in tangible assets including land that are used for the Company's main business and charge for 6 years of 5 % per annum calculated since the Company started its commercial production and (b) accelerated depreciation on tangible asset obtained in relation with new capital investment and/or expansion with useful life and depreciation tariff.
>
> (c) *Conclusion*
>
> (883) The Commission considered that this scheme is a subsidy under Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation because there is a financial contribution in the form of revenue foregone by the GOID that confers a benefit to the company concerned. The benefit for the recipients is equal to the tax saving.
>
> (884) In light of the above, the Commission therefore considered that this scheme confers a benefit to the exporting producer as it is placed in a better financial position than it would be absent the scheme. In fact, absent the scheme, it would have paid additional income tax.

[647] Indonesia's first written submission, paras. 765-769.
[648] European Union's first written submission, paras. 495-504.
[649] European Union's first written submission, paras. 500-503.

(885) The scheme is specific because it is available only to certain companies depending on their business activities in accordance with Articles 4(2)(a) of the basic Regulation.[650]

7.6.4.2 Evaluation

7.333. Indonesia asserts that the Commission failed to establish that the income tax allowance facility was limited to certain enterprises within the meaning of Article 2.1(a) of the SCM Agreement.[651] Indonesia contends that the Commission's determination that the income tax allowance facility is specific because "it is available only to certain companies depending on the business activities" is contradicted by the granting legislation, which (Indonesia asserts) makes the tax facility broadly available across the Indonesian economy and covers 71 diverse industrial sectors including the manufacturing of communication devices, motor vehicles and ships, agriculture, fishery and waste management.[652] Indonesia also asserts that the programme's implementing regulations specifies for each business field and product scope what the programme considers to be a "high" investment value measured in billion of rupiahs, "large" absorption of workers measured in the number of workers, and "high" local content measured in percent.[653]

7.334. The European Union counters that the text of the granting legislation incorporates criteria that do, in fact, demonstrate that the income tax allowance facility is specific.[654] The European Union notes that the legislation expressly limits access to the facility to certain enterprises or industries and is therefore properly considered to be *de jure* specific.[655] In particular, the European Union notes that the income tax allowance facility is available only to certain companies based on the nature of their business activities as the granting legislation limits access to companies conducting business "in the sector of economic activity with high priority on the national scale", and in "certain regions", most notably "regions that economically have viable potentials to be developed".[656] The European Union asserts that, while the legislation identifies 71 sectors that are covered by this scheme, the programme does not cover all sectors of the economy.[657] The European Union argues that whether any list of a given number of sectors constitutes a "group of certain enterprises or industries" or "certain enterprises" is not a function of the number itself, but rather is a function of what is covered and not covered.[658] Accordingly, the European Union argues that additional criteria such as "business fields" which are "in the sector of economic activity with high priority on the national scale", and "certain regions" as "regions that economically have viable potentials to be developed" limits eligibility to benefit from the program. The European Union additionally argues that even within the listed sectors the granting legislation effectively narrows the programme's availability by establishing certain "product coverage" specification requirements.[659] The European Union argues on this basis that the measure is not, contrary to what Indonesia asserts, broadly available.[660]

7.335. The Panel observes that the granting legislation indicates that the programme may be accessed by companies whose operations have: "a. … high investment value or for export; b. … large absorption of workers; or c. … high local content." We also note that the legislation contains two tables that describe the programme's eligibility according to business field and product scope.[661] The first table identifies 66 business fields, each with a specific product scope. In other words, for these business fields, only certain products produced within each identified business field are eligible for the programme. The second table similarly identifies 77 business fields, each with a specific product scope, and additionally identifies a specific regional limitation for each of the listed business field/product scopes. In other words, for each of these business fields eligibility is limited to producers of only certain products produced within a certain region or regions. The Panel also

[650] Countervailing duty final determination (Exhibit IDN-1), pp. 146-147.
[651] Indonesia's first written submission, paras. 765 and 769.
[652] Indonesia's first written submission, para. 766.
[653] Indonesia's response to Panel question No. 115 (referring to MOI Regulation 47/2019 (Exhibit IDN-233)).
[654] European Union's first written submission, paras. 500-503.
[655] European Union's first written submission, para. 500.
[656] European Union's first written submission, para. 501.
[657] European Union's first written submission, paras. 500-501.
[658] European Union' first written submission, paras. 474-475 (referring to Panel Report, *US – Softwood Lumber VII*, appealed 28 September 2020, para. 7.724) and 500.
[659] European Union's first written submission, para. 501.
[660] European Union's first written submission, paras. 501 and 504.
[661] Government Regulation 18/2015 (Exhibit IDN-115), appendices I-II.

observes that while the product coverage limitations cited by the European Union feature in the granting legislation, we note that the Commission's specificity determination does not appear to have referenced these criteria apart from noting that the programme is "available only to certain companies depending on their business activities".

7.336. The Panel is constrained to review the specificity determination that the Commission made and the reasons provided therein rather than a specificity determination that could have been made. The Panel observes that the Commission's determination describes the legal basis for the programme as the "granting of income tax facilities for investment in certain business fields and/or in certain regions", and that the Commission's specificity finding for this programme is limited to the following sentence: "The scheme is specific because it is available only to certain companies depending on their business activities in accordance with Articles 4(2)(a) of the basic Regulation."

7.337. For ease of reference, we note that Article 2.1(a) of the SCM Agreement provides that:

> Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

7.338. While the Panel observes that the legislation that establishes the income tax allowance facility appears to expressly limit access to the programme according to a list of business activities and other criteria, we also note that the Commission's specificity determination does not mention these criteria or how they interact with the list of eligible business activities. Accordingly, the Panel is of the view that the only criteria the Commission considered when evaluating whether the facility was specific was the "business activities" criteria.

7.339. We note that a prior panel that was asked to weigh the question of how 'limiting' a limitation needs to be to render "specific" a subsidy provided to a group of enterprises or industries concluded that:

> To be specific, a subsidy must be provided to a sufficiently limited "group" of enterprises or industries within the meaning of Article 2 of the SCM Agreement. Article 2 requires more than a simple demonstration that less than all of the enterprises or industries within the territory of a Member were eligible to receive the subsidy. In other words, it is not the case that any limitation whatsoever on access to a subsidy establishes specificity. Rather, it must be demonstrated that the subsidy is provided only to a sufficiently limited "group of enterprises or industries" in order to be specific within the meaning of Article 2.[662]

7.340. We agree with this analysis, which confirms our understanding that neither the Panel, nor the investigating authority, needs identify a particular number of enterprises or industries to establish that a measure is limited – and thus specific – to a "group of certain enterprises or industries". Instead, this analysis requires an investigating authority's determination to contain sufficient information and explanation to demonstrate how the eligibility criteria and circumstances support a determination that access to the programme is limited enough to be considered specific.

7.341. The European Union also contends that the granting legislation contains requirements that demonstrate that access to the facility is contingent upon the use of domestic over imported goods and export contingency, such that *per se* specificity can be shown in accordance with Article 2.3 of the SCM Agreement. The European Union argues that the Commission did not need to make a *per se* specificity finding because the basis for a finding of *de jure* specificity was clear.[663]

7.342. The Panel notes the Commission's final determination did not conclude that the programme was *per se* specific within the meaning of Article 2.3 of the SCM Agreement. As no record information thus exists to support a finding of *per se* specificity, we decline to evaluate whether the income tax allowance facility is specific on the basis that the Commission could have found – but did not find – the programme to be *per se* specific.

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[662] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1235–7.1242.
[663] European Union's first written submission, para. 502 and fn 667.

7.343. For the above reasons, the Panel finds that the Commission has provided insufficient information and explanation as to the reasons why it considered the eligibility based on the listed business activities to be sufficiently limited to justify its determination that the subsidy limits access to certain enterprises or industries. As such, the Panel is not able to evaluate the Commission's determination of whether the application of the business activities criteria "limits access" sufficiently within the meaning of Article 2.1(a) of the SCM Agreement. For this reason, the Panel finds that the Commission has not provided a reasoned and adequate explanation sufficient to justify its determination that the income tax allowance facility is specific. The Panel finds, accordingly, that the Commission's determination of the income tax allowance facility is specific is inconsistent with Articles 1.2 and 2.1 of the SCM Agreement.

7.344. Indonesia additionally contends the Commission's determination was conclusory and not preceded by any analysis such that its specificity finding was not substantiated in accordance with Article 2.4 of the SCM Agreement.[664]The Panel recalls that it has found that the Commission did not provide a reasoned and adequate explanation sufficient to justify its determination that the income tax allowance facility is specific. We therefore do not consider that it would assist in providing a positive resolution to the dispute to make further findings as to whether the Commission's determination that the income tax allowance facility is specific is also inconsistent with Article 2.4 of the SCM Agreement.

7.7 Claims concerning the Commission's alleged actions and omissions in the underlying countervailing duty investigation

7.7.1 Introduction

7.345. In its first written submission, Indonesia advances five sets of "procedural claims" challenging the Commission's "actions and omissions" in the underlying countervailing duty investigation.[665] Specifically, Indonesia submits that:

a. The Commission's decision to require the GOID to conduct a part of the investigation on behalf of the Commission and the Commission's failure to treat nickel ore mining companies as interested parties are inconsistent with Articles 10 and 12 of the SCM Agreement.

b. The Commission's application of facts available is inconsistent with Article 12.7 of the SCM Agreement.

c. The Commission's failure to disclose essential facts in sufficient time, which prevented parties/Members from defending their interests, is inconsistent with Articles 12.1 and 12.8 of the SCM Agreement, and the Commission's failure to disclose all essential facts under consideration is inconsistent with Article 12.8.

d. The Commission's failure to provide sufficient details and reasoned explanations regarding certain material issues of fact and law in the final determination is inconsistent with Article 22.3 of the SCM Agreement.

e. If the European Union submits in the context of the present dispute that the Commission did in fact conduct a pass-through analysis in the SSCRFP countervailing duty investigation – and if the Panel accepts this assertion – then Indonesia submits that the Commission failed in its procedural obligations with respect to the analysis and examination of the alleged benefit in contravention of Articles 14, 22.3, and 12.8 of the SCM Agreement.

7.346. We examine these claims in turn below.

[664] Indonesia's first written submission, para. 769.
[665] Indonesia's first written submission, para. 851.

7.7.2 Claims under Articles 12.9, 12.1, and 10 of the SCM Agreement: treatment of the nickel ore mining companies and conduct of the investigation

7.7.2.1 Introduction

7.347. As part of its investigation into whether Indonesia's SSCRFP producers received nickel ore for LTAR, the Commission solicited certain information from the GOID and from Indonesian nickel ore mining companies as input suppliers. The Commission did so, in part, by sending a questionnaire to the GOID (government questionnaire).[666] This government questionnaire: (a) requested certain information directly from the government; and (b) contained the Appendix B questionnaire, a separate questionnaire that was attached as an appendix that was described as a "questionnaire for input suppliers".[667] The Commission instructed the GOID to send the Appendix B questionnaire to "the top 10 producers and distributors of the input materials in question as well as to any other producers and distributors" of these materials and to "coordinate the response" and "attach the suppliers' reply" to the GOID's response to the government questionnaire.[668] The Commission did not designate or otherwise consider the nickel ore mining companies to be "interested parties" during the underlying investigation.[669]

7.348. Indonesia claims that Commission's conduct is inconsistent with the European Union's commitments under Articles 12.9, 12.1, and 10 of the SCM Agreement because the Commission "failed to discharge obligations that were imposed upon it as the investigating authority".[670] Specifically, Indonesia first claims, as a "threshold issue", that the European Union acted inconsistently with Article 12.9 because the Commission failed to designate nickel ore mining companies as "interested parties".[671] Second, Indonesia claims that the European Union acted inconsistently with Article 12.1 because the Commission: (a) "did not give notice to the nickel ore mining companies of the information that was required from them"[672]; and (b) "improperly forced the GOID to discharge this notification obligation"[673] and thus effectively "to conduct fact- and evidence gathering in lieu of the Commission".[674] Finally, Indonesia claims that, as a consequence of these "procedural deficiencies"[675], the European Union acted inconsistently with Article 10 because the investigation was not "conducted in accordance with the provisions of [the SCM] Agreement".[676]

7.349. The European Union requests the Panel to reject these claims in their entirety.[677] With respect to Indonesia's Article 12.9 claim, the European Union asserts that the Commission was not required to treat the nickel ore mining companies as interested parties to the SSCRFP investigation as these entities were "[a]t most, … companies supplying information or parties" to the investigation.[678] With respect to Indonesia's Article 12.1 claim, the European Union asserts that the Commission was neither obliged "to notify the nickel ore mining companies directly of the information required from them" nor "to gather information directly from them, since they were not 'interested parties'".[679] The European Union also states that it did not require "the GOID to conduct part of the investigation" but instead "merely request[ed] the exporting country [i.e. the GOID] to forward the relevant questionnaires to certain Indonesian actors in order to obtain information relevant for the investigation".[680] The European Union considers Indonesia's Article 10 claim to be "consequential" in nature, and asserts that it must be rejected in the event the Panel rejects Indonesia's Article 12.1 and 12.9 claims.[681]

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[666] See section 7.7.2.2 below.
[667] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 23.
[668] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 23.
[669] See section 7.7.2.2 below.
[670] Indonesia's first written submission, para. 883.
[671] Indonesia's second written submission, para. 587.
[672] Indonesia's first written submission, para. 914.
[673] Indonesia's first written submission, para. 914.
[674] Indonesia's first written submission, para. 883.
[675] Indonesia's first written submission, para. 869.
[676] Indonesia's first written submission, paras. 914 and 932.
[677] European Union's first written submission, para. 620.
[678] European Union's first written submission, para. 598.
[679] European Union's first written submission, para. 620.
[680] European Union's first written submission, para. 620.
[681] European Union's first written submission 574.

7.350. We begin our analysis by briefly reviewing the relevant facts as they relate to: (a) the manner in which the Commission treated the nickel ore mining companies in the underlying investigation; and (b) the nature of the Commission's information-gathering activity (section 7.7.2.2). We then recall the requirements of Articles 12.9, 12.1, and 10 of the SCM Agreement (section 7.7.2.3). Subsequently, we assess whether Indonesia has established that the European Union acted inconsistently with: (a) Article 12.9, because the Commission did not consider the nickel ore mining companies to be interested parties (section 7.7.2.4); and (b) Article 12.1, because the European Commission allegedly did not properly notify these entities of the information that they were required to produce and allegedly improperly required the GOID to conduct fact and evidence gathering (section 7.7.2.5). Finally, we consider Indonesia's Article 10 claim.

7.7.2.2 Brief overview of relevant facts in the underlying investigation

7.351. When the Commission began, and subsequently conducted, its investigation into the alleged subsidization of imports of SSCRFP, it did so by issuing a "Notice of Initiation", followed by a series of questionnaires and communications, including questionnaires and communications directed to the GOID. Upon initiation of the investigation, the Commission: (a) "specifically informed the complainant, … the GOID, known exporting producers in the countries concerned, known importers and users in the Union about the initiation of the investigation, and invited them to participate"[682]; and (b) "invited the authorities of the People's Republic of China ('GOC') to participate … as an interested party".[683] The Commission recorded these statements in its final determination. While the Commission's notice of initiation and final determination thus expressly identified several entities as "interested parties"[684], neither document stated that either SSCRFP input suppliers or Indonesian nickel ore mining companies were also considered to be "interested parties". As such, we note that Indonesia and the European Union agree that the Commission did not formally designate or otherwise invite nickel ore mining companies – as SSCRFP input suppliers – to be "interested parties" in the underlying investigation.[685]

7.352. On 18 May 2021, the Commission sent the GOID a letter and an associated "anti-subsidy questionnaire" in which the Commission sought certain "information which the European Commission deems necessary for its investigation".[686] The government questionnaire that accompanied the letter contained a series of questions to which the Commission asked the GOID to respond. The Commission's accompanying letter also stated that "answers to [the government] questionnaire may imply contacts with different authorities and public bodies, so we would be grateful if [the GOID] could coordinate the compilation of information and provide the Commission with a **consolidated reply**".[687] The government questionnaire contained a separate, additional questionnaire that was attached as an appendix (Appendix B). This attached Appendix B questionnaire was described as a "questionnaire for input suppliers"[688], and sought "[i]nformation in relation to producers and distributors of input materials, which provided inputs to the industry concerned".[689] Specifically, as noted above, the Commission instructed the GOID to send the Appendix B questionnaire to "the top 10 producers and distributors of the input materials in question as well as to any other producers and distributors" of these materials and to "coordinate the response" and to "attach the suppliers' reply" to the GOID's response to the government questionnaire. The parties agree that

[682] Countervailing duty final determination (Exhibit IDN-1), recital 8. See also Notice of initiation of countervailing duty investigation (Exhibit IDN-149), p. 18.
[683] Countervailing duty final determination (Exhibit IDN-1), recital 10. See also Notice of initiation of countervailing duty investigation (Exhibit IDN-149), p. 18.
[684] See e.g. Notice of initiation of countervailing duty investigation (Exhibit IDN-149), p. 21 (noting, *inter alia*, that "[o]ther parties will only be able to participate in the investigation as interested party from the moment they make themselves known, and provided that there is an objective link between their activities and the product under investigation").
[685] Indonesia's first written submission, paras. 898 and 899; European Union's first written submission, para. 569.
[686] GOID countervailing duty questionnaire cover letter (Exhibit IDN-125), p. 1.
[687] GOID countervailing duty questionnaire cover letter (Exhibit IDN-125), p. 1. (emphasis original)
[688] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 23.
[689] Appendix B questionnaire (Exhibit IDN-128), p. 1. For the purpose of this information request, the relevant "input materials" were nickel ore, nickel, NPI, scrap, and coal. See GOID countervailing duty questionnaire (Exhibit IDN-127), pp. 22-23.

the Appendix B questionnaire was meant to be filled out by the nickel ore mining companies as input suppliers to the SSCRFP producers.[690]

7.353. The GOID responded to the Commission's government questionnaire on 21 July 2021. In its response the GOID stated that it sent the Appendix B questionnaire "to the top 10 nickel and coal producers and distributors" and provided postal receipts in support of its assertion.[691] The GOID also provided the Appendix B responses for two nickel ore mining companies: Ekasa and Gag Nikel[692]. The Commission acknowledged these facts in its final determination, stating that the "GOID did forward the specific questionnaire intended for suppliers of input materials to known suppliers in Indonesia"[693], and noted that Appendix B replies had been received from Ekasa and Gag Nikel.[694]

7.354. On 4 October 2021, the Commission issued a deficiency letter to the GOID. This deficiency letter noted [[***]].[695] The GOID responded to the Commission's 4 October 2021 letter on 25 October 2021.[696] The GOID's 25 October 2021 response stated that [[***]] The GOID noted that it had subsequently received Appendix B responses from three additional entities, PT Tiran (Tiran), PT Bukit Asam Tbk (Bukit Asam), and Ceria and provided these responses to the Commission.[697] In its final determination, the Commission acknowledged that it received additional Appendix B replies from two nickel ore producers, Tiran and Ceria.[698]

7.355. On 10 November 2021, the Commission conducted "remote cross-checking" to "verify" the Appendix B response provided by one nickel ore mining company, Gag Nikel.[699]

7.7.2.3 Requirements under Articles 12.9, 12.1, and 10 of the SCM Agreement

7.356. Article 12.9 of the SCM Agreement reads as follows:

> For the purposes of this Agreement, "interested parties" shall include:
>
> > (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
> >
> > (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.
>
> This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

7.357. The first sentence of Article 12.9 of the SCM Agreement defines the term "interested party" to "include": (i) "an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product"; and (ii) "a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member". The use of the mandatory phrase "shall include" suggests that Article 12.9 requires investigating authorities to designate and treat the specific entities listed in

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[690] Indonesia's first written submission, para. 872; European Union's first written submission, para. 607.
[691] GOID's response to countervailing duty questionnaire (Exhibit IDN-71), p. 63.
[692] Ekasa's response to Appendix B questionnaire (Exhibit IDN-157 (BCI)); Gag Nikel's response to Appendix B questionnaire (Exhibit IDN-158 (BCI)).
[693] Countervailing duty final determination (Exhibit IDN-1), recital 340.
[694] Countervailing duty final determination (Exhibit IDN-1), recital 342.
[695] GOID countervailing duty deficiency letter (IDN-146 (BCI)), p. 3.
[696] Indonesia's response to Panel question No. 395(b); European Union's response to Panel question No. 395(b), para. 336.
[697] See GOID's response to countervailing duty deficiency letter (Exhibit IDN-83 (BCI)), pp. 10-11; Ceria's response to Appendix B questionnaire (Exhibit IDN-143 (BCI)); Tiran's response to Appendix B questionnaire (Exhibit IDN-144 (BCI)); and Bukit Asam's response to Appendix B questionnaire (Exhibit IDN-147).
[698] Countervailing duty final determination (Exhibit IDN-1), recital 342. Bukit Asam is a coal mining company. (See ibid. recital 47).
[699] Gag Nikel countervailing duty RCC report (Exhibit IDN-91 (BCI)), pp. 1 and 5.

subparagraphs (i) and (ii) as "interested parties" in all circumstances. This list is not necessarily exhaustive, however, as the last sentence of Article 12.9 permits Members – by virtue of the phrase "shall not preclude" – to allow "domestic or foreign parties other than" those mentioned in Article 12.9(i)-(ii) to be "included as interested parties".

7.358. Article 12.1 of the SCM Agreement provides that:

> Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.359. Using the mandatory word "shall", the provision requires investigating authorities to provide "[i]nterested members and all interested parties" with (a) "notice of the information" which the authorities require to conduct a countervailing duty investigation and (b) "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question".

7.360. Article 10 of the SCM Agreement states that:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[700]

7.361. Article 10 provides that a Member may only apply countervailing duties after it has initiated and conducted an investigation in accordance with the terms of SCM Agreement. This text has been understood in prior dispute proceedings to suggest that an Article 10 claim may arise when a Member has not fulfilled commitments contained in other provisions of the SCM Agreement and, in this sense, can be seen as being "consequential" to those other claims.[701] We agree with this understanding.

7.7.2.4 Claim under Article 12.9 of the SCM Agreement: Whether the Commission erred by not including the nickel ore mining companies as "interested parties"

7.362. Indonesia claims that the European Union did not fulfil its obligations under Article 12.9 of the SCM Agreement because the Commission did not include or otherwise designate Indonesia's nickel ore mining companies as "interested parties" during the course of the underlying SSCRFP investigation.

7.363. Noting that Article 12.9 of the SCM Agreement "encapsulates a broad definition of the term" "interested parties"[702], Indonesia asserts that an "interested party is <u>any</u> entity that has an 'interest' in <u>any</u> aspect of the investigation"[703]. Indonesia asserts that the "legal standard [under Article 12.9] is clear and obvious: all legitimate interested parties – i.e. entities having an interest in any aspect

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[700] Fns omitted.

[701] See e.g. Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

[702] Indonesia's first written submission, para. 870; second written submission, para. 588. Indonesia asserts that the "scope of this term is not limited to merely exporters and producers of the "product subject to investigation" (on the foreign side). Rather, the last line of the provision expands the definition of the term to include "foreign parties other than those mentioned" in sub-paragraphs (i) and (ii) of Article 12.9. Thus, a foreign input producer (and supplier/distributor) can also be included within the scope of the provision." (Indonesia's first written submission, para. 870).

[703] Indonesia's first written submission, para. 871. (underlining original; italics omitted) See also Indonesia's response to Panel question No. 306 (noting, *inter alia*, that "the moment an entity has such a legitimate interest, it <u>becomes</u> an 'interested party'" (underlining original)); second written submission, para. 592 (asserting that the "legal standard [under Article 12.9] is clear and obvious: all legitimate interested parties – i.e., entities having an interest in any aspect of the investigation – must be designated as such by the investigating authority").

of the investigation – must be designated as such by the investigating authority".[704] Indonesia submits that the Commission sourced, verified, and used information from the nickel ore mining companies, and found them "intricate" to the alleged subsidization. For Indonesia, the "[n]ickel ore mining companies were legitimate interested parties" because "information held by them was crucial; and this information was sourced, verified, and used, by the Commission".[705] While it does not claim that investigating authorities "are, in all cases and in the abstract, '*obliged*' under Article 12.9 … to treat a particular entity (or a certain type of entity, such as input suppliers) as an interested party (or that doing so, in all situations, is '*compulsory*')"[706], Indonesia claims that "*specifically in the context of the SSCRFP investigation*, the facts before the Commission were such that a reasonable and unbiased investigating authority would have found the nickel ore mining companies were indeed interested parties".[707]

7.364. Rejecting Indonesia's claim, the European Union notes that, while "Article 12.9 of the SCM Agreement includes a mandatory list of interested parties" the provision provides an "investigating authority wide discretion as to which other entities could be granted the status of 'interested party'".[708] The European Union asserts that the nickel ore mining companies were not "interested parties" and that the Commission did not need to treat them as such.[709] Specifically, the European Union asserts that "Article 12 of the SCM Agreement does not prevent investigating authorities from seeking information from entities that are not an 'interested party', such as input suppliers of the exporting producers," nor require authorities to provide such parties with the same due process rights as they provide to "interested parties".[710] As such, the European Union states that Indonesia "confuses the right to designate an entity as [an] interested party under Article 12.9 last sentence [of the] SCM Agreement with an obligation to do so".[711] The European Union asserts that the government questionnaire – to which Appendix B was attached – "was addressed correctly to the GOID, [as] 'the interested Member'", and notes that the GOID did, in fact, forward the Appendix B questionnaire to the nickel ore mining companies.[712] Given this, the European Union asserts that the nickel ore mining companies were, at most, "companies supplying information or parties to the SSCR investigation" and thus were properly not treated as "interested parties" by the Commission.[713]

7.365. While Indonesia states that it does "not submit that the residual clause in [Article] 12.9 *generally* obliges authorities to act in a certain way"[714], it maintains that, in cases where an entity holds a "legitimate" or "certain interest", the provision requires such an entity to "be '*included as [an] interested part[y]*'" by the investigating authority.[715] Insofar as Indonesia's claim relates to the interpretation of Article 12.9 of the SCM Agreement, we note that the first sentence of Article 12.9 identifies, in a non-exhaustive manner, certain specific entities (e.g. "exporter", "foreign producer", and "producer of the like product in the importing Member") that must be considered to be "interested parties" during a countervailing duty investigation. Indonesia does not argue that the nickel ore mining companies are among the entities that are specifically identified in the first sentence of Article 12.9.

[704] Indonesia's second written submission, para. 592 (referring to Panel Report, *Argentina – Poultry Anti Dumping Duties*, para. 7.131; Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.150 – 5.152). (fns omitted)

[705] Indonesia's response to Panel question No. 306. (emphasis original)

[706] Indonesia's second written submission, para. 591. (emphasis original) See also Indonesia's response to Panel question No. 306 (noting that "[w]e do not submit that the residual clause in 12.9 *generally* obliges authorities to act in a certain way" (emphasis original)).

[707] Indonesia's second written submission, para. 591. (emphasis original) See also Indonesia's response to Panel question No. 306 (noting that "in the context of the *SSCR investigation*, the facts at issue necessitated the designation of nickel companies as 'interested parties'" as information held by the nickel ore mining companies "was crucial … sourced, verified, and used, by the Commission" (emphasis original)).

[708] European Union's first written submission, para. 575.

[709] European Union's first written submission, para. 576 (stating that "the nickel ore mining companies were either 'parties to an investigation'" or merely parties "supplying information to the Commission", not "interested parties").

[710] European Union's first written submission, para. 580.

[711] European Union's second written submission, para. 259.

[712] European Union's comments on Indonesia's response to Panel question No. 309, para. 153.

[713] European Union's first written submission, para. 598.

[714] Indonesia's response to Panel question No. 306. (emphasis original)

[715] Indonesia's response to Panel question No. 306. (emphasis original)

7.366. Indonesia's arguments instead relate to the last sentence of Article 12.9 of the SCM Agreement, which as noted above, states that Members are not precluded from "allowing" entities other than those explicitly listed in the first part of the provision to be included as "interested parties" during an investigation. Indonesia argues that the term "allowing" in Article 12.9 suggests "that an authority must *'allow'* certain entities" to be treated as "interested parties".[716] We note, however, that the provision does not use the obligatory term "must". Instead, it uses the phrase "not preclude". The word "preclude" has been defined, *inter alia*, to mean "to remove the possibility of (an event, etc.) occurring, to make impossible; to rule out".[717] Given this, we are of the view that the phrase "not precluded" in the last sentence of Article 12.9 can be interpreted as contemplating the possibility of – or as not ruling out – that an authority *may* designate other (i.e. non-listed) entities as interested parties when conducting a countervailing duty proceeding. In this sense, we view the last sentence of Article 12.9 as being *permissive,* rather than obligatory, in nature[718] and we agree with the observation that the provision "connotes the power or authority given to a Member to include other parties as interested parties".[719]

7.367. Moreover, we note that Article 12.9 of the SCM Agreement does not define either the term "interested parties" or identify any particular "interest" that such parties must possess in the abstract in order to be considered to be an "interested party". The absence of such definitions supports our understanding that the last sentence of Article 12.9 does not *require* or *oblige* investigating authorities to always include as "interested parties" entities that may have a particular "interest" in an investigation. We note, in this regard, the statement in the Appellate Body report in *Japan – DRAMs (Korea)* that "Article 12.9 of the SCM Agreement does not, by its explicit terms, require that an investigating authority must establish that a party has 'an interest in the outcome of [a] proceeding'. Nor do we see any provision of the SCM Agreement that defines the nature of the interest required for an entity to be included as an interested party."[720]

7.368. We now address Indonesia's argument that, in the specific facts and circumstances of the underlying investigation, the Commission "abus[ed]", or "manifestly erred in exercising", its discretion under Article 12.9 of the SCM Agreement by not designating the nickel ore mining companies as "interested parties".[721]

7.369. The parties agree that the Commission did not formally designate or invite nickel ore mining companies – as input suppliers to the allegedly subsidized stainless steel producers in Indonesia – to be "interested parties" in the underlying investigation.[722] The parties also agree that the Commission sought information from and relating to the nickel ore mining companies via the Appendix B questionnaire that was attached to the government questionnaire that the Commission sent to the GOID as the "interested Member".[723] As noted above, the instructions to the government questionnaire asked the GOID to "forward" the Appendix B questionnaire to "the top 10 producers and distributors of the input materials in question" and to "coordinate" and "attach" these Appendix B responses to the GOID's "main questionnaire reply".[724] The "GOID did forward the specific questionnaire" to the nickel ore mining companies[725], and several nickel ore mining companies replied to the Appendix B questionnaire.[726] The Commission also verified the Appendix B response provided by one nickel ore mining company.[727]

7.370. Given this, and given that the Commission "sourced, verified, and used" information from the nickel ore mining companies that Indonesia claims was "crucial" for the Commission's final determination, Indonesia asserts that these companies were "legitimate interested parties" in the

[716] Indonesia's response to Panel question No. 306. (italics original; underlining added)
[717] Oxford Dictionaries online, definition of "preclude" https://www.oed.com/dictionary/preclude_v?tab=meaning_and_use (accessed 10 June 2025), meaning 3.
[718] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.117 (discussing Article 6.11 of the Anti-Dumping Agreement, a provision that is similarly worded and analogous to Article 12.9 of the SCM Agreement).
[719] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 240.
[720] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 237.
[721] Indonesia's response to Panel question No. 306.
[722] Indonesia's first written submission, paras. 898 and 899; European Union's first written submission, para. 569.
[723] Indonesia's first written submission, para. 872; European Union's first written submission, para. 607.
[724] GOID countervailing duty questionnaire (Exhibit IDN-127), p. 23. (emphasis omitted)
[725] Countervailing duty final determination (Exhibit IDN-1), recital 340.
[726] Countervailing duty final determination (Exhibit IDN-1), recital 342.
[727] Gag Nikel countervailing duty RCC report (Exhibit IDN-91 (BCI)), pp. 1 and 5.

investigation and should have been designated as such by the Commission.[728] Indonesia supports this assertion by stating that: (a) the information about these companies was used to make a determination of subsidization[729]; (b) the information submitted by the nickel ore mining companies was subject to verification[730]; and (c) "the interest of the nickel ore mining companies was known to the Commission from the outset of the investigation, since the alleged involvement of these companies, in alleged subsidization, was expressly stated in the complaint".[731]

7.371. With respect to Indonesia's suggestion that the nickel ore mining companies should have been designated as "interested parties" because the Commission sought and used information from them and because they held or possessed information that was relevant to the Commission's subsidy analysis[732], we note that Article 12.9 of the SCM Agreement does not contain language or otherwise define the term "interested parties" in a manner that suggests that an entity must be included as an interested party merely because: (a) it possesses or provides relevant information to an investigating authority; or (b) an authority either seeks information from, or uses information obtained from, that entity. Rather, as discussed above, Article 12.9 identifies the specific entities that shall always be included as "interested parties" and leaves open the *possibility* that other entities may also be included as "interested parties" by an investigating authority.

7.372. Moreover, we note that Article 12 of the SCM Agreement, entitled "Evidence", concerns the information gathering process in an investigation, and lists several different entities besides "interested parties". For example, Article 12.4, which discusses the confidential treatment of submitted information, refers to a number of different entities, including: (a) "a person supplying the information"; (b) "a person from whom the supplier acquired the information"; and (c) the "parties to an investigation". The use of these different terms to identify other entities involved in the information gathering process during an investigation provides contextual support for the understanding that not all entities that possess or provide relevant or necessary information to an investigating authority must be considered to be "interested parties" in an investigation. We also note, in this regard, the statement in the Appellate Body report in *Japan – DRAMs (Korea)* that, "in conducting its investigation, an investigating authority may also seek information from entities not designated as interested parties".[733] If an authority may, as part of its investigation, legitimately "source information from 'non-interested parties'" – a proposition with which Indonesia agrees[734] – then not every entity from which information is sourced must always be included as an "interested party".[735] We therefore find it difficult to accept Indonesia's argument that the act of "seeking information" from an entity "confer[s] an 'interest'" upon that entity such that it must be designated as an "interested party".[736] As discussed above, Article 12 of the SCM Agreement contemplates the involvement of many different entities in the information gathering process during an investigation and does not require that all entities from which an authority sources information to be designated as "interested parties".

7.373. Indonesia cites the Appellate Body report in *EC – Fasteners (China) (Article 21.5 – China)* to support its position that the fact that the Commission "verified information submitted by and responses made by a nickel ore mining company (PT GAG Nikel)" establishes that the Commission effectively "treated" the companies as interested parties but did not provide them with any of the corresponding rights that are accorded to such parties.[737] The parties do not dispute that the Commission verified Gag Nikel's Appendix B response. We note, however, that Article 12.6 of the SCM Agreement states that investigating authorities "may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object". As such, we note that the plain text of Article 12.6 does *not* state that authorities may carry out investigations on the premises – or examine the records of

[728] Indonesia's response to Panel question No. 306. See also Indonesia's second written submission, para. 588 and 596; first written submission, para. 903.
[729] Indonesia's second written submission, para. 588.
[730] Indonesia's second written submission, para. 588.
[731] Indonesia's first written submission, para. 900.
[732] Indonesia's first written submission, para. 891.
[733] Appellate Body Report, *Japan – DRAMs (Korea)*, fn 446.
[734] Indonesia's response to Panel question No. 307.
[735] See also Canada's third-party response to Panel question No. 27, para. 29 (noting that "requesting information from an entity does not, by itself, grant that entity 'interested party' status").
[736] Indonesia's first written submission, para. 892. See also Indonesia's response to Panel question No. 307.
[737] Indonesia's second written submission, paras. 600 and 597.

– an "interested party". As we disagree with Indonesia that "the term 'firm' in Article 12.6 and 'interested party' in Article 12.9 are one and the same"[738], we consider that the text of Article 12.6 supports our view that Article 12.9 does not require investigating authorities to include as an "interested party" (as that term is used in Article 12.9) every entity whose records may be subject to verification. We therefore also find it difficult to accept Indonesia's argument that "if an entity was relevant enough to warrant verification, then it logically follows that it should have been granted the procedural rights of an 'interested party'".[739]

7.374. Indonesia claims that the "current case is analogous to the situation in" *Japan – DRAMs (Korea)* as the nickel ore mining companies were, "through the Commission's actions and decisions, 'engaged, or involved in the matter under investigation to such an extent that [they] ha[d] an interest in the matter'".[740] Although the situation in *Japan – DRAMs (Korea)* also raised questions involving an authority's "interested parties" designation, we are of the view that the circumstances of that proceeding differ significantly from the present dispute in one important respect. In *Japan – DRAMs (Korea)*, Korea claimed that the Japanese investigating authority impermissibly exercised its discretion under the last sentence of Article 12.9 of the SCM Agreement by impermissibly *including* as "interested parties" certain financial institutions that had provided financing to the exporter at issue.[741] By contrast, in the present dispute, Indonesia challenges the Commission's alleged *failure to include* nickel ore mining companies as interested parties.

7.375. Put differently, while *Japan – DRAMs (Korea)* concerned the question of whether the investigating authority *could* include the financial institutions in that dispute as interested parties, the present dispute concerns the question of whether the Commission was *required* to include the nickel ore mining companies as interested parties. Given this, we are of the view that the statements in the Appellate Body report in *Japan – DRAMs (Korea)* on which Indonesia relies, at most, support the proposition that an investigating authority has "some discretion to include as interested parties entities that are relevant for carrying out an objective investigation and for obtaining information or evidence relevant to the investigation at hand".[742] We find it difficult to extrapolate from the existence of such discretion a *requirement* that investigating authorities *must always include* such entities as interested parties in an investigation.[743] Rather, the permissive text in the last sentence of Article 12.9 of the SCM Agreement appears to contemplate the existence of potentially diverse practices amongst investigating authorities on this issue, and does not mandate that all parties that possess or provide necessary information to an investigating authority must be included as an "interested party" in an investigation.

7.376. The above analysis is also relevant to our consideration of Indonesia's assertion that the nickel ore mining companies were "interested parties" because the complaint in the underlying proceeding alleged – and the Commission found – that these companies "were involved in the provision of subsidies (in the form of provision of nickel at less than adequate remuneration) to the SSCRFP producers".[744] Indonesia supports this assertion based on the panel's statement in *Japan – DRAMs (Korea)* that the "'interest' of an 'interested party' can arise from the fact that it was alleged to be 'a party was involved in the provision of … subsidies'".[745] We note that the panel report in that dispute stated that "a party *may* be an interested party when it was engaged, or involved, in the matter under investigation to such an extent that it has an interest in that matter".[746] As the *Japan – DRAMs (Korea)* panel focused on the question of whether an entity that was involved in the provision of subsidies "may" – not "must" – be considered to be an interested party, we are unable to conclude that this report supports Indonesia's position that Article 12.9 of the SCM Agreement

[738] Indonesia's response to Panel question No. 309(b).
[739] Indonesia's response to Panel question No. 309(b).
[740] Indonesia's second written submission, para. 588 (quoting Panel Report, *Japan – DRAMs (Korea)*, para. 7.387).
[741] Appellate Body Report, *Japan – DRAMs (Korea)*, para 237.
[742] Appellate Body Report, *Japan – DRAMs (Korea)*, para 242.
[743] See also Canada's third-party response to Panel question No. 27, para. 29 (noting that the "existing cases on the interpretation of 'interested party' were decided in the context of challenges to an investigating authority's decision to treat entities as interested parties; they do not stand for the proposition that an investigating authority has an obligation to treat an entity as an interested party if certain criteria are met").
[744] Indonesia's first written submission, paras. 886 and 888.
[745] Indonesia's first written submission, para. 886 (quoting Panel Report*, Japan – DRAMs (Korea)*, para. 7.387).
[746] Panel Report, *Japan – DRAMs (Korea)*, para 7.387. (emphasis added)

must be interpreted to require investigating authorities to consider all entities that may be involved in the provision of subsidies to be interested parties.[747]

7.377. In sum, the fact that the Commission sourced, verified, and used information from or about the nickel ore mining companies does not, in our view, establish that the Commission effectively "treated" the nickel ore mining companies as "interested parties". We therefore reject Indonesia's claim that the Commission's failure to designate nickel ore mining companies as "interested parties" in the underlying investigation resulted in a violation of Article 12.9 of the SCM Agreement.

7.7.2.5 Claim under Article 12.1 of the SCM Agreement

7.378. Indonesia presents two grounds in support of its Article 12.1 claim. First, Indonesia argues that the Commission failed to provide notice to the nickel ore mining companies – as interested parties – of the information that the authority required from them and impermissibly delegated this responsibility to the GOID.[748] Second, Indonesia asserts that the Commission improperly forced the GOID to conduct fact-finding on its behalf.[749]

7.379. Indonesia asserts that Article 12.1 of the SCM Agreement imposes a "distinct" obligation on investigating authorities to "direct[ly]"[750] "notify the interested parties/Members of the information required from them" when conducting an investigation.[751] Indonesia asserts that, "[a]s 'interested parties' in the SSCRFP CVD investigation", nickel ore mining companies were "entitled to receive a notice from the Commission of the information required from them" but that the Commission did not do so and improperly "imposed this responsibility (obligation) on the GOID".[752] In response to questioning by the Panel, Indonesia also asserts that "whether or not they were 'interested parties', the nickel mining companies should have received a notice for the 'information which the authorities require', since the Commission sought information from them"[753] and since the Commission had "actual knowledge" of the nickel ore companies through the complaint initiating the investigation.[754]

7.380. The European Union responds that, because the Commission did not consider (and need not have considered) the nickel ore mining companies to be "interested parties" in the underlying countervailing duty investigation, "[Indonesia's] entire claim under this heading is ineffective".[755]

7.381. As discussed above at paragraphs 7.358-7.359 above, Article 12.1 of the SCM Agreement requires "[i]nterested members and all interested parties" to "be given notice of the information which the authorities require". The plain text of Article 12.1 thus provides that "notice of the information which the authorities require" must only be provided to: (a) interested Members; and (b) interested parties. Given that we have determined, per the discussion in section 7.7.2.4 above, that the Commission did not err by not designating the nickel ore mining companies to be "interested parties" in the underlying investigation, it is not clear to us how Article 12.1 could be seen to nonetheless have required the Commission to directly provide to these entities "notice of the information which the authorities require".

7.382. Indonesia argues that the Commission was required to give notice to the nickel ore mining companies because the Commission had "*actual knowledge of*" these parties by virtue of information contained in the complaint on which investigation was based, and because the GOID provided the companies' details to the Commission.[756] Indonesia supports its position that Article 12.1 of the SCM Agreement required the Commission to have provided this notice based on language contained

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[747] As relevant context, we note that Article 1.1(a)(1) provides that, under certain circumstances, a financial contribution may be provided by a "public body" or a "private body" in addition to a "government". However, Article 12.9 does not require these entities to be treated as "interested parties" in all circumstances.

[748] Indonesia's first written submission, para. 907.

[749] Indonesia's first written submission, para. 922.

[750] Indonesia's second written submission, section V.A.3 (titled "Article 12.1 of the SCM Agreement requires a direct notification (communication or conveyance of information) from the investigating authority").

[751] Indonesia's first written submission, para. 857.

[752] Indonesia's first written submission, para. 907.

[753] Indonesia's response to Panel question No. 310(a). (emphasis omitted)

[754] Indonesia's first written submission, para. 913 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 249-252).

[755] European Union's first written submission, para. 601.

[756] Indonesia's first written submission, para. 913.

in the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice.*[757] We note, however, that the language that Indonesia references in this report states that "the explicit reference in Article 6.1.3 [of the Anti-Dumping Agreement] to 'known exporters' supports the view that the exporters that shall be given notice of the required information under Article 6.1 are the exporters known to the investigating authority".[758] We also note that the cited analysis in that dispute did *not* relate to the extent to which the notification requirement extended to any or all entities that the investigating authority had actual knowledge of (as Indonesia argues). Rather, the analysis in that report concerned the notification requirement under Article 6.1 in respect of the *exporters as interested parties.*[759]

7.383. Given this, and given that the plain text of Article 12.1 of the SCM Agreement does not require an authority to provide "notice" of information to any entities other than "[i]nterested Members and all interested parties", it is not clear to us how the specific circumstances in *Mexico – Anti-Dumping Measures on Rice* can be viewed as establishing a general notification rule for entities that are not "interested Members" or "interested parties". We therefore disagree with Indonesia that *Mexico – Anti-Dumping Measures on Rice* establishes that *all entities* – regardless of whether they are "interested parties" – of which an investigating authority has "actual knowledge" must be given notice of the information required from them.

7.384. Indonesia also argues that the Commission "erred by requiring the GOID to conduct a part of the SSCRFP CVD investigation in lieu of the Commission".[760] According to Indonesia, the Commission "made the GOID responsible for collecting information – in the form of filled questionnaire responses – from the nickel ore mining companies".[761] Indonesia thus claims that the Commission acted inconsistently with Article 12.1 of the SCM Agreement because "the corollary of the obligation [under that provision] that it must be the investigating authority providing notice to the interested parties, is that it is the authority that must collect this information (*i.e.* the '*information which the authorit[y] requires*')."[762]

7.385. The European Union responds that the "Commission was in its right to consider the most effective way of gathering all necessary information, in this case via the GOID".[763] The European Union states that the Commission "did not request the GOID to conduct part of the investigation", but, instead, "merely request[ed] the exporting country to forward the relevant questionnaires to certain Indonesian actors in order to obtain information relevant for the investigation".[764] As such, the European Union asserts that investigating authorities may relay communications "to the different other stakeholders in an investigation through more effective means than direct communication".[765]

7.386. Indonesia's claim concerning the allegedly improper transfer of the Commission's fact-finding and evidence-gathering responsibility from the Commission to the GOID is closely related to its claim that the Commission erred when it did not directly notify the nickel ore mining companies of the information that was required from them.[766] Essentially, Indonesia argues that Article 12.1 of the SCM Agreement mandates investigating authorities to only "seek information

[757] Indonesia's first written submission, para. 913. That dispute concerned, *inter alia*, Article 6.1 of the Anti-Dumping Agreement. Article 6.1 of the Anti-Dumping Agreement is similarly worded to Article 12.1 of the SCM Agreement, and states that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require".

[758] Appellate Body Report, *Mexico – Anti*-Dumping *Measures on Rice*, para. 250.

[759] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 246 (noting that, "Article 6.11(i) [of the Anti-Dumping Agreement] defines 'interested parties' for the purposes of the Agreement to include 'an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product'").

[760] Indonesia's first written submission, para. 853.

[761] Indonesia's first written submission, para. 922.

[762] Indonesia's first written submission, para. 923. (emphasis original)

[763] European Union's first written submission, para. 618.

[764] European Union's first written submission, para. 620.

[765] European Union's first written submission, para. 615.

[766] See e.g. Indonesia's first written submission, fn 1335 (noting that, "[s]ince the Commission failed to establish a direct line of communication (via the valid discharge of its obligation under Article 12.1 of the SCM Agreement), it was inevitable that the Commission would also be incapable of directly seeking information from these companies – i.e., to conduct fact-finding with respect to these companies.")

'*directly*' from the party that is '*in possession*' of the information at issue".[767] Stated differently, Indonesia suggests that the Commission should, and could only, have solicited Appendix B responses "directly" from the nickel ore mining companies – as opposed to channelling them through the GOID – as the information at issue concerned these companies and was in their possession.[768] Indonesia submits that the "problem with the Commission's approach is that … it was *the GOID* that was made to collect the information at issue".[769]

7.387. Indonesia's argument raises the question of whether Article 12.1 of the SCM Agreement requires an investigating authority to always seek information "directly" from the party that is in possession of the information or to whom such information relates. As we have discussed at paragraphs 7.358, 7.359, and 7.381 above, Article 12.1 requires "interested Members and all interested parties" to be given "notice of the information that is required" of them and "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question". Article 12.1 does not mention any other type of entity, including a party that is in "possession" of required information. It is therefore not clear to us how the text of Article 12.1 can be viewed as establishing a rule that an authority may only seek required information "directly" from the party that holds it.[770]

7.388. To the contrary, we note that Article 12 of the SCM Agreement (which provides immediate context for our analysis of Article 12.1) envisages that several different entities may be involved when evidence is gathered during an investigation. While Article 12.9 relates to "interested parties", we note that Article 12.4 – which contains rules requiring authorities to accord confidential treatment to certain categories of information – refers to "a person from whom the supplier acquired the information". This language indicates that the drafters of the SCM Agreement recognized that an authority may, as part of the investigative process, elect to seek information from an entity (i.e. "the supplier" of such information to the authority) which may, in turn, "acquire[] the information" from another "person". Stated differently, we are of the view that Article 12.4 contemplates the possibility that an entity that supplies information to an investigating authority may not necessarily possess the information at issue and would have to "acquire[]" it from another "person".[771] If information could only ever be sought directly from the party that possesses it, then there would be no need for another entity to "acquire" such information. The context provided by Article 12.4 thus does not support the proposition that investigating authorities can only ever seek information directly from the parties that possess it.

7.389. Indonesia seeks to support its position that an authority may only solicit information directly from an entity that holds it based on the Appellate Body report in *US – Hot-Rolled Steel*. The relevant issue in that dispute involved the question of whether an authority could apply facts available where an interested party asserted that it had "repeatedly reported" that it had encountered difficulties in obtaining information from another entity, and the authority did not provide any guidance or assistance to the interested party to "overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied".[772] Indonesia notes that in those particular circumstances, the Appellate Body report saw "nothing in the Anti-Dumping Agreement which would have prevented" the authority from asking directly the other entity for the information that was in its possession.[773] While this may well be the case, it is not entirely clear to us how the language in the *US – Hot-Rolled Steel* Appellate Body report can be read to *require* investigating authorities to *always* directly seek and collect information from an entity that possesses such information. Indeed, we note that the same report did not fault the investigating authority merely because it sought information from or about an entity through an interested party in the first instance, but rather

[767] Indonesia's first written submission, para. 925; second written submission, para. 632 (referring to and quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 106). (emphasis original)
[768] Indonesia's first written submission, para. 925.
[769] Indonesia's second written submission, para. 632. (emphasis original)
[770] We discuss Indonesia's related Article 12.7 argument in section 7.7.3.2 below.
[771] See e.g. European Union's comments on Indonesia's response to Panel question No. 311(b), para. 159 (noting that "Article 12.4 [of the] SCM Agreement clearly presupposes a case in which information requested by the investigating authority stems, is or was in the possession of [another] 'person from whom the supplier [of the investigating authority] acquired the information'").
[772] See Indonesia's first written submission, fn 1357 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 106).
[773] See Indonesia's first written submission, para. 925 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 106).

because it subsequently did not sufficiently engage with the interested party when it repeatedly reported difficulties in acquiring the requested information from the other entity.

7.390. For these reasons, we disagree with Indonesia that the Commission impermissibly transferred its responsibilities pursuant to Article 12.1 of the SCM Agreement to "conduct fact-finding", "gather facts and evidence", and "collect[] information"[774] by asking the GOID to: (a) forward the Appendix B questionnaire to the nickel ore mining companies; and (b) collect and return the companies' responses to the Commission, rather than initially sending the questionnaire directly to the companies themselves. Contrary to Indonesia's assertions, the plain text of Article 12.1 does not contain a general requirement that an investigating authority must always seek information directly from an entity that possesses such information or to whom it relates. This understanding is supported when Article 12.1 is considered in its immediate context of Article 12 as a whole, and Article 12.4 in particular, which expressly contemplates the possibility that an entity supplying information to the authority may not itself possess the requested information and thus would have to "acquire[]" it from another entity.

7.391. The fact that investigating authorities may elect to "channel" a request for information through an interested party or an interested Member does not, of course, mean that an authority is not required to further engage with an interested party or an interested Member as part of the evidence gathering process should the circumstances require. The nature of this type of further engagement, however, is a different issue and may vary from case to case based on, among other things: (a) the type of information requested; (b) the nature of the relationship between the interested parties or interested Members and other entities that may possess the requested information; and (c) any specific difficulties that an interested party or interested Member may face in acquiring the requested information. In our view, these factual considerations do not establish the existence of a general Article 12.1 rule that precludes authorities from seeking information from particular entities in the first instance, but, instead, may be factors that are relevant for evaluating, for example, an Article 12.7 claim concerning the application of facts available.

7.7.2.6 Conclusion with respect to Indonesia's claims under Articles 12.9, 12.1, and 10 of the SCM Agreement

7.392. For the above reasons, we find that Indonesia has not established that, by not designating nickel ore mining companies as "interested parties" in the underlying investigation, the Commission acted inconsistently with Article 12.9 of the SCM Agreement. We also find that Indonesia has not established that the Commission acted inconsistently with Article 12.1 of the SCM Agreement because it did not directly notify the nickel ore mining companies of the information that was required from them, or because it allegedly transferred its fact-finding responsibilities as an investigating authority to the GOID. Based on this, we also find that Indonesia has not established its consequential claim that the European Union acted inconsistently with its obligations under Article 10 of the SCM Agreement.[775]

7.7.3 Claims under Article 12.7 of the SCM Agreement: application of facts available

7.7.3.1 Introduction

7.393. In its final determination, the Commission stated that it could not collect certain information that it needed to complete its subsidy analysis due to the non-cooperation of the GOID, nickel ore mining companies, the IRNC Group, and the Chinese parent companies of the IRNC Group and that it therefore had to rely on facts available when it evaluated the alleged provision of nickel ore for LTAR, the alleged preferential financing and other support provided by certain Chinese grantors under the bilateral cooperation framework, and the government revenue forgone or not collected, noting, for example, that "with regard to the alleged government provision of nickel ore for less than adequate remuneration, the GOID did not provide the necessary information and evidence as requested by the Commission in its questionnaire and during the RCC".[776] Therefore, "in the absence of information to the contrary received from the GOID, the Commission partially relied on facts

[774] Indonesia's first written submission, paras. 922-923.
[775] See paras. 7.348 and 7.361 above.
[776] Countervailing duty final determination (Exhibit IDN-1), recital 353.

available for its findings regarding those aspects of the investigation in accordance with Article 28 of the basic Regulation".[777]

7.394. Indonesia claims that the Commission's application of facts available with respect to the alleged (a) provision of nickel ore for LTAR, (b) provision of preferential financing and other support by the Chinese grantors, and (c) government revenue forgone was inconsistent with Article 12.7 of the SCM Agreement because it:[778]

a. impermissibly resorted to facts available "with respect to" or "against"[779] the nickel ore mining companies;

b. improperly attributed the alleged non-cooperation of the nickel ore mining companies to the GOID;

c. resorted to facts available based on the improper conclusions that the GOID or the IRNC Group failed to provide necessary information within a reasonable period or significantly impeded the investigation; and

d. selected replacement facts that did not "reasonably replace" the information that was allegedly missing.

7.395. We begin our analysis by examining the "cross-cutting"[780] or "legal"[781] considerations underlying Indonesia's claims (points (a) and (b) above) in section 7.7.3.2. After a brief review of the requirements under Article 12.7 of the SCM Agreement (section 7.7.3.3) we then consider Indonesia's claims challenging specific instances in which the Commission applied facts available in the context of its findings on the alleged: (i) provision of nickel ore for LTAR (section 7.7.3.4); (ii) provision of preferential financing and other support by the Chinese grantors (section 7.7.3.5); and (iii) government revenue forgone or not collected (section 7.7.3.6).[782]

7.7.3.2 Indonesia's "cross-cutting" arguments

7.396. Indonesia presents three related "cross-cutting" or "legal" considerations underlying its Article 12.7 claims. First, Indonesia submits that facts available "are always to be applied with respect to a particular entity"[783]. Second, Indonesia argues that "an application of facts available *against* an entity cannot be justified on the basis of non-cooperation of some other entity".[784] Finally, Indonesia submits that the "authority can only seek information from (and complain about non-cooperation with respect to) the entity that actually possesses o[r] holds the information at issue".[785] Based on these cross-cutting considerations, Indonesia makes two claims. First, Indonesia asserts that the Commission erroneously had "'*de facto*' resort to facts available with respect to the nickel ore mining companies".[786] Second, Indonesia claims that the Commission improperly "attribut[ed]" the alleged non-cooperation of the nickel ore mining companies to the GOID.[787]

7.397. We note that Indonesia's cross-cutting considerations relate to the same aspect of the conduct of the investigation that is the subject of Indonesia's Article 12.1 claim discussed in section 7.7.2.5 above. Specifically, Indonesia's arguments under both sets of claims challenge the Commission's decision to seek information from the nickel ore mining companies *through* the GOID rather than directly from the companies themselves (i.e. by asking the GOID to forward the Appendix B questionnaire to the nickel ore mining companies and to collect and return the companies' responses to the Commission). As such, both sets of Indonesia's claims are premised on the argument that investigating authorities can only seek information *directly* from an entity that

[777] Countervailing duty final determination (Exhibit IDN-1), recital 354.
[778] Indonesia's first written submission, para. 941.
[779] Indonesia's second written submission, para. 660.
[780] Indonesia's first written submission, para. 954.
[781] Indonesia's second written submission, para. 648.
[782] Indonesia's second written submission, para. 648.
[783] Indonesia's second written submission, para. 648.
[784] Indonesia's second written submission, para. 648. (emphasis added)
[785] Indonesia's second written submission, para. 648.
[786] Indonesia's second written submission, para. 696.
[787] Indonesia's first written submission, para. 1000.

possesses or holds requested information and thus cannot channel information requests through an interested Member or an interested party.

7.398. To recall, under its Article 12.1 claim, Indonesia argues that "an authority *must* seek information '*directly*' from the party that is '*in possession*' of the information at issue".[788] With respect to its Article 12.7 claim, Indonesia similarly argues that an "authority can only seek information from (and complain about non-cooperation with respect to) the entity that actually possesses o[r] holds the information at issue", in this case, the nickel ore mining companies.[789] On this basis, Indonesia argues that the Commission actually resorted to facts available "with respect to" or "against" the nickel ore mining companies, "or at least their missing information"[790]. Relatedly, Indonesia alleges that the Commission improperly resorted to facts available "against" the GOID based on the alleged non-cooperation of the mining companies.

7.399. As discussed in our analysis of Indonesia's Article 12.1 claim in section 7.7.2.5 above, we are of the view that the SCM Agreement does not preclude an investigating authority from seeking information from an entity – such as an interested Member or an interested party – notwithstanding that the entity may need to acquire requested material from another person. This conclusion continues to apply – and informs our reasoning – as we evaluate Indonesia's Article 12.7 claims, including Indonesia's "cross-cutting" argument that "it is only information that is actually possessed or held by an entity that can be requested by an authority, and not information that could theoretically, possibly, be obtained by it".[791]

7.400. Indonesia considers it "evident" that the text of Article 12.7 of the SCM Agreement establishes that an authority can only "seek information from an entity (in the context of the authority's resort to facts available) if that information is actually held by or is possessed by that entity".[792] Indonesia reaches this conclusion by asserting that, because Article 12.7 "speaks of '*necessary information*' that an interested party/Member has '*refuse[d] access to*' or … otherwise not 'provide[d]'", it logically follows that Article 12.7 "recognizes that the information at issue must be of the type that a party/Member can give '*access*' to … or can otherwise '*provide*' … to the authority".[793] Recalling the dictionary definition of the words "access" and "provide", Indonesia submits that Article 12.7 stands for the proposition that "facts available" may "only [be] applie[d] to information requested from an entity that the entity has the '*ability*' to give to the authority; or information that the entity can actually '*give*' to the authority".[794] According to Indonesia, an "authority is not at liberty to resort to facts available on the basis of information that it sought from an entity that did not actually hold or possess, since it was not information that the entity had the ability to provide to the authority".[795] Indonesia thus appears to argue that an entity will *only* have the "ability" to provide information to an authority if it "actually hold[s] or possess[es]" such information.[796]

7.401. The European Union responds that information can be sought from an entity if it is in "possession" of the entity, or is "legally accessible"[797] or "[can] be obtained"[798] by it.

7.402. Article 12.7 of the SCM Agreement states that:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

[788] Indonesia's second written submission, para. 632 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 106). (emphasis original) See also Indonesia's first written submission, para. 925.
[789] Indonesia's second written submission, para. 648.
[790] Indonesia's response to Panel question No. 137.
[791] Indonesia's second written submission, para. 686.
[792] Indonesia's second written submission, para. 684.
[793] Indonesia's second written submission, para. 684. (emphasis original)
[794] Indonesia's second written submission, para. 685. (emphasis original)
[795] Indonesia's second written submission, para. 685.
[796] Indonesia's second written submission, para. 685.
[797] European Union's response to Panel question No. 133, para. 290.
[798] European Union's first written submission, para. 613.

7.403. We note that the text of Article 12.7 of the SCM Agreement does not use the word "ability". It also does not expressly state that "facts available" may only be applied when an authority demonstrates that an interested Member or interested party has refused access to or otherwise does not provide necessary information that the entity "actually holds or possesses". Given this – and even assuming *arguendo* that the term "necessary information" is limited to information that interested Members or parties have the "ability" to provide – it is not clear to us that an entity can *only* be considered to be "able" to respond to a request to provide information that it "*actually*" holds or possesses. Rather, as discussed above, while an interested Member or an interested party may not be in actual or physical possession of a particular piece of information, that Member or party may very well be able to acquire requested information from another person or entity.[799] We therefore disagree with Indonesia insofar as it argues, as a general rule, that "an entity does not have the 'ability' to give access to or provide information, if it does not actually hold or possess that information in the first place".[800] Accordingly, we also disagree that Article 12.7 limits an authority's recourse to facts available only to situations where it seeks information from an entity that "actually holds or possesses" the information at issue, as the plain text of the Article states that determinations may be made on the basis of the facts available "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information … or significantly impedes the investigation". We therefore do not consider that the Commission acted inconsistently with Article 12.7 *merely* because it sought information from or about the nickel ore mining companies "through" a request communicated to the GOID (the interested Member), or because it determined to apply facts available when the requested information was not, in turn, contained in the materials that the GOID provided to the Commission.

7.404. We note, of course, that Article 12.11 of the SCM Agreement states that "authorities shall take due account of any difficulties experienced by interested parties … in supplying information requested, and shall provide any assistance practicable". A prior WTO panel has observed that Article 6.13 of the Anti-Dumping Agreement (which is similarly worded to Article 12.11 of the SCM Agreement) "underscores that 'cooperation' [between interested parties and investigating authorities] is a two-way process involving joint effort as it requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information".[801] We also note the observation that paragraph 2 of Annex II of the Anti-Dumping Agreement[802] "requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities".[803] That said, we note that whether and how difficulties experienced by interested parties or interested Members are communicated to an authority and how they "should be taken into account by an investigating authority, … will necessarily depend on the particularities of a given investigation".[804]

7.405. With this in mind, the question before the Panel is not whether, as Indonesia alleges, the Commission improperly: (a) applied facts available "against" or "with respect to" the nickel ore

[799] The question of whether one entity has the "ability" or "means" to "acquire" information from another entity, in practice, differs from the question of whether an entity has the legal "authority" or "power" to compel or encourage another entity to provide information to it.

[800] Indonesia's response to Panel question No. 312(b). We note that accepting Indonesia's argument could, by significantly expanding the universe of interested parties in an investigation, also hinder an authority from initiating or issuing determinations in an investigation in an expeditious manner. See SCM Agreement, Article 12.12 (stating that the procedures set out in Article 12 "are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations … or from applying provisional or final measures").

[801] Panel Report, *US – Coated Paper (Indonesia)*, para. 7.117 (referring to and quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 104).

[802] Article 12.7 of the SCM Agreement is similarly worded to Article 6.8 of the Anti-Dumping Agreement. Unlike the SCM Agreement, however, the Anti-Dumping Agreement contains Annex II (entitled "Best Information Available in Terms of Paragraph 8 of Article 6"), which contains further provisions that "shall be observed in the application" of Article 6.8. We consider that Article 6.8, together with Annex II of the Anti-Dumping Agreement, provides relevant context to interpret of Article 12.7 of the SCM Agreement. We note in this regard that the panel in *US – Anti-Dumping and Countervailing Duties (Korea)* stated that "[d]epending upon the interpretative issue at hand, therefore, Annex II to the Anti-Dumping Agreement may also provide relevant context for the interpretation of Article 12.7 of the SCM Agreement." (Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, appealed 19 March 2021, para. 7.40 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423)).

[803] Appellate Body Report, *US – Hot-Rolled Steel*, para. 101.

[804] Appellate Body Report, *US - Carbon Steel (India)*, para. 4.422.

mining companies[805]; or (b) "attributed" the non-cooperation of the nickel ore mining companies *to* the GOID. Instead, the question for the Panel to consider is whether, in the specific facts and circumstances of the underlying investigation, an objective and unbiased authority – having initially determined that the GOID (the interested Member) had the means or ability to acquire or provide information from or about the nickel ore mining companies (i.e. such that the authority could have asked the GOID to forward the Appendix B questionnaire to these companies and to coordinate any responses that they provided) – could have determined to apply facts available when the authority did not receive a reply to its information request (i.e. because certain mining companies did not respond to the Appendix B questionnaire). This question is necessarily a fact-specific inquiry that – in this case – requires us to consider, among other things, the nature of the information at issue, the relationship between the GOID and the nickel ore mining companies, any specific difficulties that the GOID may have identified in obtaining the requested material (i.e. apart from the generalized fact that the information was possessed by another entity), and the nature of the Commission's engagement with the GOID once these difficulties had been identified.

7.406. We have concluded that the SCM Agreement did not preclude the Commission from seeking information from or about the nickel ore mining companies through the GOID in the first instance. In light of this, we are of the view that the "facts available" challenge that Indonesia raises requires us to examine the nature of the subsequent cooperation between the GOID and the Commission in order to evaluate, e.g., whether the Commission – when determining to apply facts available – appropriately considered the nature of the difficulties (if any) that the GOID indicated that it had encountered when responding to the Commission's information requests. Resolving this issue requires the parties – and us – to engage with the specific facts and circumstances surrounding each instance challenging the Commission's application of facts available to fill the gaps in the record caused by the alleged absence of information from or about the nickel ore mining companies, including the manner in which the Commission engaged with the GOID regarding any difficulties the GOID advised the authority that it had encountered as it attempted to provide the requested information. We note, however, that Indonesia's "cross-cutting" arguments do not embody this level of granularity or factual detail.

7.407. For these reasons, we do not agree that the Commission acted inconsistently with Article 12.7 of the SCM Agreement based on Indonesia's "cross-cutting" considerations that the Commission improperly: (a) applied facts available "against" or "with respect to" the nickel ore mining companies; or (b) "attributed" these companies' non-cooperation to the GOID. We will therefore turn to consider the merits of Indonesia's specific Article 12.7 "facts available" claims on a case-by-case basis.

7.7.3.3 Requirements under Article 12.7 of the SCM Agreement

7.408. Article 12.7 of the SCM Agreement provides:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.409. Pursuant to Article 12.7 of the SCM Agreement, a determination on the basis of the facts available can only be made in circumstances involving the existence of at least one of three alternative grounds: (a) any interested Member/party refuses access to necessary information within a reasonable period; (b) any interested Member/party otherwise does not provide necessary information within a reasonable period; or (c) any interested Member/party significantly impedes the investigation.

[805] See e.g. Canada's third-party submission, para. 40 (noting that "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"); Japan's third-party response to Panel question Nos. 29-33, para. 14 (noting that "the key issue here is not 'against whom' facts available may be used, but whether the due process requirements for resorting to facts available were fulfilled"); United States' third-party response to Panel question No. 29, para. 84 (noting that "Article 12.7 does not contain language regarding using facts available 'against' any Member or party, where the conditions for resorting to facts available are present").

7.410. As discussed above, in our assessment of whether any of these grounds is available, we must engage with the specific facts and circumstances surrounding each instance in which the investigating authority applied facts available, including the manner in which the investigating authority engaged with the interested Member/party regarding any difficulties the interested Member/party advised the authority that it had encountered as it attempted to provide the requested information.

7.411. We also note and agree with the observations of the panel in *US – Anti-Dumping and Countervailing Duties (Korea)* that: (a) "the question of whether certain information is 'necessary' is to be assessed in light of the specific facts and circumstances of a given case, including *the specific determination that is sought to be made and for which information is sought*"[806]; and that (b) investigating authorities are required to select "facts available that constitute reasonable replacements for the missing 'necessary' information in the specific facts and circumstances of a given case".[807]

7.7.3.4 Claims concerning the application of facts available in the context of the provision of nickel ore for less than adequate remuneration

7.7.3.4.1 Introduction

7.412. Indonesia submits that the Commission, in the context of its determination regarding the provision of nickel ore for LTAR, justified the application of facts available on the grounds that: (a) "PT Antam did not reply to Appendix B"; (b) "the GOID did not provide information regarding the shareholding structure of the nickel ore mining companies"; (c) "the GOID did not provide the RKAB for PT GAG Nikel within the deadline established by the Commission"; (d) "the GOID provided '*inaccurate information*' regarding PT Vale"; (e) "the GOID did not provide the translation of certain documents"[808]; (f) "the GOID did not provide certain feasibility studies"; (g) "the GOID had provided '*inconsistent data*' for the consumption of nickel ore in Indonesia"; and (h) "the GOID did not provide information about the prices of nickel ore in Indonesia".[809, 810] Indonesia challenges each of these grounds.[811]

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[806] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, appealed 19 March 2021, para. 7.269. (emphasis added) See also Panel Report, *Korea – Stainless Steel Bars*, appealed 22 January 2021, para. 7.186 ("what is 'necessary' [under Article 6.8 of the Anti-Dumping Agreement] will depend upon *the nature of the assessment* being undertaken by the authorities and the circumstances of a given investigation." (emphasis added)).

[807] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, appealed 19 March 2021 para. 7.41.

[808] We note that Indonesia confirms that its challenge to the Commission's application of facts available on the ground that the GOID did not provide the translation of "certain documents" only concerns: (a) Ceria's articles of association requested by the Appendix B questionnaire and (b) Gag Nikel's RKABs and other related documents requested during the RCC videoconference. (Indonesia's response to Panel question No. 329).

We also note the European Union's assertion that the "Commission did not apply facts available to substitute the articles of association of PT Ceria Hugraha" and that "facts available were applied overall for the lack of submission of Appendix B replies, but not specifically on the Appendix B of PT Ceria Hugraha." (European Union's response to Panel question No. 331, para. 244).

[809] Indonesia's first written submission, para. 1017. (emphasis original)

[810] In its first written submission, Indonesia also presents arguments challenging the Commission's resort to facts available with respect to the BC forms – documents requested by the Commission during the RCC with the GOID – under the heading "Alleged provision of nickel ore at less than adequate remuneration". (Indonesia's first written submission, paras. 1024-1027). The European Union argues, and we agree, that these arguments relate to the Commission's determination regarding import duty exemptions for raw materials imported into bonded zones. (European Union's first written submission, fn 821). Accordingly, we address Indonesia's arguments with respect to the BC forms in section 7.7.3.6.1 below.

Indonesia also challenges the Commission's resort to facts available with respect to the origin of certain machinery imported from China, for which the Commission requested the IRNC Group to provide information, under the heading "Alleged provision of machinery for less than adequate remuneration". (Indonesia's first written submission, paras. 1097-1107; second written submission, para. 777). Since the challenged application of facts available was made in the context of the Commission's determination regarding the import duty exemptions granted to the IRNC Group for machinery used in the construction of production facilities, we address these arguments in section 7.7.3.6.2 below.

[811] Indonesia's first written submission, para. 1018.

7.413. We note that, except for points (g) (regarding the consumption of nickel ore in Indonesia), and (h) (regarding nickel ore prices in Indonesia), all of these challenged applications of facts available concern the Commission's inquiry into whether all nickel ore mining companies in Indonesia can be considered to be public bodies. For the reasons discussed in section 7.7.3.4.2 below, we are of the view that we need not resolve Indonesia's claims challenging the manner in which the Commission determined to apply facts available in the context of its public body-related analysis in order to resolve this dispute. We therefore exercise economy with respect to these claims.

7.414. Indonesia also claims that, even if one assumes that the Commission was justified in resorting to facts available, certain replacement facts used in its final determination of whether nickel ore was provided for LTAR did not reasonably replace the missing information.[812] Specifically, Indonesia challenges the Commission's "facts available" findings that: (a) "the share of the State-owned companies in the total production in 2020 was more than 27%"[813]; that (b) the 27% figure "should be considered as underestimated, as it is very likely that among the numerous other mining companies for which public information was not available there are other State-owned ones [so that] the Commission could thus infer that a larger share of mining companies producing nickel ore was actually State-owned"[814]; and that (c) "as a result of [the] rules on RKABs, [the] mining companies' core characteristics and functions are to provide nickel ore in line with the government objective to support the downstream stainless steel industry".[815, 816] We also exercise economy for these claims for the reasons discussed in section 7.7.3.4.2 below.

7.415. Indonesia's claims that the Commission acted inconsistently with Article 12.7 of the SCM Agreement when it determined to apply facts available with respect to the consumption of nickel ore and the prices of nickel ore in Indonesia (points (g) and (h) in paragraph 7.412 above) are addressed in sections 7.7.3.4.3 and 7.7.3.4.4 below.

7.416. Indonesia lastly asserts that the GOID cooperated with all of the Commission's requests for information "to the best of its ability despite unreasonable burdens being placed upon it by the Commission"[817], such that "it was improper for the Commission to disregard the information provided by the GOID and resort to facts available against it under Article 12.7 of the SCM Agreement".[818] We address this assertion in section 7.7.3.4.5 below.

7.7.3.4.2 Facts available applied in the context of the public body analysis

7.417. In its examination into whether all nickel ore mining companies in Indonesia could be considered to be public bodies[819], the Commission resorted to facts available in its analyses of "ownership and formal indicia of control by the GOID"[820] and "[g]overnment authority and the exercise of meaningful control by the GOID" in particular with regard to the rules concerning RKABs.[821]

7.418. Indonesia submits that these applications of facts available were inconsistent with Article 12.7 of the SCM Agreement.[822]

7.419. We recall that (a) whether the missing information in question is "necessary" and (b) whether selected facts available reasonably replace the "necessary information" must be assessed on a case-by-case basis, including by reference to the determination that is to be made.[823]

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[812] Indonesia's first written submission, para. 1111.
[813] Countervailing duty final determination (Exhibit IDN-1), recital 389.
[814] Countervailing duty final determination (Exhibit IDN-1), recital 389.
[815] Countervailing duty final determination (Exhibit IDN-1), recital 424.
[816] Indonesia's first written submission, paras. 1112-1120.
[817] Indonesia's first written submission, section VIII.B.3.d.iii.
[818] Indonesia's first written submission, para. 1081.
[819] See section 7.5.2.2 above for the overview of the Commission's public body determination.
[820] See paras. 7.125-7.126 above. See also Countervailing duty final determination (Exhibit IDN-1), recitals 378 (regarding Antam's Appendix B questionnaire response), 380-386 (regarding the shareholding structures of the ten largest nickel ore producers in Indonesia, including Vale), and 389 (regarding the share of the state-owned companies' production of nickel ore).
[821] See para. 7.127 above. See also Countervailing duty final determination (Exhibit IDN-1), recitals 419-424.
[822] Indonesia's first written submission, paras. 1017-1018 and 1112-1120.
[823] See para. 7.411 above.

In view of this, and in light of our finding in section 7.5.2 above that the Commission's public body determination is inconsistent with Article 1.1(a)(1) of the SCM Agreement, we do not consider it necessary to make findings as to whether the manner in which the Commission applied facts available to arrive at its determination was also inconsistent with Article 12.7 in order to provide a positive resolution to this dispute.

7.420. We therefore decline to make findings on Indonesia's Article 12.7 claims challenging the Commission's resort to facts available with respect to: (a) Antam's response to the Appendix B questionnaire; (b) information regarding the nickel ore mining companies' shareholding structure; (c) Gag Nikel's RKABs; (d) information about Vale; (e) the translation of certain documents; and (f) the provision of feasibility studies. We also decline to make findings on Indonesia's Article 12.7 claims that the replacement facts that the Commission used in its determination that nickel ore was provided to the SSCRFP producers for LTAR did not reasonably replace the missing information concerning the share of total production of nickel ore held by state-owned mining companies and the production targets set out in the RKABs.

7.7.3.4.3 Consumption of nickel ore in Indonesia

7.421. Indonesia challenges the Commission's conclusion that the GOID provided "inconsistent data" regarding the consumption of nickel ore in Indonesia.[824] Specifically, Indonesia takes issue with recitals 348 and 351 of the final determination[825], which state, in relevant part, that:

> Furthermore, the Commission noted discrepancies related to the overall consumption of nickel ore on the Indonesian market. The Commission was not able to reconcile this data with the purchases of nickel ore of the exporting producers of the SSCR.
>
> …
>
> Regarding the inconsistent data for the consumption of nickel ore in Indonesia, the GOID insisted that this data was accurate and claimed that it relied on the nickel ore quantity consumed by IRNC Group considering that it was the only stainless-steel producer who use nickel ore as input. To be noted that the GOID was asked to submit the total consumption of nickel ore in Indonesia, not only the consumption of nickel ore for the stainless steel producers. Nevertheless, as highlighted in the Article 28 letter to the GOID, this data does not reconcile with the cross-checked data of the purchases of nickel ore of IRNC Group.[826]

7.422. As part of its evaluation of Indonesia's challenge, the Panel asked the parties to explain whether the Commission in fact relied on "facts available" to replace the allegedly inconsistent data that the Commission received regarding the domestic consumption of nickel ore.[827] Indonesia responded to this inquiry by stating that "it is unclear from the case-record whether the Commission utilized replacement facts for this allegedly missing (or inconsistent) information/data".[828] The European Union, for its part, responded by asserting that the Commission "did not replace the inaccurate information with facts available".[829]

7.423. In its comments on the European Union's response, Indonesia argues that "a resort to facts available, without the actual plugging of the allegedly missing 'necessary' information, is legally problematic" because "it casts doubt on whether the information at issue was even 'necessary' in the first place".[830] Indonesia questions: "What is the point of (and indeed, the legal basis for) finding an entity to be non-cooperative and resorting to facts available against it (or with respect to its

[824] Indonesia's first written submission, paras. 1048-1052.
[825] Indonesia's first written submission, para. 1048.
[826] Countervailing duty final determination (Exhibit IDN-1), recitals 348 and 351.
[827] See Panel question No. 346 (asking the parties to "please explain, with reference to the investigation record, for what purpose the Commission considered the nickel ore consumption data to be *'necessary information'* and whether the Commission relied on *'facts available'* replacing the missing information for that purpose").
[828] Indonesia's response to Panel question No. 346.
[829] European Union's response to Panel question No. 346, para. 268.
[830] Indonesia's comments on European Union's response to Panel question No. 346.

allegedly missing information), as under Article 12.7 of the SCM Agreement, if that information will not be eventually filled in?"[831]

7.424. The above suggests that Indonesia appears to acknowledge that the Commission did not replace the allegedly inconsistent data that it received regarding domestic nickel ore consumption with "facts available". Indonesia also has not pointed to any specific determination that the Commission made on the basis of facts available or inferences drawn from the GOID's submission of allegedly inconsistent data regarding the domestic consumption of nickel ore. Accordingly, to the extent Indonesia's claim of inconsistency under Article 12.7 of the SCM Agreement is premised on the assertion that the Commission "resort[ed] to facts available" with respect to this information, we find that Indonesia has not substantiated this claim.

7.425. To the extent Indonesia's argument may be understood to suggest that an investigating authority may violate Article 12.7 of the SCM Agreement when it concludes that an interested Member has provided "inconsistent data" or otherwise been "non-cooperative" even when those conclusions do not serve as the basis to apply the facts available, we disagree. Article 12.7 sets forth the conditions under which an investigating authority may make determinations on the basis of facts available. Nothing in the text or context of Article 12.7 indicates that these conditions apply when an investigating authority does not resort to facts available.

7.426. Given that Indonesia has not established that the Commission's "inconsistent data" conclusion served as the basis of a facts-available determination, we find that Indonesia has not demonstrated that the Commission acted inconsistently with Article 12.7 of the SCM Agreement with respect to the data that the GOID submitted regarding the domestic consumption of nickel ore.

7.7.3.4.4 Nickel ore prices in Indonesia

7.427. Indonesia challenges the Commission's conclusion that the GOID failed to provide information about the prices of nickel ore on the domestic market.[832] In particular, Indonesia challenges the Commission's conclusion in recital 348 of the final determination[833] that "[t]he GOID also failed to provide statistics on Indonesian domestic prices of nickel ore although according to the legislation in force it collects such information".[834]

7.428. To evaluate Indonesia's claim that the Commission improperly applied facts available in connection with the GOID's alleged failure to provide statistical information on the domestic prices of nickel ore, the Panel asked the parties to explain whether the Commission did, in fact, rely on facts available to account for this price information.[835] Indonesia responded to the inquiry by stating that "[f]rom a perusal of the investigation's case-record, it is unclear to Indonesia whether the Commission expressly relied on 'facts available' to fill the informational gap".[836] The European Union, for its part, responded by asserting that "[t]he Commission did not substitute the lacking macro-data on domestic prices with other facts available".[837]

7.429. Indonesia's comments on the European Union's response essentially mirror the comments it provided on the European Union's response with respect to the domestic consumption of nickel ore quoted at paragraph 7.423 above.[838] In view of this, we consider that the reasoning set out in paragraphs 7.424-7.425 above equally applies here.

7.430. Given this, we find that Indonesia has failed to demonstrate that the Commission acted inconsistently with Article 12.7 of the SCM Agreement with respect to the Commission's conclusion that the GOID failed to provide information about nickel ore prices in Indonesia.

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[831] Indonesia's comments on European Union's response to Panel question No. 346.
[832] See Indonesia's first written submission, paras. 1017-1018, 1056-1059.
[833] See Indonesia's first written submission, para. 1056.
[834] Countervailing duty final determination (Exhibit IDN-1), recital 348.
[835] See Panel question No. 349 (inviting the parties to please "explain, with reference to the record … whether the Commission relied on 'facts available' [in] replacing the missing price information").
[836] Indonesia's response to Panel question No. 349.
[837] European Union's response to Panel question No. 349, para. 273.
[838] Indonesia's comments on European Union's response to Panel question No. 349.

7.7.3.4.5 GOID's cooperation

7.431. Indonesia also claims, "[a]s a final point on the issue of the alleged non-cooperation of the GOID" with respect to information about the nickel ore mining companies[839], that the Commission's resort to facts available was inconsistent with Article 12.7 of the SCM Agreement, because the Commission's request for information imposed "unreasonable burdens"[840] on the GOID, and because the GOID "acted to the best of its abilities"[841] to respond to the Commission's informational requests, but that the Commission failed to take these efforts into account in its decision to resort to facts available.

7.432. Indonesia confirms that this claim is "independent from [its] challenge to the Commission's stated grounds for resort to facts available (that [it has] challenged elsewhere in [its] submissions)".[842] Given this, we understand Indonesia's "unreasonable burden"/"best of its abilities" claim to challenge the Commission's decision to apply facts available with respect to information about the nickel ore mining companies *as a whole*, regardless of the specific circumstances that the Commission may have cited to support a particular decision to apply facts available.

7.433. Indonesia advances a number of arguments to support its claim that the Commission was not entitled to have applied facts available to the GOID (i.e. notwithstanding the GOID did not provide the Commission with certain requested information about the nickel ore mining companies) because: (a) the Commission "expected" the GOID to provide the Commission with an allegedly "vast amount[] of information" about the nickel ore mining companies; and (b) the GOID "acted to the very best of its abilities" to gather this information.[843] We examine these arguments below.

7.434. In its first written submission, Indonesia asserts that "*[a]ssuming* that it was lawful for the Commission to make the GOID responsible for providing information possessed/held by various state-owned and independent (private) nickel ore mining companies", the Commission nonetheless imposed an unreasonable burden on the GOID by requiring it to "contact and collect responses [to the Appendix B questionnaire] from more than 290 nickel ore mining companies".[844] Specifically, Indonesia asserts that:

> The GOID acted to the very best of its abilities – both, with respect to approaching the nickel ore mining companies… and providing information regarding these companies to the Commission. Thanks to the GOID's extensive efforts, the Commission was able to obtain large amounts of information about (concerning) the nickel ore mining companies. At the same time, any delay in the submission of this information is attributable to the vast amounts of information that the Commission expected from the GOID… In such a situation, it was improper for the Commission to disregard the information provided by the GOID and resort to facts available against it under Article 12.7 of the SCM Agreement.[845]

7.435. The European Union rejects the Indonesia's contention that the Commission requested an unreasonable amount of information. Specifically, the European Union states that "Appendix B … required necessary information and supported documents to determine, *inter alia*, State ownership, buyers, how prices were formed, and potential subsidies received by mining companies", and asserts that Indonesia has not "shown why requesting such information was by far inappropriate in this case".[846] The European Union also asserts that "the Commission never asked for Appendix B to be filled in by all 290 nickel miners" but instead "merely asked the GOID to forward Appendix B [to] the top 10 producers and distributors of nickel ore, as well as, … any other producers and distributors of nickel ore, which provided nickel ore to the exporting producers".[847]

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[839] Indonesia's first written submission, para. 1079. See also Indonesia's response to Panel question No. 391.
[840] Indonesia's first written submission, para. 1080 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 102).
[841] Indonesia's first written submission, para. 1081.
[842] Indonesia's response to Panel question No. 179.
[843] Indonesia's first written submission, para. 1081.
[844] Indonesia's first written submission, para. 1080. (italics original; bold type omitted)
[845] Indonesia's first written submission, para. 1081.
[846] Indonesia's first written submission, para. 1081.
[847] European Union's response to Panel question No. 180, para. 332.

7.436. To resolve Indonesia's claim, we consider the government questionnaire that the Commission asked the GOID to complete during the underlying investigation. As we have noted in section 7.7.2.2 above, the instructions to this government questionnaire, in relevant part, read as follows:

> Please forward Appendix B (questionnaire for input suppliers) to the top 10 producers and distributors of the input materials in question, as well as to any other producers and distributors of the materials in question, which have provided inputs to the two cooperating companies. Please also make sure that suppliers to the producers of the product under investigation are included among those replying to the appendix …
>
> In this respect, please note that the Commission has requested each cooperating company to prepare a list of all their suppliers of the input materials in question, and to provide a copy of that list to the GOI[D]. Please coordinate with the cooperating exporting producers in order to ensure that all relevant producers and distributors are identified and reported in Appendix B.[848]

7.437. We note that the first sentence of the above instructions indicates that the scope of the intended recipients of the Appendix B questionnaire is generally limited to "the top 10 producers and distributors of the input materials in question, as well as to any other producers and distributors of the materials in question, which have provided inputs to the two cooperating companies". We are of the view that, contrary to Indonesia's assertion, these instructions do not indicate that the Commission "expected the GOID to contact and collect responses from more than 290"[849] companies.[850]

7.438. Indonesia counters that "[t]he fact that the EU insists in these proceedings that even companies like PT Vale [that did not provide nickel ore to the exporting producers] should have nonetheless responded to Appendix B, shows that the Commission required the GOID to collect Appendix B responses not just from the top 10 producers/suppliers of the exporting producers, but to any and every nickel ore mining company".[851] We discern nothing in the final determination indicating that the Commission resorted to facts available due to Vale's failure to respond to the Appendix B questionnaire.[852] Moreover, even accepting that the Commission requested the GOID to provide certain information about Vale, this request, standing alone, does not establish that the Commission – notwithstanding the above instructions – nonetheless required the GOID to collect responses to the Appendix B questionnaire from all nickel ore mining companies doing business in Indonesia.

7.439. We also note that the investigation record does not indicate that the GOID in fact contacted, or otherwise made efforts to collect information from, more than 290 nickel ore mining companies.[853]

7.440. Given this, we are of the view that Indonesia's claim that the Commission imposed an unreasonable burden on the GOID by requiring the GOID to collect questionnaire responses from "more than 290" nickel ore mining companies lacks a factual basis. As such, we are also of the view that Indonesia has not demonstrated that the Commission's application of facts available was unreasonable because the GOID "acted to the very best of its abilities" in responding to the Commission (i.e. such that any delay or failure of the GOID to provide the requested information about the nickel ore mining companies was "attributable to the vast amounts of information that the Commission expected from the GOID"[854]), as Indonesia has not substantiated its assertion that the Commission improperly requested "vast amounts of information" from the GOID.

7.441. Notwithstanding the above, we note that Indonesia's second written submission raises several additional arguments in support of its claim that the Commission's decision to apply facts

[848] GOID countervailing duty questionnaire (Exhibit IDN-127) p. 23. (emphasis omitted)
[849] Indonesia's first written submission, para. 1080.
[850] We note that Indonesia concedes that the GOID did not understand the questionnaire instructions to require the Appendix B questionnaire be forwarded to all nickel ore mining companies in Indonesia. See Indonesia's response to Panel question No. 327.
[851] Indonesia's response to Panel question No. 392.
[852] See e.g. Countervailing duty final determination (Exhibit IDN-1), recitals 366-367.
[853] See Input supplier questionnaire receipts (Exhibit IDN-129 (BCI)); GOID's email to nickel ore suppliers (Exhibit IDN-130 (BCI)).
[854] Indonesia's first written submission, para. 1081.

available to the GOID was illegitimate. Specifically, Indonesia states that it is "completely legitimate for a respondent to refuse to acquiesce to unreasonable demands from the authority (for example, if the authority would require an interested Member to perform notification and fact-finding responsibilities on behalf of the authority)", and that "it was not the GOID's responsibility, in the first place, to 'collect information on its [the Commission's] behalf', no matter how many or how few the entities in question".[855]

7.442. We note that these later-developed arguments – particular the statement that the GOID need not collect information "no matter how many or few" entities were at issue – contrast with the assumption underpinning Indonesia's assertion in its first written submission that the Commission could not legitimately apply facts available to the GOID in view of the volume of information that it had been asked to produce.[856] In any event, as we have discussed in sections 7.7.2.5 and 7.7.3.2 above, the SCM Agreement does not preclude an investigating authority from seeking information from an entity – such as an interested Member or an interested party – notwithstanding that the entity may need to acquire requested material from another person. We therefore do not consider that the mere fact that the Commission requested the GOID to collect questionnaire responses from nickel ore mining companies renders the Commission's resort to facts available inconsistent with Article 12.7 of the SCM Agreement.

7.443. For these reasons, we reject Indonesia's claim that the Commission was not permitted to apply facts available because "the GOID cooperated to the best of its abilities, despite the unreasonable burdens placed upon it by the Commission".[857]

7.7.3.5 Claims concerning the application of facts available in the context of the alleged provision of preferential financing and other support by Chinese grantors

7.444. Indonesia challenges the Commission's applications of facts available due to the GOID's and the IRNC Group's alleged failures to provide the Commission with certain requested information as part of the Commission's inquiry into the alleged preferential financing and other support that certain Chinese grantors provided to support the production of SSCRFP in Indonesia.[858]

7.445. We recall our conclusion in section 7.4.2 above that the Commission's finding that the preferential financing and other support by the Chinese grantors can be attributed to the GOID was inconsistent with Article 1.1(a)(1) of the SCM Agreement. Specifically, we recall our conclusion that the *chapeau* of Article 1.1(a)(1) does not allow an investigating authority to attribute a financial contribution of a Member to another Member on the ground that the latter induced the contribution from the former. Given this finding, and given that the facts available claims that Indonesia challenges here ultimately relate to the Commission's determination that the GOID induced the preferential financing and other support at issue, we do not consider that making additional findings on Indonesia's Article 12.7 claims regarding the Commission's decision to apply facts available in the context of the preferential financing and other support that the Chinese grantors allegedly provided to the IRNC Group is necessary to provide a positive solution to the dispute.

7.7.3.6 Claims concerning the application of facts available in the context of government revenue forgone or not collected

7.7.3.6.1 BC forms

7.446. During the RCC videoconference, the GOID explained, with regard to the import duty exemptions for raw materials imported into bonded zones[859], that the Indonesian customs authorities monitor the importation, transfer, and exportation of raw materials into, between, and

[855] Indonesia's second written submission, paras. 767-768.
[856] See para. 7.434 above. We note that Indonesia's first written submission argues that "***[a]ssuming*** that it was lawful for the Commission to make the GOID responsible for providing information possessed/held by various state-owned and independent (private) nickel ore mining companies, Indonesia would like to again bring to the notice of the Panel the vast amount of information at issue." (Indonesia's first written submission, para. 1080). (emphasis original)
[857] Indonesia's first written submission, para. 1081; second written submission, para. 766.
[858] Indonesia's first written submission, paras. 1064-1077, 1084-1094, 1108-1110, and 1121-1139.
[859] See section 7.6.2 above.

from bonded zones via documents called "BC forms".[860] The Commission's RCC report states that "[a]ll these forms (named as BC25, BC30, BC23, BC40, BC2.7 and BC20) were requested … but the GOID did not provide them within the deadline", i.e. 19 November 2021.[861] In its Article 28 letter, dated 3 December 2021, that the Commission issued to the GOID, the Commission informed the GOID that it was still missing the BC forms.[862] On 14 December 2021, the GOID submitted copies of Indonesia's customs regulations that contained blank BC forms as attachments.[863]

7.447. Indonesia claims that the Commission rejected the blank BC forms because they were submitted after the deadline, and asserts that they were provided within a "reasonable period".[864] Although there is no express indication by the Commission on the investigation record that the Commission rejected the blank BC forms due to the late submission, the European Union does not deny that the Commission applied facts available with regard to the blank BC forms.[865]

7.448. We begin with the observation that consideration of the BC forms, whether taken as submitted or replaced with "facts available", is a part of the evidence relating to the import duty exemptions for raw materials imported into bonded zones which we have examined in section 7.6.2 above. We recall our conclusion in section 7.6.2.2.1 that the Commission acted inconsistently with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement by determining that the import duty exemption constituted a subsidy without having notified the GOID of the need for a "further examination" pursuant to Annex II(II)(2). We therefore do not consider that making further findings as to whether the Commission also acted inconsistently with Article 12.7 by applying facts available with respect to the BC forms in the circumstances of the underlying investigation would assist in providing a positive solution to the dispute.

7.7.3.6.2 Origin of the machinery imported from the Chinese parent companies of the IRNC Group

7.449. In the final determination, the Commission examined whether the import duty exemption programme for machinery used in the construction of production facilities (including steel plants), as set out in the Regulation of Finance Minister 176/PMK.011/2009 and its relevant amendments, provided a subsidy to the IRNC Group.[866] Based on this examination, the Commission concluded that "[t]his programme provides a financial contribution in the form of revenue forgone by the GOID … as IRNC Group is relieved from payment of import tariffs which would be otherwise due"[867] at the rate of "5% based on the HS code of the equipment".[868]

7.450. During the underlying investigation, in response to the first deficiency letter issued by the Commission to the IRNC Group, the IRNC Group claimed that none of the machinery that it imported from the Chinese parent companies was subject to import duty because the machinery imports fell within the terms of the Agreement on Trade in Goods of the Framework Agreement on

[860] GOID countervailing duty RCC report (Exhibit IDN-117 (BCI)), pp. 16-17.
[861] GOID countervailing duty RCC report (Exhibit IDN-117 (BCI)), p. 17. We note that the Commission's RCC report does not appear to specify whether the Commission requested the GOID to provide either blank BC forms or the completed forms the IRNC Group submitted to Indonesian customs authorities during the investigation period.
[862] GOID Article 28 letter (Exhibit IDN-126), p. 2.
[863] GOID's email of 14 December 2021 (Exhibit EU-147); Director General Customs Regulation 20/2016 (Exhibit IDN-122.b); Director General Customs Regulation 28/2016 (Exhibit IDN-159.b). In response to a question from the Panel, Indonesia confirms that the GOID submitted blank forms and did not submit filled-out forms. Indonesia asserts that the filled-out forms "could not be obtained" due to confidentiality. (Indonesia's response to Panel question No. 390).
[864] Indonesia's first written submission, paras. 1024-1027.
[865] See European Union's response to Panel question No. 386, para. 328 (stating that: "The BC Forms were submitted not only late, but blank. The GOID could have submitted filled in forms, but it chose to submit blank forms. It is it [sic] clear from recital (903) of the Contested AS Regulation, the verification of the GOID took place after the verification of the exporters. Thus, at the time when the GOID submitted the BC Forms, on 14 December 2021, the Commission could not have the possibility to cross-check with the exporters how the BC Forms were checked in practice.").
[866] Countervailing duty final determination (Exhibit IDN-1), recitals 888-909. See also Countervailing duty GDD (Exhibit IDN-108), recitals 710-730.
[867] Countervailing duty final determination (Exhibit IDN-1), recital 906. See also Countervailing duty GDD (Exhibit IDN-108), recital 727.
[868] Countervailing duty final determination (Exhibit IDN-1), recital 905. See also Countervailing duty GDD (Exhibit IDN-108), recital 726.

Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations (China-ASEAN FTA).[869] During the RCC videoconference, the Commission asked the IRNC Group to provide invoices from original manufacturers of the machinery.[870] The IRNC Group did not submit the requested invoices, but instead provided the import customs declarations for the machinery and the approval letters issued by the Indonesian authorities for the exemption of import duty on the machinery.[871]

7.451. In the final determination, the Commission dismissed the IRNC Group's claim on the basis of facts available on the ground that the IRNC Group failed to submit requested information with respect to the origin of the machinery. The final determination states, in relevant part, that:

> Indeed, the investigation revealed that the related companies from which IRNC Group imported the equipment were not the actual manufacturers of the equipment. The company claimed that the origin of the equipment was China; however, it failed to submit any evidence in this regard. While it was clear that the equipment was shipped from China, IRNC refused to submit the invoices from the actual country of origin of the equipment.
>
> Therefore, the Commission informed IRNC Group that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation with regard to the subsidy scheme in question. The IRNC Group claimed that the Chinese related parties were not within the scope of the investigation as they were not within the territory nor the jurisdiction of the GOID and therefore were not obligated to provide the invoices from the original manufacturer or country of origin. Furthermore, it was stated that the proof of origin was the fact that on the Custom declaration it was stated China as the origin of goods.
>
> …
>
> The IRNC group has not submitted any document indicating the origin of the equipment as well as the spare parts linked to this equipment apart from the Custom Declaration. Therefore, in the absence of the requested information the Commission considered that it did not receive crucial and necessary information relevant to this aspect of the investigation. Therefore, the Commission applied Article 28 of the basic Regulation and relied on facts available with respect to these points.[872]

7.452. Indonesia challenges the Commission's resort to facts available with regard to the origin of the machinery. Indonesia argues, *inter alia*, that there was no "necessary information" missing from the investigation record because the IRNC Group provided sufficient evidence to demonstrate that the origin of the machinery was China.[873] The European Union rejects Indonesia's arguments.[874]

7.453. According to Indonesia's first written submission[875], the evidence submitted by the IRNC Group to the Commission includes the import customs declarations for the machinery[876] and the approval letters issued by the Indonesian authorities for the exemption of import duty for the machinery.[877, 878] For Indonesia, these documents "show that the legitimate origin of the goods was

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[869] Countervailing duty final determination (Exhibit IDN-1), recital 902; IRNC Group's response to first countervailing duty deficiency letter (Exhibit EU-161 (BCI)), p. 4. The second deficiency letter issued to the IRNC Group did not contain any questions relating to this topic. See IRNC Group's response to second countervailing duty deficiency letter (Exhibit EU-162 (BCI)).

[870] IRNC Group countervailing duty RCC report (Exhibit IDN-169 (BCI)), pp. 29, 50, 60, 66, and 77.

[871] See para. 7.453 below.

[872] Countervailing duty final determination (Exhibit IDN-1), recitals 901-902 and 904. See also Countervailing duty GDD (Exhibit IDN-108), recitals 722-723 and 725.

[873] Indonesia's first written submission, paras. 1098-1102 and 1104-1106.

[874] European Union's first written submission, paras. 703-708; second written submission, paras. 349-353.

[875] Indonesia's first written submission, para. 1098.

[876] IRNC's customs declaration (Exhibit IDN-56.b (BCI)).

[877] Import duty exemption approval letter (Exhibit IDN-57.b (BCI) (English translation)).

[878] Indonesia also asserts that the IRNC Group submitted the "contract and invoice (between IRNC and Tsingshan)" (Indonesia's response to Panel question No. 187) and "invoices from the seller"

China".[879] In response to the Panel's question asking how these documents are considered sufficient to establish the origin of the goods in light of the rules of origin under the China-ASEAN FTA, Indonesia contends that "the issue is not whether or not the IRNC Group fulfilled the requirements of the China-ASEAN FTA, to the satisfaction of the Indonesian customs officials. The question here is whether, in the context of the SSCRFP investigation, there was enough proof given by the Group (to the Commission) to demonstrate that the origin of the machinery was China."[880] Indonesia further adds that "the Commission did not even *consider* the requirements under the FTA, in the context of the investigation".[881]

7.454. The European Union responds that "a simple origin declaration does not explain how the origin was constituted, but merely assumes the correctness of the declared country, without indicating the origin rules applied for establishing the origin"[882] and that the Commission "merely intended to understand how the origin of the goods indicated was determined".[883] The European Union also submits that "it can hardly be found unreasonable to request genuinely convincing evidence on the origins of the equipment in the context of a transaction between related entities".[884]

7.455. In our view, the parties' arguments raise two questions: (a) whether the Commission's determination at issue concerns the origin status of the machinery under the China-ASEAN FTA; and (b) whether given the facts of the underlying proceeding an unbiased and objective investigating authority could have concluded that the IRNC Group refused access to, or otherwise did not provide, "necessary information" regarding the origin of the machinery at issue.[885]

7.456. With respect to the first question, as noted above, Indonesia asserts that the issue was not "whether or not the IRNC Group fulfilled the requirements of the China-ASEAN FTA".[886]

7.457. We disagree. We recall that (a) the origin of the machinery became an issue in the underlying investigation when the IRNC Group claimed that no import duty was applicable to the machinery imported from China due to the China-ASEAN FTA; and that (b) this claim was made in the context of the Commission's examination of whether the investigated import duty exemptions for the machinery involved a financial contribution in the form of government revenue forgone that is otherwise due. We also note that the Article 28 letter issued by the Commission to the IRNC Group states that [[***]][887] Moreover, the final determination states that "in the absence of any information in the file indicating that these equipment was indeed manufactured in China, the Commission concluded that an import duty was applicable, i.e. 5 %", confirming that the issue of the machinery's origin was directly connected to the applicability of the 5% import duty.[888] Given the above, we consider that the purpose of the Commission's inquiry into the origin of the machinery was to decide whether the machinery was eligible for preferential duty treatment under the China-ASEAN FTA, such that the 5% duty did not apply to the machinery even in the absence of the import duty exemptions for machinery used in the construction of production facilities.

7.458. Next, we consider the second question, that is, whether the Commission could have considered that the IRNC Group refused access to, or otherwise did not provide, necessary information regarding the origin of the machinery. In this respect, we recall that, as discussed in section 7.1.2 above, our task when reviewing an investigating authority determination is not to engage in a *de novo* review of the evidence or to substitute our judgement for that of the authority.

(Indonesia's response to Panel question No. 379). However, we note that these documents do not appear to be on the Panel record. Notwithstanding this, the Panel understands Indonesia's argument that the IRNC Group adduced sufficient proof to the Commission to demonstrate the Chinese origin of the machinery to rest primarily on the import customs declarations and the approval letters and, as such, examines these materials when evaluating Indonesia's claim.

[879] Indonesia's first written submission, para. 1099.
[880] Indonesia's reply to Panel question No. 379.
[881] Indonesia's reply to Panel question No. 379. (emphasis original)
[882] European Union's first written submission, para. 705.
[883] European Union's first written submission, para. 704.
[884] European Union's second written submission, para. 350.
[885] We note that nothing in the final determination suggests, and that the parties have not argued, that the Commission resorted to facts available on the ground that the IRNC Group "significantly impede[d] the investigation".
[886] Indonesia's reply to Panel question No. 379.
[887] IRNC Group Article 28 letter (Exhibit IDN-155 (BCI)), p. 2. (emphasis added)
[888] Countervailing duty final determination (Exhibit IDN-1), recital 905.

We thus do not find it necessary to determine whether the underlying origin evidence that the IRNC Group provided to the Commission establishes that the origin of the machinery is China.[889] Instead, our task is to evaluate whether, in light of the evidence on the investigation record, an unbiased and objective investigating authority could have concluded that the IRNC Group refused access to, or otherwise did not provide, necessary information to determine whether the origin of the machinery was China.

7.459. In this respect, we recall that previous dispute settlement reports have understood that the term "necessary information" that appears in Article 12.7 of the SCM Agreement is "meant to ensure that Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination".[890] We agree with this understanding.

7.460. With this in mind, we turn to the Commission's findings regarding the IRNC Group's alleged failure to provide necessary information. As such, we note that the Commission's final determination states, in relevant part, that:

a. The IRNC Group "claimed that the origin of the equipment was China; however it failed to submit any evidence in this regard… IRNC refused to submit the invoices from the actual country of origin of the equipment";[891]

b. "The IRNC group has not submitted any document indicating the origin of the equipment as well as the spare parts linked to this equipment apart from the Custom Declaration. Therefore, in the absence of the requested information the Commission considered that it did not receive crucial and necessary information relevant to this aspect of the investigation"[892]; and,

c. "[I]n the absence of any information in the file indicating that these equipment was indeed manufactured in China, the Commission concluded that an import duty was applicable".[893]

7.461. Thus, the Commission's resort to facts available appears to have been made on the grounds of the alleged failure of the IRNC Group to submit: (a) the invoices from the original manufacturers of the machinery; (b) any documents other than the customs declarations that indicated the origin of the machinery; and (c) any other information indicating that the machinery was manufactured in China.

7.462. We examine these grounds in turn.

7.463. First, with respect to the IRNC Group's failure to provide invoices from the original manufacturers, Indonesia submits that "[w]hile such suppliers declarations are commonly used in the EU, the same is not the case in Asia. Companies in Asian countries rely more on customs declarations or certificates of origin issued by the exporting country" and that the China-ASEAN FTA "also endorses this approach".[894] The European Union responds that the Commission requested the

[889] We also observe that Indonesia's position, as clarified in its response to a question from the Panel after the second substantive meeting, is not that the IRNC Group provided sufficient evidence to satisfy the origin requirements under the China-ASEAN FTA. Instead, Indonesia argues that "[t]he question here is whether, in the context of the SSCRFP investigation, there was enough proof given by the Group (to the Commission) to demonstrate that the origin of the machinery was China (for the record: the Commission did not even consider the requirements under the FTA, in the context of the investigation)." (Indonesia's response to Panel question No. 379).

Although we find, as discussed in paragraph 7.457, that the Commission's determination regarding the origin of the machinery pertains to the eligibility for the preferential tariff treatment under the China-ASEAN FTA, we agree with Indonesia to the extent its argument suggests that the Panel's review should focus on the Commission's findings that formed the basis of its decision to resort to facts available and not on the requirements under the China-ASEAN FTA for which the Commission did not make a finding in the underlying investigation.

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

[891] Countervailing duty final determination (Exhibit IDN-1), recital 901. For the full quote of the recital, see para. 7.451 above.

[892] Countervailing duty final determination (Exhibit IDN-1), recital 904.

[893] Countervailing duty final determination (Exhibit IDN-1), recital 905.

[894] Indonesia's first written submission, paras. 1100 and 1102. (fns omitted)

invoices from the original manufacturers of the equipment in order to "understand how the origin of the goods indicated was determined, which cannot be discerned from a simple origin declaration".[895] When the Panel asked the European Union whether the Commission considered that such an understanding may be derived from the invoices issued by the original manufacturers, the European Union cited recitals 813 and 817 of the final determination.[896]

7.464. We are not convinced by the European Union's response, as the cited recitals appear to relate primarily to the calculation of the benefit conferred by the provision of the machinery for LTAR. Although we note that the Commission states at recital 813 that it "tried to determine the origin of the equipment by requesting the invoices from the original manufacturers", we are of the view that the context of recital 813 (in particular the first sentence of the recital (which states "[w]ith respect to the 'country of provision or purchase' of the equipment…") and the concluding sentence (which states "[h]ence, the Commission had to rely on facts available with regard to the actual country of origin of the purchases")) indicates that this recital is unrelated to the question of the origin status of the equipment under the China-ASEAN FTA. While we do not deny that there may be some overlap between (a) the information that the Commission considered necessary to determine the country of provision or purchase and (b) the information that was necessary to determine the origin of the machinery under the China-ASEAN FTA, they concern different subject matters regarding different alleged subsidy measures. As such, we are of the view that an unbiased and objective investigation authority could not have assumed, without any explanation, that invoices from the original manufacturers were necessary to determine the machinery's origin status under the China-ASEAN FTA (in the context of its examination of the import duty exemptions for machinery used in the construction of production facilities), merely because the authority considered the same evidence necessary to determine its country of provision or purchase (in the context of its benefit analysis of the provision of the machinery for LTAR). Similarly, recital 817 concerns a different subject matter (i.e. "the arms-length value of said equipment") that is not directly relevant to the issue of the origin of the machinery.

7.465. No other evidence on the record or arguments of the parties suggest that the Commission otherwise evaluated whether the invoices from the original manufacturers were necessary to determine the origin of the machinery under the China-ASEAN FTA. In our view, this falls short of the requirement under Article 12.7 of the SCM Agreement.

7.466. Second, with respect to the alleged failure of the IRNC Group to provide documents other than the customs declarations that indicated the origin of the machinery, in our view, the record indicates that the Commission did not expressly request the IRNC Group to provide evidence for the origin of the machinery other than the invoices from the original manufacturers. This appears to be confirmed, for example, by the fact that Article 28 letter that the Commission issued to the IRNC Group states that [[***]][897] and does not mention any other origin-related information requests.

7.467. Moreover, while the final determination states that the GOID explained to the Commission during the RCC that the origin of the machinery was established at the time of importation on the basis of "the form BC2.3 and the formal letter declaring the origin of the equipment from the country of origin" and "asked the Commission to ask the IRNC Group to submit such information"[898, 899], we

[895] European Union's first written submission, para. 704.

[896] European Union's response to Panel question No. 380, paras. 315-317 (quoting Countervailing duty final determination (Exhibit IDN-1), recitals 813 and 817).

[897] IRNC Group Article 28 letter (Exhibit IDN-155 (BCI)), p. 2.

[898] Countervailing duty final determination (Exhibit IDN-1), recital 903.

[899] In this respect, the Panel notes that the description of the GOID's explanation in the RCC report documenting the RCC with the GOID does not appear to correspond fully with this statement in the final determination. Specifically, on one hand, the RCC report states that:

[[***]]

(GOID countervailing duty RCC report (Exhibit IDN-117 (BCI)), p. 17).

In the final determination, on the other hand, the Commission stated that the "GOID explained that IRNC Group should have provided to the Commission the form BC2.3 and the formal letter declaring the origin of the equipment from the country of origin and asked the Commission to ask the IRNC Group to submit such information". (Countervailing duty final determination (Exhibit IDN-1), recital 903).

note that, in its response to a question from the Panel on this topic, the European Union confirms that the Commission did not request the IRNC Group to submit these documents.[900] Thus, the IRNC Group's failure to submit these documents could not have served as a basis for the Commission's application of facts available.

7.468. Finally, with respect to the alleged failure of the IRNC Group to provide any additional documentation indicating that the machinery was manufactured in China, we observe that the IRNC Group submitted the approval letters for the import duty exemption for the machinery issued by the Indonesian authorities during the RCC.[901] In its comments on the general disclosure document, the IRNC Group stated that [[***]][902] Indonesia clarifies that "[f]or example, the [[***]], submitted as Exhibit IDN-57a/b (BCI) shows that (for example) the [[***]] was manufactured by a company called [[***]], which is located in [[***]] China."[903]

7.469. During the course of these panel proceedings, the Panel asked the European Union whether the Commission considered the approval letters, and if so, why the Commission did not accept them as evidence of the origin of the machinery. The European Union responded to this inquiry by stating that:

> [T]he Commission considered the approval letters, see recital (902) of the Contested AS Regulation. "Furthermore, it was stated that the proof of origin was the fact that on the Custom declaration it was stated China as the origin of goods". However, these approval letters are letters from the Indonesian authorities certifying the exemption from import duties. In the EU's understanding, they do not correspond to the formal letters to be attached to the forms BC 2.3 and submitted to the Indonesian authorities.[904]

7.470. Contrary to this statement, we discern nothing in recital 902 to suggest that the Commission considered the approval letters. Specifically, we note that the quoted sentence discusses the indication of origin on the customs declaration and does not mention the approval letters. Moreover, the fact that the approval letters are not "the formal letters to be attached to the forms BC 2.3 and submitted to the Indonesian authorities" cannot, without more, serve as a proper basis to reject the approval letters, given that the Commission did not request the IRNC Group to submit them. Although the primary purpose of the approval letters was to authorize the exemption of the import duties on the machinery used in the construction of production facilities[905], to the extent that the Commission's concern was whether the machinery was manufactured in China, the Commission was required to provide a reasoned and adequate explanation as to why the approval letters could not be used to establish the machinery's country of origin.

7.471. In light of the above, we consider that an unbiased and objective authority could not have concluded that the IRNC Group failed to provide any information that indicated that equipment at issue was manufactured in China[906].

The Panel asked the parties to confirm whether the GOID's explanation that the Commission documented in the RCC report and the final determination means that, in the GOID's understanding, the IRNC Group submitted the "formal letters declaring the origin from the country of origin… (corresponding to a certificate of origin)" to the Indonesian customs authorities at the time of the importation of the machinery, and both parties confirmed this is the case. (See Indonesia's response to Panel question 381; European Union's response to Panel question No. 381, para. 318).

[900] While the European Union asserts, in its comments on Indonesia's response to Panel question No. 379, that "additional pieces of evidence are required to be kept in order to be able to further substantiate preferential origin. On request of the Commission this evidence should have been produced by Indonesia," (European Union's comments on Indonesia's response to Panel question No. 379, para. 210), we note that this assertion does not seem to appear in either the final determination or any other documents on the investigation record.

[901] See IRNC Group countervailing duty RCC report (Exhibit IDN-169 (BCI)), pp. 34 ([[***]]), 53 ([[***]]), and 62 ([[***]]); Import duty exemption approval letter (Exhibit IDN-57.b (BCI) (English translation)).

[902] IRNC Group's comments on countervailing duty disclosure (Exhibit IDN-55 (BCI)), p. 12.

[903] Indonesia's response to Panel question No. 187.

[904] European Union's response to Panel question No. 382(b), para. 320.

[905] See Countervailing duty final determination (Exhibit IDN-1), recital 888.

[906] Countervailing duty final determination (Exhibit IDN-1), recital 905.

7.472. For these reasons, we therefore conclude that the Commission acted inconsistently with Article 12.7 of the SCM Agreement, when it determined to apply facts available on the grounds that the IRNC Group did not provide necessary information with respect to the origin of the machinery. Having found that the Commission's resort to facts available was inconsistent with Article 12.7 on this ground, we do not consider it necessary to address other arguments that Indonesia makes in support of this claim.

7.7.4 Claims under Articles 12.1 and 12.8 of the SCM Agreement: essential facts

7.7.4.1 Introduction

7.473. Indonesia claims that the time period that the Commission provided interested parties to comment on the completeness or correctness of the essential facts under consideration failed to: (a) provide an "ample opportunity to present in writing all evidence" which parties considered relevant in contravention of Article 12.1 of the SCM Agreement; and (b) afford "sufficient time for the parties to defend their interests" in contravention of Article 12.8 of the SCM Agreement.[907]

7.474. Indonesia also claims that the Commission acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose all the "essential facts under consideration which form the basis for the decision" to impose countervailing duties.[908]

7.475. Each of these claims are addressed separately, below.

7.7.4.2 Claim of insufficient time to comment on the disclosure of essential facts

7.7.4.2.1 Introduction

7.476. Indonesia's claim of insufficient time challenges the amount of time that the Commission provided for the IRNC Group to comment on the Commission's general disclosure document (GDD). The Commission issued the GDD[909] on 17 December 2021. The IRNC Group received notice that the GDD had been issued in the early morning of 18 December 2021, and received the GDD itself later that day.[910] The Commission established an initial due date of 4 January 2022 for the IRNC Group to comment on the GDD.[911] The IRNC Group requested an additional week to submit its comments on the GDD, citing: (a) the size and complexity of the GDD; (b) the absence of any earlier disclosure; and (c) the closure of the company's offices during the holidays.[912] The Commission responded by granting the IRNC Group three additional days (until 7 January 2022) to submit its comments on the GDD.[913]

7.477. Article 12.1 of the SCM Agreement provides that:

> Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.478. Article 12.1 of the SCM Agreement requires investigating authorities to provide interested Members and interested parties with an "opportunity" to present in writing all evidence considered relevant.[914] We note that the SCM Agreement does not define the term "opportunity", explain when such an opportunity will be considered to be "ample", nor otherwise specify – apart from Article 12.1.1 (which requires authorities to provide respondents at least 30 days to respond to questionnaires) – the amount of time that interested Members and interested parties must be

[907] Indonesia's first written submission, paras. 1142-1143, 1161-1179.
[908] Indonesia's first written submission, paras. 1141, 1180-1215.
[909] Countervailing duty GDD (Exhibit IDN-108).
[910] Indonesia's first written submission, para. 1155.
[911] Indonesia's first written submission, para. 1156.
[912] Indonesia's first written submission, para. 1158 (referring to IRNC Group's deadline extension request for comments on countervailing duty final disclosure (Exhibit IDN-194)).
[913] Indonesia's first written submission, para. 1159 (referring to Commission's response to IRNC Group's deadline extension request (Exhibit IDN-195)).
[914] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

provided to present evidence to an authority. Toward this end, we note that while Article 12.1 has been interpreted as precluding investigating authorities from imposing "unreasonable deadlines" for the submission of *inter alia* comments on disclosure, as doing so would "prevent the submitters of the information from adequately defending their interests"[915], the determination of whether a particular deadline is or is not 'unreasonable' must necessarily be made on a case-by-case basis.

7.479. Article 12.8 of the SCM Agreement provides that:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.480. The second sentence of Article 12.8 of the SCM Agreement concerns the timing of disclosure. The right of parties to defend their interests is effective only when the essential facts underpinning a final determination are disclosed in a timely manner.[916] Thus, disclosure should be made in such a way that parties/Members have sufficient time to defend their interests.[917] The issue of the timeliness of the disclosure of the essential facts is also determined on a case-by-case basis, after a review of the "disclosure as a whole".[918]

7.7.4.2.2 Evaluation

7.481. Indonesia submits that the Commission violated Articles 12.1 and 12.8 of the SCM Agreement when it required the IRNC Group to comment on the GDD by 7 January 2022. Indonesia asserts that this deadline only provided the IRNC Group with 11 working days to submit comments, which was insufficient for the IRNC Group to adequately defend its interests in light of the size and complexity of the GDD, the absence of any previous indications of the contents of the GDD, and because several months remained before the Commission was required to issue its final determination in the investigation.[919] Indonesia asserts that, when a panel is asked to analyse a 'sufficiency of time' claim under Article 12.8 (i.e. to determine whether a particular amount of time that an authority has provided is "sufficient" for a party to defend its interests), the only days that are relevant to this analysis are "working days", as most companies and their employees do not work on weekends and public holidays.[920] Indonesia states that, when public holidays and weekends are accounted for, the initial comment deadline that the Commission established for the IRNC Group provided it with 8 working days to comment on the GDD (i.e. from 17 December 2021 to 4 January 2022). The 'non-working' days included six weekend days and four public holidays: 24 December 2021 (Christmas Eve); 27 December 2021 (Boxing Day); 31 December 2021 (New Year's Eve); and 3 January 2022 (New Year holiday).[921] Indonesia states that the Commission subsequently granted the IRNC Group three additional 'working' days, until 7 January 2022, to comment on the GDD.[922]

7.482. While the European Union does not disagree that Articles 12.1 and 12.8 of the SCM Agreement sets the standard against which Indonesia's claims should be evaluated, the European Union disputes how that standard applies to the circumstances of the present dispute.[923] The European Union asserts that the question of whether an authority has provided a party with sufficient time to defend its interests – in this case to comment on a disclosure – has to be assessed on a case-by-case basis, and that the disclosure of the essential facts in this instance was timely and provided sufficient time to all interested parties to defend their interests. Specifically, the European Union notes that all parties were initially provided a period of 18 days, until 4 January 2022, within which they could make comments, and that this period was subsequently

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[915] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 15.35.
[916] Appellate Body Report, *China – GOES*, fn 390.
[917] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.
[918] Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.251 and 7.254.
[919] Indonesia's first written submission, paras. 1159-1160, 1162-1166, and 1177-1179.
[920] Indonesia's first written submission, fn 1814 (referring to Panel Reports, *EU – Footwear (China)*, para. 7.833; *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.134.) and paras. 1162-1164; second written submission, paras. 800-801.
[921] Indonesia's first written submission, para. 1156.
[922] Indonesia's first written submission, para. 1159 (referring to Commission's response to IRNC Group's deadline extension request (Exhibit IDN-195)).
[923] European Union's first written submission, para. 730.

extended by 3 days (for a total of 21 days) for the IRNC Group. The European Union submits that, had the Commission granted the full extension of time that the IRNC Group had requested, it would have had an additional 2 working days. The European Union asserts this could not possibly have made a difference for the IRNC Group's right of defence and that the time allotted was not very far from what the IRNC Group could have expected had the Commission granted the IRNC Group's request in full.[924]

7.483. The European Union also states that the Commission took into account comments made and issued an additional final disclosure to parties and granted a period of 4 days to comment thereon, for a total of 21 + 4 days.[925]

7.484. Indonesia responds that the 4 days were given to provide views on the additional disclosure, and as such these days are irrelevant to Indonesia's claim with regard to the main disclosure document rather than the additional disclosure.[926]

7.485. Before describing and evaluating the remainder of the parties arguments, the Panel first evaluates the arguments of the parties with respect to: (a) the time period that is relevant to Indonesia's claim; (b) the use of "working days" or "calendar days" to measure the relevant time period; and (c) the consideration of the occurrence of "non-working days" during the relevant time period. Following this, the Panel turns to describing and evaluating the parties' remaining arguments with respect to the sufficiency of time provided to comment on the GDD.

7.486. The Panel considers that the GDD and the additional final disclosure were separate disclosures, and therefore the sufficiency of time to respond to each is a separate matter. Accordingly, the issue presented by Indonesia's claim in this dispute is whether the time that the Commission provided to the IRNC Group to respond to the GDD, i.e. from the disclosure on 17 December 2021 until the extended due date on 7 January 2022, was sufficient in the circumstances of the underlying proceeding.

7.487. The Panel recalls that, as mentioned above, the SCM Agreement does not specify the amount of time that interested Members and interested parties must be provided to comment on a disclosure. The Panel notes, however, that Article 12.1.1 (which requires authorities to provide respondents at least 30 days to respond to questionnaires) expresses the time for respondents to fulfil that requirement in calendar days, not working days. As such, we are of the view that Articles 12.1 and 12.8 cannot be interpreted to either require or prohibit an investigating authority from using either "calendar days" or "working days" when determining how much time should be provided to interested parties to respond to a disclosure. The Panel notes the diversity among WTO Members with respect to the frequency and distribution of holidays and observances as well as the diverse traditions and customs amongst Members with respect to working schedules. The Panel also notes that the SCM Agreement does not mandate that authorities expressly consider these multiple traditions when setting deadlines, as well as the fact that investigations may involve multiple exporting countries as well as related companies operating in multiple countries. Given this, we are of the view that it is not unreasonable for an authority to set a deadline for parties to comment on a disclosure based on calendar days.

7.488. An authority should, of course, give due consideration to any constraints that a party indicates may preclude it from meeting a particular deadline. This may include, as here, statements regarding pending holidays that may occur during the period prior to a deadline. We note that the IRNC Group did advise the Commission that the period that the Commission initially set for the IRNC Group to comment on the GDD included certain holidays. Specifically, we note that the IRNC Group's request for additional time to comment on the GDD stated that:

> The Definitive Disclosure includes massive information, e.g., the 155-page General Disclosure Document, the 79-page Remote Cross-checking Report, and complex subsidy calculation documents. There is no provisional disclosure to us before in this investigation, it is therefore the first time for us to know the commission's positions on many important matters both from the subsidy aspects and the injury aspects.

[924] European Union's second written submission, para. 370.
[925] European Union's first written submission, paras. 736-738.
[926] Indonesia's second written submission, para. 799.

> In addition, the offices of IRNC and its related companies will be close[d] during the Christmas and the New Year holiday.
>
> More time is therefore necessary for us to analyze the complicated legal and fact issues included in the Definitive Disclosure and to make meaningful comments thereof. [927]

7.489. The Panel observes that the IRNC Group's request for additional time notes that two holidays (Christmas and New Year) would be occurring during the comment period when "the offices of IRNC and its related companies would be close[d]". We also note that, unlike Indonesia's claim, the IRNC Group's request does not appear to ask for additional time to comment on the GDD due to the fact that the Commission's deadline included (a) six weekend days and (b) Boxing Day. We evaluate the reasonability of the Commission's deadline on the basis of the record in the underlying proceeding.

7.490. As noted above, the Commission responded to the IRNC Group's extension request by granting the IRNC Group three additional days to comment on the GDD. In evaluating Indonesia's Article 12.8 claim that the Commission did not provide the IRNC Group with sufficient time to complete this task, the Panel considers that the concept of the 'sufficiency of time' cannot be determined in the abstract but must instead be evaluated by considering whether an objective and unbiased investigating authority could have determined that the time afforded was sufficient. The Panel also considers that nothing in Articles 12.1 and 12.8 of the SCM Agreement requires an investigating authority to either partially or fully grant requests for additional time if the authority considers (in an objective and unbiased manner) that the time afforded to respond to a request or to perform a required task is sufficient. In this instance, given that the record indicates that: (a) the Commission granted the IRNC Group a three-day extension to account for the Christmas and New Year's holidays; and (b) the IRNC Group's extension request did not mention the fact that the Commission's deadline included either six weekend days or Boxing Day, we are of the view that an objective and unbiased investigating authority could have reasonably granted the IRNC Group a three day extension to account for the fact that the IRNC Group's offices would be closed during the comment period for Christmas and New Year.

7.491. The Panel now turns to examine and evaluate the parties' remaining arguments on the sufficiency of time provided to comment on the GDD.

7.492. Indonesia submits that, taken together, the disclosure amounted to hundreds of pages of documentation, in addition to allegedly complex subsidy and price undercutting calculations.[928] Indonesia contends that while the GDD was issued 10 months after the initiation of the investigation, it was the first time the IRNC Group was notified of the factual bases for several significant decisions made by the Commission regarding subsidization and injury.[929]

7.493. The European Union contends that the factual issues disclosed were mostly the facts that the IRNC Group had itself provided to the Commission. Given this, the European Union disagrees that the quantity of data prevented the IRNC Group from defending its interests because there would be no misunderstandings about the origin, veracity, and content of the information contained in the GDD. The European Union asserts that the Commission took this into account and provided sufficient time to enable the IRNC Group to understand and interpret the Commission's conclusions.[930]

7.494. Indonesia responds that the fact that the disclosure related to information submitted by the parties does not justify the Commission's decision to limit the amount of time for the IRNC Group to comment on the GDD.[931] The issue, according to Indonesia, is not about what facts were used (for

[927] IRNC Group's deadline extension request for comments on countervailing duty final disclosure (Exhibit IDN-194).
[928] Indonesia's first written submission, para. 1166.
[929] Indonesia's first written submission, paras. 1169-1171; second written submission, para. 802.
[930] European Union's response to Panel question No. 202, para. 355.
[931] Indonesia's opening statement at the first substantive meeting, para. 122 (referring to Appellate Body Reports in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.131 and 5.133).

which, the submitting party may be relevant), but rather how those facts were used by the Commission to make its determination (for which, the submitting party is irrelevant).[932]

7.495. Indonesia also contends that the GDD covered complex newly adopted methods such as attributing subsidies allegedly conferred by third-country grantors to the GOID, and treating private enterprises as public bodies.[933] Indonesia submits that while the obligation in Article 12.8 of the SCM Agreement is limited to essential facts, it contends that the disclosure implicated "several essential facts underlying" complex questions of third-country subsidization and the alleged provision of nickel ore for LTAR so that the parties should have been given sufficient time to study these facts and respond to them.[934] Indonesia also asserts that the GDD covered a large number of both broad and specific issues, and that each issue contained large amounts of inconsistent and incoherent information and detail.[935] Indonesia further submits that the GDD contained many mistakes that complicated the process of analysing and commenting on the contents of the GDD.[936] Indonesia thus argues that the period of time granted to the IRNC Group was not "sufficient" to "defend its interests" because it did not have enough time to: (a) fully express its concerns about the "completeness and correctness of the facts being considered" by the Commission; (b) "provide additional information or correct perceived errors"; and (c) "make arguments as to the proper interpretation of those facts".[937]

7.496. The European Union responds that Indonesia's claim that the Commission was required to provide the IRNC Group with extensive time to comment on the GDD due to the alleged complexity of the Commission's findings on subsidization etc. goes beyond the scope of Article 12.8 of the SCM Agreement, which, the European Union notes, is limited to "facts, as opposed to the reasoning of the investigating authorities".[938]

7.497. The Panel is of the view that all of the attendant circumstances surrounding the disclosure may be relevant to determining whether the time the Commission provided the IRNC Group to comment was sufficient, including the fact that the subject of the disclosure related to information that had been submitted by the IRNC Group. The Panel considers that the issue to be resolved by the Panel is whether the whole time afforded to the IRNC Group to respond to the GDD was sufficient. The Panel takes into consideration the volume, format, complexity, and novelty of the disclosure and any additional circumstances that would have been known to the Commission when establishing the comment period in evaluating the sufficiency of the time afforded. In light of all these circumstances, the Panel assesses whether an objective and unbiased investigating authority could – consistently with Articles 12.1 and 12.8 of the SCM Agreement – have concluded that 21 calendar days was sufficient time for the IRNC Group to comment on the Commission's disclosure of essential facts.

7.498. We recall that the SCM Agreement does not specify the amount of time that interested Members and interested parties must be provided to comment on a disclosure of essential facts. We also recall that Article 12.1.1 (which requires authorities to provide respondents at least 30 days to respond to questionnaires) may be a useful reference point when determining whether a particular comment deadline is sufficient for an interested party to defend its interests. The Panel considers that the drafters of the SCM Agreement established this 30-day period as a way of balancing, on the one hand, the interest of providing respondents with sufficient time to gather the information necessary to complete these questionnaires and, on the other hand, the interest in ensuring that an investigative authority has sufficient time to both complete its investigation and satisfy all of the SCM Agreement's substantive and procedural requirements "within one year, and in no case more than 18 months" in accordance with Article 11.11. The Panel considers that similar balancing considerations should be taken into account when determining whether the amount of time that an authority provides an interested Member or an interested party to comment on the disclosure of

[932] Indonesia's second written submission, para. 814 (quoting Appellate Body Report, *China – GOES*, fn 390).
[933] Indonesia's first written submission, paras. 1172-1173; second written submission, para. 803.
[934] Indonesia's response to Panel question No. 203.
[935] Indonesia's first written submission, paras. 1167-1168.
[936] Indonesia's first written submission, para. 1176.
[937] Indonesia's first written submission, para. 1166 (quoting Panel Reports, *EC – Salmon (Norway)*, para. 7.805; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.237).
[938] European Union's first written submission, paras. 739-741 (quoting Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148).

essential facts is "ample" for the purposes of Article 12.1 and "sufficient" for the purposes of Article 12.8.

7.499. With respect to any alleged "inconsistent and incoherent information and detail" contained in the disclosure, we find that Indonesia has not established that the Commission was aware of those circumstances when it established the comment period, nor did the IRNC Group bring any such circumstances to the Commission's attention in its request for additional time to comment.

7.500. In light of the above points, the Panel finds that an objective and unbiased investigating authority, taking into account the relative volume, format, complexity, and novelty of a disclosure as compared to the countervailing duty questionnaires, could have considered that somewhat less time would suffice to comment on the disclosure than the time that a respondent is given to respond to the countervailing duty questionnaires under Article 12.1.1 of the SCM Agreement. Accordingly, we are of the view that an objective and unbiased investigating authority could – having taken account of the circumstances attendant with this particular disclosure – have reasonably determined that 21 calendar days (18 initial calendar days plus 3 additional days granted in response to the IRNC Group's request for additional time) was sufficient time for the IRNC Group to comment on the GDD.

7.501. Given this, the Panel finds that Indonesia has not demonstrated that the Commission acted inconsistently with Articles 12.1 and 12.8 of the SCM Agreement in establishing a period of 21 calendar days for the IRNC Group to comment on the GDD.

7.7.4.3 Claims of failure to disclose essential facts under consideration

7.7.4.3.1 Introduction

7.502. Indonesia claims that the Commission acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose all the "essential facts under consideration which form the basis for the decision" to impose countervailing duties.[939] Indonesia submits that the essential facts in countervailing duty investigations cover the topics of subsidization, injury, and causation.[940] Indonesia asserts that facts relating to the determination of benchmarks were not disclosed and that these are "essential facts" with respect to subsidization.[941]

7.503. The European Union submits the Commission's disclosure fully complied with the requirements of Article 12.8 of the SCM Agreement.[942] As a general matter, the European Union submits that there is a distinction between "essential facts" and the "findings and conclusions relating to elements which form the basis of the decision to apply definitive measures." The European Union argues that while Article 22.3 requires a separate report make available in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, "investigating authorities are not required to disclose the reasoning underpinning their determinations in the disclosure" of essential facts.[943]

7.504. Article 12.8 of the SCM Agreement, in relevant part, provides that:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.

7.505. This provision requires an investigating authority to disclose the "essential facts" that "form the basis" of the authority's decision to apply a countervailing duty.[944] Essential facts are the specific facts that underlie an investigating authority's final findings and conclusions in respect of the three

[939] Indonesia's first written submission, paras. 1141, 1180-1215.
[940] Indonesia's first written submission, para. 1180 (referring to Panel Report, *Mexico – Olive Oil*, para. 7.110).
[941] Indonesia's first written submission, para. 1180 (referring to Panel Reports, *US – Ripe Olives from Spain*, para. 7.386 and fn 805; *China – GOES*, para. 7.465).
[942] European Union's first written submission, para. 730.
[943] European Union's first written submission, para. 744.
[944] Panel Report, *US – Ripe Olives from Spain*, para. 7.386.

essential elements – subsidization, injury, and causation – that must be present for the application of definitive measures.[945]

7.506. The purpose of Article 12.8 of the SCM Agreement is to provide interested Members and interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority and to provide interested Members/parties with an opportunity to: (a) provide additional information to the authority or correct perceived errors; and (b) comment on or make arguments as to the proper interpretation of those facts.[946] An authority must disclose the essential facts in a "coherent way" that enables the interested Members/parties to properly understand the basis for the authority's decision to apply a duty.[947] In addition, the disclosure of 'essential facts' must be accomplished in a manner that permits an interested party to understand how these facts have been used and potentially relied upon by an investigating authority.[948] Parties should not be expected to "deduce the essential facts themselves from the information they have otherwise received".[949]

7.507. With respect to procedural claims, such as Indonesia's Article 12.8 claims, we are of the view that the disposition of directly related substantive claims may be relevant to the consideration of whether resolution of the procedural claim is necessary to provide a positive solution to the dispute. As such, where the complainant has prevailed on a directly related substantive claim, we consider that it may be appropriate for us to consider that it would not add anything to our findings to make additional findings on procedural claims in respect of the same aspects of the determination.[950]

7.7.4.3.2 Evaluation

7.508. Indonesia's claims identify four categories of alleged missing essential facts:

a. facts regarding provision of nickel ore for less than adequate remuneration;

b. facts regarding the provision of land at less than adequate remuneration;

c. facts regarding preferential financing; and

d. facts regarding injury to the domestic industry.

7.509. Each category is addressed separately below.

7.7.4.3.2.1 Essential facts regarding provision of nickel ore for less than adequate remuneration

7.510. Indonesia raises claims with respect to the disclosure of essential facts regarding the provision of nickel ore for less than adequate remuneration. We examine these claims in the following order: (a) 27% share of state-ownership and control of PT Tonia Mitra Sejahtera and Antam; (b) reconciliation of nickel consumption volumes; and (c) Philippines benchmark price and Philippines benchmark adjustment.

27% share of state-ownership and control of PT Tonia Mitra Sejahtera and Antam

7.511. Indonesia submits that the GDD does not provide any factual basis for the Commission's determination that state-owned companies accounted for "[more than] 27%" of the total production of nickel ore in Indonesia in 2020. Indonesia contends that despite the crucial role this figure played in the Commission's determination that there is a "substantial domestic production of nickel ore" by "fully or partially State-owned" companies, and its decision to ultimately apply

[945] Panel Report, *Mexico – Olive Oil*, para. 7.110. (emphasis added)
[946] Panel Reports, *EC – Salmon (Norway)*, para. 7.805; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.237.
[947] Appellate Body Report, *China – GOES*, para. 240.
[948] Panel Report, *US – Ripe Olives from Spain*, para. 7.386.
[949] Panel Report, *Russia – Commercial Vehicles*, para. 7.277.
[950] See Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.440 (concerning a parallel issue under Article 22.3 of the SCM Agreement).

countervailing duty measures, the GDD does not provide the "essential facts" that demonstrate how the Commission arrived at the "27%" production figure.[951]

7.512. Indonesia also submits that the Commission did not identify any source for its conclusions in recitals 332 to 336 of the GDD, in which the Commission stated that it resorted to research based on publicly available information to determine *inter alia* that: (a) the Indonesian Ministry of Trade is a shareholder in PT Tonia Mitra Sejahtera; (b) members of the board of commissioners and of the board of directors of Antam were dismissed and replaced by the GOID in 2018; and (c) senior officials of Antam were dismissed and replaced by the GOID in 2019.[952]

7.513. We recall our conclusion in section 7.5.2 above that the Commission's finding that all nickel ore mining companies are public bodies is inconsistent with the European Union's commitments under Article 1.1(a)(1) of the SCM Agreement. In particular, we recall that the Commission's determination that *all* nickel ore mining companies in Indonesia are public bodies was based primarily on its examination of the regulatory framework that governed the activities and conduct of these companies in Indonesia (irrespective of their ownership), and not on its analysis of the "ownership and formal indicia of control by the GOID". We observe that the Article 12.8 claims that Indonesia advances here ultimately relate to and challenge an analysis of the nickel ore mining companies' "ownership and formal indicia of control by the GOID" that was found not to be the primary basis for the Commission's public body findings for all nickel ore mining companies. For these reasons, we do not consider that making additional findings on Indonesia's Article 12.8 claims regarding the Commission's disclosure of facts that were not ultimately at the core of the Commission's public body determination is necessary to provide a positive resolution to the dispute. We therefore decline to make findings on Indonesia's Article 12.8 claims challenging the Commission's disclosure with respect to the 27% share of state-ownership and control of PT Tonia Mitra Sejahtera and Antam.

Reconciliation of nickel consumption volumes

7.514. Indonesia submits that while the Commission stated that it could not "reconcile" the data that the GOID provided on the consumption of nickel ore in the Indonesian market with IRNC's nickel ore purchases as one of the grounds for resorting to facts available, the Commission never explained what it meant by the term "reconcile". Indonesia contends that the absence of this explanation hampered the GOID's and the IRNC Group's ability to comment on the correctness and completeness of the facts under consideration or to "correct perceived errors, and … make arguments as to the proper interpretation of those facts".[953]

7.515. The European Union responds that the meaning of the term 'reconcile' is apparent from text of recital 365 of the GDD. Recital 365 states that "the volume of domestic consumption of nickel ore submitted by the GOID could not be reconciled with the volume of purchases of nickel ore of IRNC that were cross-checked during the RCC, which seems to indicate that the GOID submitted erroneous information regarding the consumption of nickel ore".[954] The European Union asserts that this statement indicates that the volumes reported by the GOID did not correspond to (i.e. could not be reconciled with) the information provided by the IRNC Group. The European Union further submits that significant discrepancies existed in the data that the GOID submitted between the volume of nickel ore production and the volume of nickel ore consumption from 2017 to 2020. Specifically, the European Union notes that: (a) the GOID-submitted figures on the total consumption of nickel ore by the SSCRFP industry was the same as – and thus identical to – the total consumption of nickel ore across all sectors of the economy; and that (b) the total nickel ore consumption data that the GOID provided for 2019 and 2020 was less than the amount of nickel ore consumed by IRNC alone during the investigation period. The European Union submits that these discrepancies raised doubts about the accuracy of the GOID's nickel ore consumption data. The European Union, therefore, argues that the meaning of the term "reconcile" was "self-evident" and thus need not have been separately defined.[955]

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[951] Indonesia's first written submission, paras. 1181-1184.
[952] Indonesia's first written submission, para. 1189.
[953] Indonesia's first written submission, paras. 1191-1193 (quoting, *inter alia*, Panel Report, *EC – Salmon (Norway)*, para. 7.805 (emphasis added by Indonesia)).
[954] Countervailing duty GDD (Exhibit IDN-108), recital 365.
[955] European Union's first written submission, para. 749.

7.516. Indonesia argues that it was not privy to the SSCRFP producers' submissions so that the nature of the unreconciled figures were not, and did not become, "self-evident" until the Commission noted these apparent discrepancies in its final determination.[956]

7.517. We recall our prior examination in section 7.7.3.4.3 above regarding the Commission's statement that it could not "reconcile" the GOID's data on the consumption of nickel ore in the Indonesian market with IRNC's nickel ore purchases. We note that the content of the statement at issue under that claim is identical to the statement Indonesia challenges with this claim. Here again, Indonesia asserts that the statement was made as one of the grounds for resorting to facts available. Consistent with our conclusion in section 7.7.3.4.3 above, we do not find a basis to conclude that the Commission replaced the allegedly inconsistent data that it received regarding domestic nickel ore consumption with "facts available". Indonesia has not pointed to any specific determination that the Commission made on the basis of facts available or inferences drawn from the GOID's submission of allegedly inconsistent data regarding the domestic consumption of nickel ore. We recall that essential facts are the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury, and causation. Indonesia's claim of inconsistency under Article 12.8 of the SCM Agreement depends on the challenged statement forming a basis for a final finding or conclusion by the Commission on these three essential elements. We find that Indonesia has not substantiated that the challenged statement was an essential fact.

7.518. This finding is based on the fact that Indonesia has not shown that the Commission's statement that it was unable to reconcile the data that the GOID submitted regarding the domestic consumption of nickel ore with IRNC's purchases of nickel ore had an impact on the Commission's determination to apply countervailing duty measures. Given that Indonesia has not substantiated that the challenged statement was an essential fact, we find that Indonesia has not demonstrated that the Commission acted inconsistently with Article 12.8 of the SCM Agreement.

Philippines benchmark price and Philippines benchmark adjustment

7.519. Indonesia submits that although the disclosure that the Commission issued to the IRNC Group regarding the Philippines prices that the Commission used as a benchmark stated that "[d]etailed daily prices" were available in an attached document identified as the "Nickel ore and chromium benchmark", the referenced attachment was not provided in either the disclosure or in the additional disclosure documents.[957]

7.520. Indonesia argues that this disclosure relating to the calculation of the alleged benefit for nickel ore provided for LTAR was therefore incomplete, omitted any reference to required adjustments, and should have been provided as a non-confidential summary. Indonesia claims that these deficiencies constitute inconsistencies with Articles 12.1 and 12.8 of the SCM Agreement.[958]

7.521. We recall our conclusions in sections 7.5.2 and 7.5.3 above that upheld Indonesia's claims challenging the Commission's determination that the GOID, "through the mining companies acting as public bodies or entrusted/directed by the GOID, provide nickel ore to the stainless steel industry".[959] Having thus found the Commission's financial contribution determination to be inconsistent with Article 1.1(a)(1) of the SCM Agreement, we observe that the Articles 12.1 and 12.8 claims that Indonesia advances here ultimately relate to determining the benefit associated with the provision of nickel ore for LTAR. For these reasons we do not consider that making additional findings on Indonesia's Article 12.1 and 12.8 claims regarding the Commission's alleged failure to disclose facts relating to the benefit determination associated with this alleged financial contribution is necessary to provide a positive resolution to the dispute. We therefore decline to make findings on Indonesia's Article 12.1 and 12.8 claims challenging the Commission's disclosure with respect to the Philippines benchmark price and the Philippines benchmark adjustment.

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[956] Indonesia's second written submission, para. 822.

[957] Indonesia's first written submission, para. 1195 (referring to IRNC Group countervailing duty disclosure of benchmarks for subsidy calculations (Exhibit IDN-185 (BCI)); IRNC Group countervailing duty disclosure of nickel ore data for subsidy calculations (Exhibit IDN-189 (BCI))).

[958] Indonesia's first written submission, para. 1196.

[959] Countervailing duty final determination (Exhibit IDN-1), recital 540.

7.7.4.3.2.2 Essential facts regarding the provision of land at less than adequate remuneration

7.522. Indonesia submits that the GDD failed to disclose the factual basis for the Commission's determination that the "land in question was the property of the Indonesian State" as a basis for the conclusion that a financial contribution was provided "in the form of provision of State land".[960] In particular, Indonesia submits that the following factual elements were only provided in the final determination: (a) that "the land of the territory where IMIP was established is State Land ('Tanah Negara') with the status of former Swapraja land"; (b) the conclusion (based on Article 43 of the Agrarian Law of 1960) that "it was up to the GOID to decide whether the land would be transferred to IMIP or not"; and (c) that "the GOID actively intervened in several ways to procure the land to IMIP".[961] Indonesia argues that these omissions prevented the parties from commenting on the "completeness and correctness" of the facts being considered by the Commission, before they were "crystalized" in the final determination.[962]

7.523. Indonesia asserts that the Commission did not establish a factual basis for the conclusions adopted in the disclosure documents, including: (a) the fact that "the land of the territory where IMIP was established is State Land ('Tanah Negara') with the status of former Swapraja land"; (b) the factual conclusion that "it was up to the GOID to decide whether the land would be transferred to IMIP or not; (c) that "the GOID actively intervened in several ways to procure the land to IMIP"; (d) the GOID's alleged intermediary role between villagers and the IMIP; and (e) the supposed similarity in the area of the plots of land and the definition of alleged compensation as an average price per square meter. Indonesia argues that the basis for these types of factual findings is supposed to be provided at the disclosure stage of the proceeding rather than in the final determination because by then it is too late to question or challenge the factual basis adopted by the authority, thus negating the purpose of Article 12.8 of the SCM Agreement.[963]

7.524. The European Union responds that the GDD states that: (a) "[t]he land in question was the property of the Indonesian State"[964]; (b) "[a]s a matter of fact, the GOID was the owner of the land"[965]; and that (c) "[t]he fact that there were villagers occupying the land and IMIP paid the agreed compensation to the villagers to purchase the land does not make such a transaction a transaction between two private parties".[966] The European Union argues that the essential fact that the GOID owned the land was, therefore, disclosed to the interested parties.[967] The European Union contends that the GOID's disagreement with this factual assessment and the Commission's rebuttal to those arguments in the final determination does not establish that the Commission failed to disclose this essential fact.[968]

7.525. We recall that the purpose of Article 12.8 of the SCM Agreement is to provide interested Members and interested parties with the information necessary to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts. We consider that the question before us is not whether all of the facts and explanations that appear in the final determination were previously disclosed. Indeed, it is to be expected that, when parties take the opportunity to comment on a disclosed matter, the investigating authority may respond to those comments including by referring to additional information from the record of the investigation and further explanation to address the comments raised. In our view, this is an indication that the disclosure served the purpose of giving parties an opportunity to defend their interests. We find that the disclosure provided the essential fact that the Commission considered that it was a fact that the GOID had owned the land and provided additional detail sufficient for the parties to comment on this matter. We are of the view that the essential fact at issue was disclosed in sufficient detail for the parties to defend their interests by raising their arguments which prompted the Commission to expand on its explanations and offer additional

[960] Indonesia's first written submission, para. 1198.
[961] Indonesia's first written submission, para. 1200 (quoting Countervailing duty final determination (Exhibit IDN-1), recitals 851, 853, 855 and 856).
[962] Indonesia's first written submission, para. 1202.
[963] Indonesia's response to Panel question 206; second written submission, paras. 825-831.
[964] Countervailing duty GDD (Exhibit IDN-108), recital 675.
[965] Countervailing duty GDD (Exhibit IDN-108), recital 677.
[966] Countervailing duty GDD (Exhibit IDN-108), recital 677.
[967] European Union's second written submission, para. 377.
[968] European Union's first written submission, para. 755.

details. Accordingly, we are of the view that the obligation to disclose essential facts was satisfied in this instance. We, therefore, find that Indonesia has not demonstrated that the Commission's disclosure failed to comply with Article 12.8 by not disclosing the essential factual basis for the determination that the "land in question was the property of the Indonesian State" with respect to the conclusion that a financial contribution was provided "in the form of provision of State land".

7.7.4.3.2.3 Essential facts regarding preferential financing

7.526. Indonesia submits that the GDD stated that the benefit that was calculated in connection with the provision by the Chinese grantors of certain allegedly preferential financing to the IRNC Group was "[b]ased on the result of 11 sales transactions of steel companies in the period 2006 to 2019", but that no further information about the sales transactions was disclosed in the GDD in contravention of Article 12.8 of the SCM Agreement.[969]

7.527. We recall our conclusion in section 7.4.2 above that the Commission's finding that the preferential financing and other support by the Chinese grantors can be attributed to the GOID was inconsistent with Article 1.1(a)(1) of the SCM Agreement. Specifically, the *chapeau* of Article 1.1(a)(1) does not allow an investigating authority to attribute a financial contribution of a Member to another Member on the grounds that the latter induced the contribution from the former. Given this, and given that the Article 12.8 claim that Indonesia advances here ultimately relates to determining the benefit associated with the preferential financing that the Commission determined was attributable to the GOID because the GOID induced it, we do not consider that making additional findings on Indonesia's Article 12.8 claims regarding the Commission's disclosure of essential facts relating to preferential financing that the Chinese grantors allegedly provided to the IRNC Group is necessary to provide a positive resolution to the dispute.

7.7.4.3.2.4 Essential facts regarding injury to the domestic industry

7.528. Indonesia submits that the disclosure documents nowhere set forth the methodology used to analyse the conditions of competition in the EU market for the imported products and the product manufactured by the domestic industry, and that this information was only revealed in the final determination. Indonesia argues that the "methodology" used by an authority is an essential fact that must be disclosed and is a relevant consideration under *inter alia* Articles 15.3 (cumulation) and 15.5 (causation) of the SCM Agreement, and that the failure to disclose this methodology denied parties the opportunity to comment on the facts under consideration.[970] Indonesia asserts that the fact that the competition analysis was conducted on the basis of the product control numbers (PCNs) provided by the sampled companies is missing from the disclosure, and that this fact was only provided in the final determination.[971]

7.529. The European Union responds that the fact that the Commission's analysis was made at the PCN level was disclosed to the sampled Indonesian exporting producers.[972] The European Union argues that recital 765 of the GDD explains how Indian and Indonesian imports of SSCRFP were competing with the EU like product, and that SSCRFP was sold to similar categories of customers. The European Union submits that the essential fact that these imports competed with the EU like product was disclosed and that nothing more is required to be disclosed under Article 12.8 of the SCM Agreement. The European Union argues that the Commission additionally explained in the GDD how the subsidized imports were capable of causing negative effects to the EU industry.[973] The GDD read in relevant part:

> The conditions of competition between the subsidised imports from each of the two countries concerned and between them and the Union like product were similar. Indeed, SSCR originating in India and Indonesia competed with each other when

[969] Indonesia's first written submission, para. 1205.
[970] Indonesia's first written submission, para. 1215.
[971] Indonesia's response to Panel question No. 208; second written submission, para. 833.
[972] European Union's second written submission, para. 380 (referring to IRNC Group countervailing duty disclosure of undercutting calculation overview (Exhibit IDN-192 (BCI)), p. 2; IRNC Group countervailing duty disclosure of undercutting calculation spreadsheet (Exhibit IDN-193 (BCI))).
[973] European Union's first written submission, para. 762 (referring to Countervailing duty GDD (Exhibit IDN-108), recitals 810–812).

> imported for sale on the Union market, and with the like product produced by the Union industry, as all of them are sold to similar categories of customers.
>
> …
>
> Imports from the countries concerned increased by more than 50% in the period considered and their market share almost doubled. This increase in market share was at the detriment of imports from third countries. However, the low priced subsidised imports from the countries concerned created a price pressure on the Union industry. Prices of imports from India and Indonesia have been, during the period considered, between 5 and 19% below prices of the Union industry. Due to these imports prices, the Union producers were not only unable to reflect raw material cost increases in their prices, they were even forced to decrease their sales prices in order to maintain their market share.
>
> As a result, the profitability of the Union producers, at a relatively high level in 2017, dropped down to almost zero in the IP, which had a further adverse effect on all the financial indicators of the companies in question.
>
> There is thus a strong causal link between the subsidised imports from India and Indonesia and the injury suffered by the Union industry.[974]

7.530. We consider that the methodology for the analysis of competitive conditions can be an essential fact to the extent that it underlies the determination of causation and injury. We are of the view, however, that the fact that the analysis was conducted using PCNs was disclosed to the sampled Indonesian exporting producers who would have provided the relevant data and would be in a position to comment on the appropriateness of how it was used. In this respect, we do not consider the fact that this particular detail was not explicitly disclosed in the GDD necessarily leads to the conclusion that the defence of interests with respect to this matter was inhibited. For this reason, we find that Indonesia has not demonstrated that the Commission's disclosure failed to comply with Article 12.8 by not including in the GDD that the analysis of competitive conditions was conducted using PCNs.

7.7.5 Claims under Article 22.3 of the SCM Agreement: sufficient detail of findings and conclusions

7.7.5.1 Introduction

7.531. Indonesia claims that the Commission's final determination was deficient in terms of the level of detail that it provided regarding certain material issues of fact and law and that it failed to provide "reasoned and adequate explanation[s]" underpinning several factual findings and legal determinations contrary to Article 22.3 of the SCM Agreement.[975]

7.532. The European Union responds that Indonesia's Article 22.3 claims should be rejected because the final determination contains sufficient detailed explanations with respect to each of Indonesia's claims.[976]

7.533. Indonesia argues that the obligation contained in Article 22.3 of the SCM Agreement should be read in light of the general obligation that investigating authorities have to explain the factual and legal bases of their determinations.[977] Indonesia contends that, in its view, an adequate

[974] Countervailing duty GDD (Exhibit IDN-108), recitals 765 and 810-812.
[975] Indonesia's first written submission, paras. 1227-1251.
[976] European Union's first written submission, paras. 764-830.
[977] Indonesia's first written submission, paras. 1224 (referring to Panel Report, *China – Broiler Products*, paras. 7.258 and 7.266; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 184 and 186) and 1225 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

explanation is an explanation that provides "sufficient details" to allow a "full understanding" of the authority's reasoning behind the imposition of a measure.[978]

7.534. The European Union contends that the question a panel must ask is not whether the reasoning in question was adequate or correct but whether such reasoning was laid out in "sufficient detail". The European Union submits that the substantive standard of review should not be confused with the standard applicable under Article 22.3 of the SCM Agreement.[979]

7.535. Article 22.3 of the SCM Agreement provides that:

> Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise 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. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

7.536. Article 22.3 of the SCM Agreement requires a final determination to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".[980] The obligation in Article 22.3 is procedural in character, relating to the nature of the public notice an investigating authority must provide with respect to its substantive determinations.[981] The text of Article 22.3 indicates that the disclosure required relates to the findings and conclusions actually reached by an investigating authority, rather than to findings and conclusions that could reasonably have been reached.[982] Further, the obligation relates to "issues of fact and law considered material by the investigating authorities".[983] This indicates that the disclosure obligation relates to those issues that an investigating authority subjectively considers material. Therefore, Article 22.3 is a procedural provision that does not discipline the substantive adequacy of an investigating authority's reasoning.[984] Where Article 22.3 claims are directly linked to substantive claims on the same matter that have been upheld, it may be appropriate to consider whether making additional findings on the same matter is necessary to provide a positive resolution to the dispute.[985]

7.7.5.2 Evaluation

7.537. Indonesia asserts that the Commission allegedly failed to provide sufficient detail and explanation to support the following five categories of decisions:

a. requiring the GOID to conduct a part of the investigation on behalf of the Commission;

b. provision of nickel ore for less than adequate remuneration;

c. cooperation between the GOID and the GOC;

d. preferential financing; and

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[978] Indonesia's response to Panel question No. 209 (quoting Merriam-Webster Dictionary online, definition of "adequate" https://www.merriam-webster.com/dictionary/adequate#:~:text=1,that%20is%20good%20or%20acceptable (accessed 10 June 2025), meaning 1 ("sufficient for a specific need or requirement")).
[979] European Union's first written submission, paras. 767-769 (quoting Panel Report, *China - GOES*, paras. 7.355-7.356 and 7.365).
[980] Panel Report, *China – GOES*, para. 7.355.
[981] Panel Report, *China – GOES*, para. 7.356.
[982] Panel Report, *China – GOES*, para. 7.356.
[983] Panel Report, *China – GOES*, para. 7.356.
[984] Panel Report, *China – GOES*, para. 7.356.
[985] See Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.440.

e. government revenue foregone or not collected that is otherwise due.

7.538. Each category is addressed separately below.

7.7.5.2.1 Decision to "require" the GOID "to conduct" a part of the countervailing duty investigation

7.539. Indonesia submits that the final determination presents no details or explanation to justify the Commission's decision to "require" the GOID to conduct a part of the investigation on the Commission's behalf, other than suggesting that the decision was made for the purpose of "administrative convenience". Indonesia argues that the absence of these details and explanations is striking given that the GOID had notified the Commission that the GOID was not responsible for performing these functions and could not perform the obligations that the Commission sought to impose on it.[986]

7.540. The European Union responds that matters relating to the organization of the investigation need not be included in the final determination as they have no bearing on the substantive determination and are, therefore, not issues that are "material" within the meaning of Article 22.3 of the SCM Agreement. The European Union submits that Indonesia understood that the Commission was asking the GOID to forward the relevant requests for information to the mining companies "for administrative convenience" but that the GOID disagreed with that approach for substantive reasons. The European Union argues that this is not a violation of Article 22.3.[987]

7.541. Indonesia argues that matters of organization are included in the scope of "issues of fact and law", and that this covers the delegation of responsibility to the GOID which included a consideration of facts (the alleged relationship between the GOID and the nickel ore mining companies), as well as of the law (i.e. the question of whether obligations can be shifted from an authority to an interested Member).[988] Indonesia further argues that the organizational matter of making the GOID responsible for notification and "fact-finding" was necessary for the Commission to proceed with the investigation by seeking information about the nickel ore mining companies through the GOID, and was therefore "material".[989] Indonesia further argues that a more detailed explanation was required in light of the GOID's express objection to this matter during the investigation.[990]

7.542. The European Union responds that 'materiality' has not been interpreted to include such matters under the analogous provision of the Anti-Dumping Agreement (Article 12.2.2) because the word "material" refers to issues which must be resolved to reach a determination to apply a final duty.[991] The European Union argues that not every issue arising during an investigation can be considered to have "led to" the application of a duty, even though a particular issue may be of significance to one or more interested parties.[992] The European Union further argues that the obligation relates to the matrix of facts, law and reasons that logically fit together to render the decision to apply final measures.[993]

7.543. We understand that the premise of Indonesia's Article 22.3 claim centres on the contention that the Commission's final determination was obligated to – but did not – address the question of "whether obligations can be shifted from the authority to the interested Member". We recall our findings in section 7.7.2 above in which we: (a) disagree with the view that the Commission was under a general requirement to always seek information directly from the entity that possesses such information or to whom it relates; and (b) conclude that investigating authorities may elect to "channel" a request for information through an interested party or an interested Member. We are of the view that these findings invalidate the premise of Indonesia's Article 22.3 claim that the

[986] Indonesia's first written submission, para. 1228.
[987] European Union's first written submission, para. 777.
[988] Indonesia's response to Panel question No. 211; second written submission, para. 839.
[989] Indonesia's response to Panel question No. 211.
[990] Indonesia's second written submission, para. 838.
[991] European Union's second written submission, para. 383 (quoting panel report, *China – X-Ray Equipment*, paras. 7.458-7.459).
[992] European Union's second written submission, para. 383 (quoting panel report, *China – X-Ray Equipment*, paras. 7.458-7.459).
[993] European Union's second written submission, para. 383 (quoting panel report, *China – X-Ray Equipment*, paras. 7.458-7.459).

Commission was required to support/explain its decision to shift the burden of conducting the investigation from the authority to the interested Member. For this reason, we find that Indonesia has not demonstrated that the Commission acted inconsistently with Article 22.3 of the SCM Agreement by electing not to include this explanation in the final determination.

7.7.5.2.2 Determination regarding provision of nickel ore at less than adequate remuneration

7.544. Indonesia asserts several claims with respect to certain findings related to the ownership and control of nickel ore mining companies by the GOID, alleging that the final determination provides, contrary to Article 22.3 of the SCM Agreement, either no source or insufficient detail or explanations in respect of these findings.[994]

7.545. Indonesia submits that the final determination does not provide any detail or explanation that would enable the parties to understand how the Commission defined or conceptualized the meaning of the term "State-owned" when it concluded that certain nickel ore mining companies are "State-owned".[995]

7.546. Indonesia also submits that with respect to the determination that "the share of the State-owned companies in the total production in 2020 was more than 27%" the Commission states that the figure of "27%" was calculated taking into account the public information available for only five companies, but does not indicate which companies were assessed in arriving at this figure.[996] Indonesia argues that the absence of this information precluded the parties from understanding the "rationale for the investigating authority's decision" that the share of the state-owned companies in the total domestic production of nickel ore was 27%.[997] Indonesia asserts that the explanation was not sufficiently detailed because it could not know which five companies constituted the 27% figure or how this figure was calculated. The evidentiary basis of the Commission's decision was, therefore, not provided in the final determination according to Indonesia.[998]

7.547. Indonesia additionally submits that with respect to certain findings related to the alleged "management and control" by the GOID of nickel ore mining companies Dwiwarna and Gag Nikel, the final determination provides no source for the factual findings that the Commission arrived at based on "its own research … due to the lack of cooperation of GOID".[999]

7.548. Indonesia finally submits that no source, details, or explanations are given for the findings that the GOID exerted management and/or control over certain companies, including PT Tonia Mitra Sejahtera, Gag Nikel, and Vale.[1000]

7.549. We recall our conclusion in section 7.5.2 above that the Commission's finding that all nickel ore mining companies are public bodies is inconsistent with Article 1.1(a)(1) of the SCM Agreement. In particular, we recall that the Commission's determination that all nickel ore mining companies in Indonesia are public bodies was based primarily on its examination of the regulatory framework that governed the activities and conduct of these companies (irrespective of their ownership), and not on its analysis of the "ownership and formal indicia of control by the GOID". We observe that the Article 22.3 claims that Indonesia advances here ultimately relate to an analysis of the "ownership and formal indicia of control by the GOID" that was found not to be the basis for Commission's public body findings. For these reasons we do not consider that making additional findings on Indonesia's Article 22.3 claims involving conclusions in the final determination that were not ultimately at the core of the Commission's public body determination is necessary to provide a positive resolution to the dispute. We therefore decline to make findings on Indonesia's Article 22.3 claims challenging the Commission's disclosure with respect to claims related to the ownership and control of nickel ore mining companies by the GOID.

[994] Indonesia's first written submission, paras. 1229-1237.
[995] Indonesia's first written submission, para. 1230.
[996] Indonesia's first written submission, para. 1231.
[997] Indonesia's first written submission, para. 1231.
[998] Indonesia's second written submission, para. 849.
[999] Indonesia's first written submission, para. 1232.
[1000] Indonesia's first written submission, paras. 1234-1237.

7.7.5.2.3 Determination regarding cooperation between the GOID and the GOC

7.550. Indonesia contends that the final determination provides unclear and internally inconsistent reasoning in its resort to facts available with respect to the alleged cooperation between the GOID and the GOC. In support of this contention, Indonesia cites certain findings in the final determination for which the GOID allegedly did not provide requested documentation pertaining to priority projects.[1001]

7.551. We note that the nature of the cooperation between the GOID and GOC ultimately relates to the question of whether preferential financing and other support by the Chinese grantors can be attributed to the GOID. In that respect we recall our conclusion in section 7.4.2 above that the Commission's finding that the preferential financing and other support by the Chinese grantors can be attributed to the GOID was inconsistent with Article 1.1(a)(1) of the SCM Agreement. Specifically, we recall our conclusion that the *chapeau* of Article 1.1(a)(1) does not allow an investigating authority to attribute a financial contribution of a Member to another Member on the ground that the latter induced the contribution from the former. Given this, and the fact that Indonesia's Article 22.3 challenge here ultimately relates to the Commission's determination that the GOID induced the preferential financing at issue, we do not consider that making additional findings on Indonesia's Article 22.3 claim regarding the level of detail that the Commission's final determination provides with respect to the nature of the cooperation between the GOID and the GOC is necessary to provide a positive resolution to the dispute.

7.7.5.2.4 Determination regarding preferential financing

7.552. Indonesia submits that – in the context of the Commission's determination that SSCRFP producers in Indonesia were receiving preferential financing – the Commission's final determination did not: (a) provide detail regarding the use of ordinary shares to determine the alleged benefit with respect to the alleged equity injection where the shares at issue were "special shares with very limited governance rights";[1002] (b) provide explanation for the selected proxy to determine the alleged benefit arising from the CAF equity injection;[1003] or (c) provide explanation for questioning the origin of certain machinery allegedly provided to the IRNC Group for LTAR and not accepting documentation to establish the origin thereof.[1004]

7.553. We recall our conclusion in section 7.4.2 above that the Commission's finding that the preferential financing and other support by the Chinese grantors can be attributed to the GOID was inconsistent with Article 1.1(a)(1) of the SCM Agreement. Specifically, we recall our conclusion that the *chapeau* of Article 1.1(a)(1) does not allow an investigating authority to attribute a financial contribution of a Member to another Member on the ground that the latter induced the contribution from the former. Given this finding, and given that the Article 22.3 claims that Indonesia advances here ultimately relate to determining either the existence of or the benefit associated with the same preferential financing improperly attributed to the GOID, we do not consider that making additional findings on Indonesia's Article 22.3 claims regarding the sufficiency of detail in the Commission's final determination on preferential financing is necessary to provide a positive resolution to the dispute.

7.7.5.2.5 Determinations regarding government revenue foregone or not collected

7.7.5.2.5.1 Import duty exemptions for raw materials imported into bonded zones

7.554. Indonesia submits that the Commission failed to explain or provide details regarding its decision to depart from the relevant legal standard under Footnote 1 of the SCM Agreement by not determining whether there was an "excess remission" in respect of the import duty exemptions. Indonesia further submits that the Commission failed to provide "sufficient details" or any reasoned

[1001] Indonesia's first written submission, para. 1238 (referring to Countervailing duty final determination (Exhibit IDN-1), recitals 552, 573, and 710); second written submission, para. 859.
[1002] Indonesia's first written submission, para. 1249 (quoting Countervailing duty final determination (Exhibit IDN-1), recital 780).
[1003] Indonesia's first written submission, para. 1243.
[1004] Indonesia's first written submission, para. 1244; second written submission, para. 865.

and adequate explanations as to why it chose to countervail not just the alleged "excess" exempted duties but the entire amount of unpaid duties.[1005]

7.555. We observe that this claim relates to the Commission's determination to countervail import duty exemptions for raw materials imported into bonded zones which we have examined in section 7.6.2 above. We recall our conclusion that the Commission acted inconsistently with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement by determining that the import duty exemptions constituted a subsidy without having notified the GOID of the need for a "further examination" pursuant to Annex II(II)(2). We therefore do not consider that it would assist in providing a positive resolution to the dispute to make further findings as to whether the Commission's final determination provided sufficient detail in explaining the reasons for the amount of such exemptions that were determined to be countervailable.

7.7.5.2.5.2 Income tax holiday

7.556. Indonesia submits that the Commission provided mere "conclusory statements" and did not provide sufficient factual or legal bases for its conclusion that the income tax holiday scheme: (a) constituted a financial contribution in the form of revenue foregone; (b) conferred a benefit; and (c) was specific. Indonesia contends that the Commission concluded, without further detail or explanation, that the scheme was a subsidy because "there is a financial contribution in the form of revenue foregone by the GOID that confers a benefit to the company concerned".[1006] Indonesia also contends that the Commission concluded, again without further detail or explanation, that the scheme was specific because "it is available only to certain companies active in certain sectors that are qualified as 'pioneer industries' in accordance with Articles 4(2)(a) of the basic Regulation".[1007]

7.557. The European Union responds that recitals 872-878 of the final determination allow for a full understanding of the reasons for the imposition of measures. The European Union submits that these recitals set forth in detail that:

> [T]he income tax holiday scheme provides tax holiday to corporate taxpayers, which performs investment in so-called "pioneer industries". Pursuant to Article 1 of MoF 150/2018, "pioneer industries" are industries characterised by large connectivity, creation of added-value and high externality, introduction of new technology, and of strategic value to the national economy. Under Article 3(2) of MoF 150/2018 "pioneer industry" includes, among other things, the upstream basic metal industry: (i) steel; or (ii) not steel, with or without its integrated derivatives product processing facilities. In order to benefit from the reduction of their income tax under this scheme, the taxpayers must: (1) have the status of an Indonesian legal entity; (2) make an investment that is a new investment and that has not been given/has not been rejected to receive a reduction of the CIT; (3) the investment must be made in an industry that qualifies as "pioneer industry"; (4) the new investment is of minimum IDR 100 billion; and (5) the taxpayer satisfies the debt to equity ratio set out in the regulation.
>
> [The Commission] found that the IRNC Group received from the Directorate General of Taxation a tax benefit for one of its ferronickel plants, which allowed for 100% reduction of net taxable income for ferronickel products for 7 years and 50% reduction for the next 2 years. The [Commission] found that 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 subsidy was specific because it is available only to certain companies active in certain sectors that are qualified as "pioneer industries".
>
> The amount of countervailable subsidy was calculated in terms of the benefit conferred on the recipients during the investigation period. The benefit was calculated as the difference between the income taxes payable in the absence of the income tax deduction

[1005] Indonesia's first written submission, para. 1246.
[1006] Indonesia's first written submission, para. 1248 (referring to Countervailing duty final determination (Exhibit IDN-1), recital 875).
[1007] Indonesia's first written submission, para. 1249 (referring to Countervailing duty final determination (Exhibit IDN-1), recital 876); second written submission, para. 868.

> facility and the income taxes paid in the investigation period (IP). The subsidy rate established for this specific scheme amounted to 1,65 % for IRNC Group.[1008]

7.558. The European Union argues that the Commission's conclusion is complete, coherent, and understandable, and that the Commission reasonably concluded that "there is a financial contribution in the form of revenue foregone by Indonesia that confers a benefit to the company concerned". The European Union contends that the same is true for the Commission's conclusion that the income tax holiday scheme was specific because "it is available only to certain companies active in certain sectors that are qualified as 'pioneer industries' in accordance with Articles 4(2)(a) of the basic Regulation". The European Union argues that Indonesia's disagreement with the final determination's findings on this issue does not establish a violation of Article 22.3 of the SCM Agreement.[1009]

7.559. We are of the view that the whole of the Commission's final determination with respect to the income tax holiday must be examined to assess whether sufficient detail is provided to support the conclusions reached, consistent with Article 22.3 of the SCM Agreement. The issue is not whether the conclusions themselves are presented in conclusory statements, but rather whether the whole discussion of the matter at issue is sufficient to satisfy the obligation in Article 22.3. We find that the final determination does recite sufficient factual findings regarding the income tax holiday with references to the evidentiary record and sets forth conclusions in statements that incorporate a reason for the conclusion. In our view, this satisfies the Article 22.3 obligation to "set forth … in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Accordingly, we find that Indonesia has not demonstrated that the Commission's final determination with respect to the income tax holiday is inconsistent with Article 22.3.

7.7.5.2.5.3 Income tax allowance facility

7.560. Indonesia argues that the Commission did not provide sufficient detail or explanation for its conclusion that the income tax allowance facility: (a) constituted a financial contribution; and (b) was specific. Indonesia contends that the Commission concluded "there is a financial contribution in the form of revenue foregone by the GOID" without further detail or explanation. Indonesia additionally contends that the Commission merely stated that the scheme was specific "because it is available only to certain companies depending on their business activities" without further detail or explanation.[1010]

7.561. We recall our conclusion in section 7.6.4 above that the Commission's determination that the income tax allowance facility is specific is inconsistent with Articles 1.2 and 2.1 of the SCM Agreement. Specifically, we recall our conclusion that the Commission's final determination did not provide a reasoned and adequate explanation sufficient to justify its determination that the income tax allowance facility is specific. Given this finding, and given that the Article 22.3 claims that Indonesia advances here ultimately relate to the same programme, we do not consider that making additional findings on Indonesia's Article 22.3 claims regarding the sufficiency of detail in the Commission's final determination on the income tax allowance facility is necessary to provide a positive resolution to the dispute.

7.7.6 Conditional claims under Articles 12.8, 14, and 22.3 of the SCM Agreement regarding pass-through analysis

7.562. Indonesia conditionally seeks a finding of violation of Articles 12.8, 22.3, and 14 of the SCM Agreement, as well as a finding of failure on part of the Commission to provide "reasoned and adequate" explanations regarding its determination of alleged benefit that: (a) any benefit accruing to the IRNC Group's Chinese shareholders had passed through to the IRNC Group; and that (b) any alleged benefit accruing to the nickel ore mining companies passed through to the non-sampled SSCRFP producers.[1011] Indonesia's claim is explicitly conditioned upon a hypothetical scenario, stating that "if the EU submits in the context of the present dispute that the Commission did in fact

[1008] European Union's first written submission, paras. 821-823 (referring to MOF Regulation 150/2018 (Exhibit IDN-112); Countervailing duty final determination (Exhibit IDN-1), recitals 872-878). (fns omitted)
[1009] European Union's first written submission, paras. 820-823.
[1010] Indonesia's first written submission, paras. 1250-51; second written submission, para. 868.
[1011] Indonesia's first written submission, paras. 1253-1255.

conduct such a pass-through analysis in the SSCRFP CVD investigation – and if the Panel accepts this assertion – then Indonesia submits that the Commission failed in its procedural obligations with respect to the analysis and examination of the alleged benefit".[1012] We note that related claims regarding the benefit analysis for the shareholder loans[1013] and the non-sampled cooperating producer[1014] are examined separately above.

7.563. The European Union submits that "the Commission did not conduct a pass-through analysis in the context of the financial support received by the IRNC's Chinese parent companies which was allocated to the IRNC's activities in Indonesia" and that "the Commission did not conduct any pass-through analysis when setting the countervailing duty rate of the non-sampled cooperating exporters".[1015]

7.564. Indonesia has confirmed, in response to a question by the Panel, that "if … the Commission did not conduct a pass-through analysis in these two situations, then Indonesia's claim in para. 1253 of its first written submission, namely, that the Commission failed to explain its methodology and failed to provide the underlying factual bases for such an analysis, need not be addressed by the Panel".[1016]

7.565. We note that the European Union does not submit that Commission conducted a pass-through analysis in the relevant aspects of its determination. We also note that satisfaction of the second condition is itself dependent on the satisfaction of the first condition. The Panel finds, therefore, that neither of the conditions Indonesia posits for asserting its conditional claim are satisfied. Indonesia's conditional claim will not be addressed by the Panel.

7.8 Claims concerning the Commission's findings in the underlying anti-dumping investigation in connection with fair comparison and due allowances

7.8.1 Introduction

7.566. The Panel now turns to address Indonesia's claims challenging certain elements of the Commission's anti-dumping duty determination with respect to IRNC. Indonesia claims that the determination is inconsistent with Articles 2.4 and 6.1 of the Anti-Dumping Agreement and the *chaussette* of Article VI:1 of the GATT 1994 because the Commission, according to Indonesia, improperly:

a. deducted certain transport related expenses and storage expenses only from the export price but not from the normal value;

b. deducted selling, general, and administrative (SG&A) expenses and notional profit for export sales that IRNC made through related traders but not from normal value; and

c. imposed an unreasonable burden of proof by failing to indicate what information was necessary to ensure a fair comparison.

7.567. We address each of these claims in turn.

7.8.2 Deduction of certain transport and storage expenses from export price but not from normal value

7.8.2.1 Introduction

7.568. Indonesia claims that the Commission's anti-dumping determination is inconsistent with Article 2.4 of the Anti-Dumping Agreement because, in calculating a margin of dumping for IRNC,

[1012] Indonesia's first written submission, para. 1254. (emphasis original)
[1013] See section 7.4.4 above.
[1014] See section 7.5.4.2 above.
[1015] European Union's first written submission, para. 832.
[1016] Indonesia's response to Panel question No. 216.

the Commission deducted certain transport-related expenses and warehouse expenses from the export price but did not deduct similar expenses from the normal value.[1017]

7.569. The European Union rejects Indonesia's claim and asserts that (a) the deductions that the Commission made to the export price were necessary to make comparisons at the same level of trade in accordance with the second sentence of Article 2.4 of the Anti-Dumping Agreement, and (b) IRNC failed to substantiate its request that the Commission adjust the normal value to reflect expenses that IRNC incurred to warehouse and transport its SSCRFP when it was sold in the domestic market.

7.570. By way of background, we note that the record in the underlying proceeding indicates (and that the parties agree) that all of IRNC's sales that were destined for the European Union were first made to related traders. Once these related traders received the SSCRFP from IRNC, they either shipped the product directly to the European Union or to a warehouse in a third country before it was subsequently shipped to the European Union. The Commission made adjustments to all of these export sales to arrive at an *ex-works* price by deducting from the invoiced price all costs incurred, either by IRNC or the related traders, from the point at which the product left IRNC's "premises".[1018]

7.571. By comparison, we note that the record also indicates (and that the parties agree) that when IRNC made domestic sales, it sold either to unrelated customers or to related traders and that, following production, IRNC's SSCRFP was first stored in IRNC's warehouse in Morowali (on Sulawesi island where IRNC's factory is located) after which it was shipped either directly to domestic customers or to a warehouse that IRNC rented in Surabaya (on Java island where the Surabaya port is located) before subsequently being delivered to customers. The Commission also made adjustments to these domestic sales to arrive at an *ex works* price by deducting all costs incurred, either by IRNC or by its related traders, from the point at which the product left IRNC's "premises" from either of the two warehouses.[1019]

7.8.2.2 Evaluation

7.572. We begin our analysis by recalling the provisions relevant to the claim. Article 2.4 of the Anti-Dumping Agreement reads, in relevant part, as follows:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability[1020].

7.573. Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to make a fair comparison between the export price and the normal value and sets forth certain requirements that must be complied with in order to ensure that the comparison is fair.

7.574. The first sentence of Article 2.4 of the Anti-Dumping Agreement simply states the obligation that a fair comparison shall be made.

7.575. The second sentence of Article 2.4 of the Anti-Dumping Agreement provides that this comparison shall be made variously taking into consideration the features of the export price(s) and normal value(s) to be compared. Three features are referenced: (a) "level of trade" which is not defined; (b) "the ex-factory level" which incorporates a reference to a delivery term of sale; and (c) when in time the sales are made. The comparison shall be made: (a) "at the same" level of trade; (b) "normally at" the ex-factory level; and (c) "in respect of sales made at as nearly as

[1017] Indonesia's first written submission, paras. 1286-1345.
[1018] See Indonesia's first written submission, paras. 1268-1269 and 1289; European Union's first written submission, paras. 848-849.
[1019] See Indonesia's first written submission, para. 1290; European Union's first written submission, para. 850.
[1020] Fns omitted.

possible the same" time. The present claim appears to raise questions about the meaning of, and the relationship between, the first two features, i.e. "level of trade" and "the ex-factory level".

7.576. The third sentence of Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to make "[d]ue allowance … in each case, on its merits, for differences which affect price comparability" and provides an illustrative list of differences that may affect price comparability, including "differences in … physical characteristics". Article 2.4 does not prescribe a particular methodology that authorities must follow in order to ensure that a comparison is fair.

7.577. We note that the parties appear to have certain shared understandings about the nature of the adjustments that Article 2.4 of the Anti-Dumping Agreement requires an investigating authority to make to the normal value and/or the export price to ensure that the comparison between the two is "fair" when determining a margin of dumping. Both parties agree, for example, that the second sentence of Article 2.4 requires an authority to make certain adjustments to the export price and the normal value to ensure that the comparison between the two is made at the "same" level of trade.[1021] The parties also agree that the third sentence of Article 2.4 requires an authority to – as appropriate – make other "due allowances" adjustments to account "for differences in conditions and terms of sale, taxation, levels of trade … and any other differences which are also demonstrated to affect price comparability." Both parties acknowledge that an important aspect of the third sentence relates to the burden imposed on the party advocating for a due allowance to establish that the allowance is warranted by demonstrating that the difference at issue affects price comparability.[1022]

7.578. The parties' arguments regarding whether or not adjustments for certain expenses should be made are divided according to the above understanding of the nature of the adjustments that must be made under the second sentence and the due allowances that must be made under the third sentence of Article 2.4 of the Anti-Dumping Agreement. We consider the arguments that the parties raise under the second sentence and the third sentence of Article 2.4 in turn, below.

7.8.2.2.1 The second sentence of Article 2.4 of the Anti-Dumping Agreement

7.579. As noted above, the first and second sentences of Article 2.4 of the Anti-Dumping Agreement provide that:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.

7.580. The parties agree in part and differ in part in their understanding of the meaning of the phrase "level of trade" in the second sentence of Article 2.4 of the Anti-Dumping Agreement. Both parties note the fact that this phrase, and the extended phrase "same level of trade", is modified by the phrase "normally at the *ex-factory* level". The parties also appear to agree that the term "*ex-factory*" is a particular delivery term of sale and that such delivery terms "are generally used to determine who bears the relevant responsibilities and thus to identify the constituting elements of a given price [and that] [i]dentifying those elements is a key to fulfilling the obligation under the second sentence of Article 2.4, i.e. to make the comparison at the same level of trade."[1023] Because both parties incorporate the dimension of the delivery term of sale into the concept of the level of trade, we understand that Indonesia and the European Union share the view that whenever different sales prices reflect different delivery terms, these different sales will not be comparable to one another until they have been adjusted by "netting back" to prices that reflect the same level of trade. The parties further agree that "whilst comparison at the *ex-factory* price level is a suggestion a comparison at the same level of trade is an obligation".[1024] Both parties also agree that an export

[1021] The parties refer to the process of adjusting export sales prices and normal values to bring them "back" to the same level of trade as the "netting back process". (European Union's first written submission, para. 863; Indonesia's second written submission, para. 886).

[1022] Indonesia's first written submission, paras. 1279-1281; European Union's first written submission, paras. 839-840.

[1023] Indonesia's second written submission, para. 892 (quoting European Union's response to Panel question No. 218, para. 366).

[1024] Indonesia's second written submission, para. 874 (quoting European Union's first written submission, para. 862).

price and normal value that specify delivery at a warehouse gate could be used to make the comparison at the same level of trade.[1025]

7.581. The European Union contends that while the term "level of trade" is not defined in the Anti-Dumping Agreement or in the European Union's regulations, the Commission's understanding and application of the term incorporates the dimension of the delivery term of sale into the concept of level of trade.[1026] With this understanding, the Commission recognizes that a sale price will include, or not, different elements such as transport, handling, loading and ancillary expenses, depending on who bears the relevant responsibilities according to the terms and conditions of sale, in particular the delivery term.[1027] In view of the elements included in the price, adjustments are made as part of the "netting back process" under the second sentence of Article 2.4 of the Anti-Dumping Agreement to arrive at a price that reflects the same level of trade along the dimension of the delivery term.[1028]

7.582. Indonesia considers that "the same level of trade should be based on the shipment term of the sales".[1029] As such, Indonesia asserts that the phrase "normally at the ex-factory level" refers to a particular "level of trade" that should normally be the basis for the comparison.

7.583. We agree with view that while Article 2.4 of the Anti-Dumping Agreement does not define the term "level of trade", the connected phrase "normally at the ex-factory level" indicates that the delivery term of sale constitutes an important basis for understanding whether or not comparisons are made at the "same" level of trade.

7.584. The European Union asserts that the terms ex-works and ex-factory have the same meaning and are interchangeable. The European Union explains that the Commission makes comparisons at the "ex-works level" with reference to the "premises" of the seller and that this was understood by IRNC during the underlying investigation. IRNC had argued that the Surabaya warehouse was not part of IRNC's premises because the warehouse was rented by IRNC rather than owned by IRNC.[1030] This argument was rejected by the Commission. As such, the Commission treated warehouses that were either rented or owned by IRNC as part of IRNC's "premises". Accordingly, the Commission treated all expenses associated with transporting IRNC's product to – and storing the product at – the Surabaya warehouse as "internal" and considered them to be incurred before the sale.[1031] With respect to the export sales, the European Union submits that warehousing and transport costs were deducted during the "netting back" process to arrive at the same level of trade as the domestic sales. These warehousing and transport costs were incurred by a related trader who rented the warehouse in question. Because the warehouse was neither rented nor owned by IRNC, the Commission determined that it was not part of IRNC's premises and thus could not belong to the "ex-works level of trade". Given this, the European Union asserts that the circumstances relevant to establishing the "same" level of trade were fundamentally different between the export sales that were stored at the related trader's rented warehouse and the products utilizing the Surabaya warehouse.[1032] The European Union submits that an adjustment for differences relating to products utilizing the Surabaya warehouse was still possible under the third sentence of Article 2.4 of the Anti-Dumping Agreement if the necessary conditions had been satisfied.[1033]

7.585. Indonesia accepts that it is "commonly understood that the terms ex-factory and ex-works level are the same", but maintains that there is, nevertheless, a "small distinction between both

[1025] Indonesia's second written submission, para. 891.
[1026] The European Union also understands the concept of level of trade to include at least one additional dimension relating to the marketing stage at which the sale is made, such that sales made by manufacturers, wholesalers and retailers are at different levels of trade. (See European Union's response to Panel question No. 218, paras. 365-367). The analysis under this claim focuses on the dimension of the level of trade that relates to the delivery term of sale because the parties agree that the expenses in question are directly related to that dimension of the level of trade.
[1027] European Union's responses to Panel question No. 218, para. 366, and No. 404, para. 361.
[1028] European Union's response to Panel question No. 404, para. 361.
[1029] Indonesia's response to Panel question No. 218 (quoting Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.235).
[1030] IRNC's comments on anti-dumping final disclosure (Exhibit IDN-213), pp. 3-4.
[1031] Anti-dumping final determination (Exhibit IDN-2), recital 83.
[1032] European Union's second written submission, paras. 404-405.
[1033] European Union's second written submission, para. 409.

terms".[1034] According to Indonesia, this "small distinction" has to do with the fact that, while the ex-works delivery term allows for any place of delivery to be specified, ex-factory is essentially the ex-works delivery term where the place of delivery has been specified as the factory. Indonesia states that the 2020 Incoterms define an ex-works shipment as one where the seller delivers goods to the buyer at a named place, which may be a factory or a warehouse. Indonesia asserts that this indicates that the term "ex-works" does not necessarily refer to the seller's premises.[1035] Notwithstanding this, we note that Indonesia agrees that there is "in principle nothing wrong with the Commission comparing the export price and the normal value at an ex-works level".[1036]

7.586. The Panel notes that Indonesia's Article 2.4 claim does not require the Panel to determine whether the Commission was obligated to make comparisons "at the ex factory level" nor to interpret the meaning of word "normally" within the context of the second sentence of Article 2.4 of the Anti-Dumping Agreement. We also note that Indonesia does not challenge, in principle, the Commission's determination to make comparisons at a level of trade that corresponds to "ex works" delivery. As such, the Panel's task is to evaluate whether an objective and unbiased authority could have determined that comparisons made at a level corresponding to an "ex works" delivery term in reference to the "premises" of the seller can be considered as at the "same level of trade" within the meaning of Article 2.4. Or, stated differently, when using the "ex works" delivery terms as the basis for the level of trade, [whether] an objective and unbiased authority could (consistently with Article 2.4) have determined to treat "ex works Surabaya warehouse" and "ex works Morowali warehouse" as the same level of trade given that both warehouses are either owned or rented by IRNC and thus are both part of IRNC's "premises".

7.587. Indonesia asserts that the reference in the second sentence of Article 2.4 of the Anti-Dumping Agreement to ex-factory suggests that the level of trade can be considered to be the same if the place of delivery is the factory, which is a singular place. Indonesia reasons that where an ex works delivery term is used as the basis for the level of trade, the place of delivery could be a warehouse, but should be a singular warehouse, not multiple warehouses. Where the place of delivery is different, Indonesia considers that the constituting elements of the price are different and, therefore, the level of trade is different such that an adjustment for those elements that differ is required to ensure that the comparison is made at the same level of trade.[1037] Specifically, Indonesia argues that:

> There is … in principle nothing wrong with the Commission comparing the export price and the normal value at the ex-works level, but these should be the same ex-works level.
>
> As concerns the present case, Indonesia does not consider that an ex-works (Morowali warehouse) export price and an ex-works (Surabaya warehouse) normal value are at the same level since the assigned place of delivery is different. [1038]

7.588. Indonesia submits that this is consistent with the fact that in most cases expenses that are typically part of the "netting back process" (i.e. transport, insurance, handling and loading costs incurred between the goods leaving the premises of the producer up until delivery to the first independent customer) are expected to have been reflected in pricing and would indeed affect price comparability.[1039]

7.589. We understand Indonesia's claim under the second sentence of Article 2.4 of the Anti-Dumping Agreement to be that the Commission acted inconsistently with its obligation to make comparisons at "the same level of trade" when it made its comparisons on the basis of export prices and normal values that had been adjusted to correspond to delivery at multiple locations (i.e. the Surabaya and Morowali warehouses) at the "premises" of the seller rather than a singular delivery location (i.e. the Morowali warehouse).

[1034] Indonesia's second written submission, para. 887.
[1035] Indonesia's second written submission, para. 888.
[1036] Indonesia's second written submission, para. 891.
[1037] Indonesia's second written submission, paras. 892-96.
[1038] Indonesia's response to Panel question No. 218.
[1039] Indonesia's second written submission, para. 879.

7.590. The European Union disputes that the obligation to make comparisons at the same level of trade requires adjustments to "net back" all sales to a single place of delivery.[1040] Instead, the European Union asserts that the Commission properly considered that the "netting back" exercise achieves a comparison at the same level of trade by adjusting for expenses to deliver the product to the customer from wherever the product was located on IRNC's premises prior to delivery.[1041] As such, the European Union states that:

> IRNC sold the like product on the domestic market from two warehouses: the Morowali warehouse and the Surabaya warehouse. In light of the definition [of the ex-works delivery term], it is only logical that the *ex-works* level for the former would be the warehouse gate in Morowali and the *ex-works* for the latter would be the warehouse gate in Surabaya. This is exactly how the European Union netted back the normal value – to the gate of IRNC's (rented or owned) premises that was the closest to where the like product was being stored prior to departure to the domestic customer. [1042]

7.591. We are not persuaded that the text of the second sentence of Article 2.4 of the Anti-Dumping Agreement necessarily requires an investigating authority to define the same level of trade to be based on a singular delivery location in all circumstances. The Panel is of the view that sales made at the level of the ex-works delivery term could permissibly be considered by an investigating authority to be made at the "same" level of trade even though a singular delivery location is not specified. In particular, we note that the ex-works delivery term allows the place of delivery to be specified, and that both parties agree that ex-works is a legitimate delivery term upon which to base the level of trade within the meaning of Article 2.4. Accordingly, while ex-works Surabaya warehouse and ex-works Morowali warehouse represent different delivery locations, both are properly understood to be ex-works sales. We consider that the ex-works level based on the "premises" of the seller is not contrary to the common understanding of the term "ex-works" put forward by either party, as both parties acknowledge that the ex-works delivery term allows the delivery location to be specified. Neither does the term ex-factory reference in Article 2.4 necessarily imply that a singular delivery location is mandatory to make the comparison at the same level because a seller could operate multiple factories that produce the merchandise at issue. We also consider that Indonesia's acknowledgement that the terms "ex-works" and "ex-factory" are commonly understood to be the same (while noting that there is a technical distinction between them) does not provide a textual basis for the Panel to conclude that the Commission's interpretation of the second sentence of Article 2.4 is an impermissible one.

7.592. The Panel finds further support for this conclusion based on the fact that the third sentence of Article 2.4 of the Anti-Dumping Agreement includes the "level of trade" as among the reasons that an authority may need to make due allowance to account for differences demonstrated to affect price comparability. The inclusion of the phrase "level of trade" in the third sentence suggests to us that differences affecting price comparability may relate to additional delivery specifications. To the extent that differences between delivery specifications result in differences that affect price comparability, such differences can appropriately be addressed using "due allowances" under the third sentence of Article 2.4 where such differences are not assumed to exist but instead must be demonstrated to exist.

7.593. Having found that Indonesia has not established that the Commission acted inconsistently with its obligation to make comparisons at the same level of trade within the meaning of the second sentence of Article 2.4 of the Anti-Dumping Agreement, we next examine Indonesia's arguments relating to the claimed due allowances under the third sentence of Article 2.4.

7.8.2.2.2 The third sentence of Article 2.4 of the Anti-Dumping Agreement

7.594. In addition to its claim that IRNC's warehousing and transport expenses should have served as the basis for the Commission to make adjustments to normal value as part of the "netting back process", Indonesia submits that in the event "the Panel were to rule that these expenses are not part of the 'netting back process', Indonesia considers that, at least for the transport-related expenses (i.e. the expenses incurred for bringing the goods to the Surabaya warehouse), such an adjustment would need to be made" under the third sentence of Article 2.4 of the

[1040] European Union's second written submission, paras. 398-401.
[1041] European Union's second written submission, paras. 400-401.
[1042] European Union's second written submission, para. 400.

Anti-Dumping Agreement.[1043] As such, Indonesia claims that the Commission acted inconsistently with the third sentence of Article 2.4 of the Anti-Dumping Agreement and the *chaussette* of Article VI:1 of the GATT 1994 because the Commission declined to make adjustments to the normal value to reflect transport-related expenses that were incurred when IRNC's merchandise was transported from the Morowali warehouse to the Surabaya warehouse, while allegedly equivalent expenses that were incurred in connection with export sales to the European Union were subject to a downward adjustment to the export price.[1044]

7.595. Indonesia asserts that "the rented Surabaya warehouse, located more than 1,000km away from IRNC's production facility (in Morowali, on another island), does not form part of IRNC's premises".[1045] This issue arises from the Commission's use of the ex-works delivery term with the delivery location specified as the "premises" of the seller as the basis for the level of trade that is the "same level of trade" at which comparisons between export prices and normal values are made to determine margins of dumping, and is addressed above. We do not find any basis upon which to reject the Commission's determination that warehouses that are rented or owned by IRNC form part of IRNC's premises.

7.596. We note that the Commission's determination also referenced the fact that sales contracts for export transaction allowed "transshipment" by the trading company as the goods were transported to the European Union, in addition to the fact that the trading company incurred transport and warehousing expenses for export transactions while IRNC incurred such expenses for domestic transactions.[1046] The Commission further determined that "an adjustment to the export price does not automatically entail an adjustment to the normal value, and that such adjustment to the normal value needs to be duly justified, based on facts and evidence, by the party requesting it".[1047] The Panel agrees that an assertion of "sameness" is not, by itself, sufficient to justify an allowance on the domestic side because expense-related evidence relating to domestic transactions – including evidence relating to the role played by trading companies in the sales transaction – will necessarily differ from export transactions.

7.597. Indonesia asserts that the Commission refused to deduct expenses that IRNC incurred in connection with transporting goods to the Surabaya warehouse from the normal value. Indonesia emphasizes the European Union's response to Panel question No. 217, in which the European Union explains that the Commission would have considered a cost adjustment if IRNC had claimed and demonstrated that "the Surabaya warehouse was used occasionally only as a transit warehouse" as, in that case:

> [T]he Commission would have been justified in considering all domestic sales as Morowali ex-factory and then equally justified in adjusting for all costs incurred after leaving the warehouse in Morowali when netting the normal value back to the ex-factory level.[1048]

7.598. Indonesia agrees with the European Union's analysis, but asserts that the supposedly hypothetical situation was in fact the case here, quoting a statement of an IRNC official as reported in the RCC report:

> The company replied that if the storage is within 15-30 days no additional fees are charged to its clients. In case of delay in the payment or when the client is not able to pick up directly the goods at the port, the goods are transferred and stocked at the warehouse in Surabaya. [1049]

7.599. The RCC report, however, also notes that [[***]].[1050] We do not consider that the Commission was required to accept the IRNC official's statement in the absence of evidence supporting its veracity. The Panel notes that both parties take the position that if the hypothetical

[1043] Indonesia's second written submission, para. 899.
[1044] Indonesia's first written submission, paras. 1302-1340; second written submission, para. 874.
[1045] Indonesia's second written submission, para. 906.
[1046] Anti-dumping final determination (Exhibit IDN-2), recital 84.
[1047] Anti-dumping final determination (Exhibit IDN-2), recital 86.
[1048] Indonesia's second written submission, para. 907.
[1049] Indonesia's second written submission, para. 908. (emphasis original)
[1050] IRNC Group anti-dumping RCC report (Exhibit IDN-206 (BCI)), p. 12.

situation had in fact occurred, then the transportation expenses at issue would have been included in the "netting back process" under the second sentence of Article 2.4 of the Anti-Dumping Agreement. Accordingly, we do not consider that the scenario described supports Indonesia's claim that an adjustment to domestic sales was required pursuant to the third sentence of Article 2.4.

7.600. We note that IRNC's comments on the Commission's final disclosure were directed at having these expenses treated identically to the expenses on the export side that were included in the "netting back process" on the basis that the warehouse involved in the domestic sales transactions was not part of the manufacturer's "premises". In particular, the IRNC's comments on the final disclosure argued that the distinction between warehouses that were rented or owned by IRNC and those that were rented or owned by a related trading company did not justify treating the transport and warehousing costs that IRNC incurred in connection with its domestic sales differently from transport and warehousing costs incurred in connection with its export sales. [1051] We have addressed this issue already above and as well in respect of Indonesia's claim under the second sentence of Article 2.4 of the Anti-Dumping Agreement, as the adjustments made to the export side were made to ensure that comparisons were made at the same level of trade. Here, we evaluate only whether the Commission's decision not to adjust the domestic transactions was inconsistent with the third sentence of Article 2.4. Moreover, the Panel finds that it is not inconsistent with the obligation in the third sentence of Article 2.4 to treat any similar adjustment to the normal value as a separate matter because such an adjustment would necessarily be based on an examination of different evidence.

7.601. Examining IRNC's comments on the final disclosure more closely, we note that IRNC argued that the Commission was requiring that it demonstrate a difference affecting price comparability for the domestic transport to Surabaya while the Commission allegedly had not demonstrated a difference affecting price comparability on the export side.[1052] IRNC's argument emphasized that for adjustments to domestic transactions for transport related expenses the burden to substantiate *would be on IRNC*. IRNC argued that the Commission bore the burden for the adjustments made on the export side, but contended that the Commission had not satisfied that burden because the Commission allegedly had not explained why adjustments are required on the export side, but not on the domestic side, to ensure price comparability.[1053] In other words, IRNC was emphasizing that the Commission had allegedly not met its burden to substantiate the adjustment to export transactions.

7.602. We find IRNC's comments instructive for what they do not claim about the referenced adjustments to the domestic transactions. In particular, we do not understand IRNC's comments to assert that it *had substantiated* a request for adjustment to the domestic sales. Rather, we understand IRNC to be opposing the adjustment on the export side due to an alleged lack of substantiation by the Commission, and alternatively asserting that the allegedly unsubstantiated adjustments made to the export transactions justified making similarly unsubstantiated adjustments to the domestic sales. The Commission took this statement as a request for adjustment to the domestic transactions, albeit a request that was not accompanied by substantiation.

7.603. With this understanding of IRNC's comments and the Commission's consequent determination, we turn to address Indonesia's claim under the third sentence of Article 2.4 of the Anti-Dumping Agreement that an adjustment to the domestic transactions was warranted. Where transport-related related expenses differ between compared transactions, Indonesia argues:

> [These] are elements that "… *have an impact, or are likely to have an impact, on the prices of the transactions*" and are therefore "*expected to have [been] reflected in […] pricing*". As such, transport-related expenses are in principle factors that affect price comparability and for which, therefore, in principle, adjustments are necessary. [1054]

7.604. Indonesia's claim thus asserts that transport-related expenses are elements that have an impact, or are likely to have an impact, on the prices of the transactions and are therefore expected to have been reflected in the price. Indonesia thus asserts that transport-related expenses are in

[1051] IRNC's comments on anti-dumping final disclosure (Exhibit IDN-213 (BCI)), pp. 3-5.
[1052] IRNC's comments on anti-dumping final disclosure (Exhibit IDN-213 (BCI)), pp. 3-5.
[1053] IRNC's comments on anti-dumping final disclosure (Exhibit IDN-213 (BCI)), pp. 3-5.
[1054] Indonesia's second written submission, para. 910 (quoting Panel Report, *US – Stainless Steel (Korea)*, para. 6.77 (emphasis added by Indonesia; fns omitted)).

principle factors that affect price comparability and for which adjustments are necessary. In this respect, we understand Indonesia to be arguing, similar to IRNC in the underlying investigation, that substantiation for such adjustments is not necessary. We disagree. The third sentence of Article 2.4 of the Anti-Dumping Agreement reads as follows:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

7.605. The *chaussette* of Article VI:1 of the GATT 1994 reads as follows:

> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

7.606. We are of the view that neither Article 2.4 of the Anti-Dumping Agreement nor the *chaussette* of Article VI:1 of the GATT 1994 prescribes a particular methodology that authorities must follow to ensure that a comparison is fair. The text of Article 2.4 refers to differences that are "*demonstrated* to affect price comparability".[1055] As we see it, the provision thus makes explicit that exporters bear the burden to substantiate, by argument and evidence, their requests for adjustments for any claimed differences affecting price comparability. If exporters request an adjustment but fail to demonstrate the existence of a difference that affects price comparability, investigating authorities are not obliged to make an adjustment. We note that prior dispute settlement reports concur with the view that the burden to substantiate an exporter's claimed adjustment falls upon the exporter making the claim.[1056]

7.607. The Panel is of the view that the record, as described above, does not support a finding that IRNC demonstrated a difference affecting price comparability. Indeed, we note that the record demonstrates that IRNC objected to any requirement that it demonstrate that the expenses in question affected price comparability because IRNC asserted that the Commission had not made such a demonstration on the export side of the comparison. The Commission subsequently responded "that a mere statement requesting an adjustment without providing any substantiated request in support clearly falls short" of the requirement for the exporter to demonstrate with argument and evidence the existence of a difference affecting price comparability for which an allowance is due. The Commission concluded with respect to the adjustment to domestic transactions that the "claim was thus rejected as unsubstantiated." The Panel finds that the Commission's conclusion is reasoned and adequately supported by the record as described.

7.608. The Panel finds that it was not necessary for the Commission to make a finding that price comparability was unaffected because IRNC never attempted to demonstrate that price comparability was affected, arguing instead to the Commission that it should not have to demonstrate it. On this basis, the Panel finds that Indonesia has not established that the Commission acted inconsistently with the third sentence of Article 2.4 of the Anti-Dumping Agreement by rejecting IRNC's claim for adjustment.

7.8.3 Deduction of SG&A expenses and notional profit for related traders from export price but not from normal value

7.8.3.1 Introduction

7.609. Indonesia claims that the Commission's treatment of adjustments for SG&A expenses and profit for the involvement of related trading companies (i.e. which resulted in a downward adjustment to account for commission-like expenses that were paid to such traders in connection with export sales but without making a similar adjustment to the normal value) is inconsistent with Article 2.4 of the Anti-Dumping Agreement.[1057] Specifically, Indonesia claims that the Commission's downward adjustment to the export price for the involvement of related traders in the

[1055] Emphasis added.
[1056] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.163 and 5.204; *EC – Fasteners (China)*, para. 488. See also Panel Reports, *EC – Fasteners (China)*, para. 7.298; *EC – Tube or Pipe Fittings*, para. 7.158; *Korea – Certain Paper*, para. 7.147; and *EU – Footwear (China)*, para. 7.282.
[1057] Indonesia's first written submission, paras. 1346-1404.

export sales is inconsistent with the third sentence of Article 2.4 because it was not shown that there was a difference affecting price comparability.[1058] Indonesia also submits that, in light of the adjustment made to the export price, the Commission's refusal to make similar adjustments to the normal value for the involvement of related traders in domestic sales is inconsistent with the third sentence of Article 2.4.[1059]

7.610. The European Union submits that sufficient record evidence existed to allow the Commission to reach the reasonable and reasoned conclusion that commissions were paid with respect to export sales in which a trading company was involved (and for which an SG&A adjustment is appropriate), whereas no such commissions were claimed and demonstrated to have been paid to the traders involved in the domestic sales.[1060]

7.611. The European Union also notes that IRNC failed to comment on the additional final disclosure despite the fact that it was invited to do so. This disclosure set forth the findings mentioned above which the Commission took into consideration in its analysis of the relationship between the producer and the related traders for export sales.[1061] The European Union further contends that IRNC did not claim that a similar relationship was present between the producer and the related traders with respect to domestic sales.[1062]

7.8.3.2 Evaluation

7.8.3.2.1 Export price adjustment

7.612. Indonesia claims that the Commission failed to establish that the involvement of related traders in exports to the European Union resulted in a difference which affects price comparability.[1063] According to Indonesia, the Commission's findings that the related traders had functions similar to an agent working on a commission basis are insufficient to support the conclusion that a difference affecting price comparability exists.[1064]

7.613. In its comments on the provisional disclosure, IRNC had argued "the Commission cannot simply make such an adjustment, without providing evidence showing that the functions of the related companies are in fact similar to those of an agent working on a commission basis".[1065] IRNC further commented that "the Commission did not present any evidence, let alone evidence why an adjustment is required on the export side but not on the domestic side where sales are also made through related traders".[1066]

7.614. Thus, IRNC's argument was not that there was no price effect on the export side, but that there would be a similar price effect on the domestic side. The Commission subsequently issued the additional final disclosure in which it made a series of six findings and concluded that "the Commission established that the relationship between the related traders … and IRNC [was] that of companies acting as an agent on a commission basis. Accordingly, the Commission decided to apply the provisions of Article 2(10)(i) of the EU basic anti-dumping regulation and adjust the export price."[1067] The European Union submits that none of the evidence nor its relevance for the conclusions reached were questioned by IRNC following the additional final disclosure.[1068] The European Union also submits that the commission paid for the assistance with export sales is an element affecting price comparability that should be removed. The European Union contends that

[1058] Indonesia's first written submission, paras. 1355 and 1358-1374.
[1059] Indonesia's first written submission, paras. 1356 and 1375-1396.
[1060] European Union's first written submission, paras. 908 and 913.
[1061] European Union's first written submission, paras. 901-902.
[1062] European Union's first written submission, para. 902.
[1063] Indonesia's first written submission, paras. 1358-1374.
[1064] Indonesia's first written submission, paras. 1364-1365.
[1065] IRNC's comments on anti-dumping provisional disclosure (Exhibit IDN-211 (BCI)), p. 12.
[1066] IRNC's comments on anti-dumping provisional disclosure (Exhibit IDN-211 (BCI)), p. 13.
[1067] IRNC Group additional anti-dumping final disclosure (Exhibit IDN-216 (BCI)), p. 2. Article 2(10)(i) of the EU basic anti-dumping regulation provides that: "[a]n adjustment shall be made for differences in commissions paid in respect of the sales under consideration. The term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis." (Basic anti-dumping Regulation (Exhibit IDN-214)).
[1068] European Union's first written submission, para. 912.

the Commission did demonstrate that the commission paid on the export sales resulted in a difference which affects price comparability.[1069]

7.615. Indonesia acknowledges that at least two of the Commission's findings in the additional final disclosure "may have been associated with an effect on prices" but re-affirm IRNC's argument that these findings were equally applicable to both export sales and domestic sales and, therefore, do not demonstrate a difference affecting price comparability.[1070]

7.616. According to the European Union, the evidence supporting a downward price adjustment related only to the export sales as they concerned the relationship with traders that sold only for export. The European Union also asserts that the record indicated that related traders performed functions similar to those of an agent working on a commission basis.[1071] The European Union cites the panel report in *EU – Fatty Alcohols (Indonesia)* for the proposition that where a related trader acts as an agent working on a commission basis and receives a mark-up on this account, such mark-up normally qualifies as a difference which affects price comparability.[1072] The European Union further argues that the Commission has an established practice in this respect and that IRNC's comments demonstrate that it was aware of this practice. The European Union submits that, when the Commission considered the nature of the related traders' relationship with IRNC as a whole, including the above-mentioned findings, the Commission reasonably found that the related traders were similar to agents working on a commission basis and that the commission paid to the traders on the export side constituted an expense that is linked to the export side alone thereby affecting price comparability.[1073]

7.617. Indonesia responds to these assertions by stating that the Commission did not make an explicit statement finding a "difference affecting price comparability" during the investigation or in the final determination, nor reference the panel's analysis in *EU – Fatty Alcohols (Indonesia)*.[1074]

7.618. The Panel finds that the Commission examined evidence that was specific to the export side and concluded that there was an effect on export price for which an adjustment was appropriate. The Panel does not consider that the Commission was obligated under Article 2.4 of the Anti-Dumping Agreement to use a specific formula of words or to make reference to supportive prior analyses when making this particular adjustment as the third sentence of Article 2.4 merely requires an authority to make due allowances for "differences which are … demonstrated to affect price comparability". We are of the view that the record in the underlying proceeding indicates that the Commission provided a reasoned and adequate basis for its decision to make a downward adjustment on price based on evidence that related specifically and exclusively to the export transactions. Under such circumstances the Panel finds that it is not inconsistent with the obligation in the third sentence of Article 2.4 to treat any similar adjustment to the normal value as a separate matter because such an adjustment would necessarily be based on an examination of different evidence. As mentioned above, investigating authorities are not obliged to make an adjustment that has not been substantiated by the party requesting it.[1075] As the third sentence of Article 2.4 does not prescribe a particular methodology that authorities must follow to ensure that a comparison is fair, the Panel considers that under these circumstances the Commission's approach - to separately address adjustments to the export side and the normal value side - was not contrary to the obligation in the third sentence of Article 2.4.

7.619. For the above reasons, the Panel finds that Indonesia has not established that the Commission acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by deducting SG&A expenses and notional profit for export sales through related traders found to be performing functions similar to those of an agent working on commission basis.

[1069] European Union's first written submission, paras. 912-913.
[1070] Indonesia's first written submission, para. 1373.
[1071] European Union's first written submission, para. 910.
[1072] European Union's second written submission, para. 418 (referring to Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.128; Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.112).
[1073] European Union's first written submission, para. 901.
[1074] Indonesia's second written submission, para. 926.
[1075] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.163 and 5.204; *EC – Fasteners (China)*, para. 488; Panel Reports, *EC – Fasteners (China)*, para. 7.298; and *Korea – Certain Paper*, para. 7.147.

7.8.3.2.2 Normal value non-adjustment

7.620. Indonesia claims that, by not adjusting the normal value to account for expenses associated with IRNC's related traders, the Commission violated the third sentence of Article 2.4 of the Anti-Dumping Agreement.[1076] Indonesia contends that IRNC did request that, if an adjustment was made for export sales, then an equivalent adjustment also needed to be made to account for the involvement of IRNC's related traders in the company's domestic sales.[1077] Indonesia submits that "IRNC simply requested the Commission to carry out the same adjustment on the normal value side as the one carried out on the export side."[1078] According to Indonesia, all the findings that the Commission cited in the additional final disclosure to support making adjustments to the export price for the involvement of related trading companies equally apply for the involvement of related trading companies in IRNC's domestic sales.[1079] Indonesia argues that the Commission was obligated to consider the requested adjustment, particularly when the adjustment was requested as a result of another adjustment made on the investigating authority's own initiative.[1080]

7.621. The European Union submits that no proper claim to make an adjustment to the normal value to account for the company's commission expenses was made by IRNC at any stage of the investigation, and that no commissions were demonstrated to have been paid to the traders involved in the domestic sales.[1081] According to the European Union, IRNC never claimed that its domestic traders acted as agents working on a commission basis and in any case never substantiated such a claim.[1082] The European Union submits that the burden of proof for claiming an adjustment under Article 2.4 of the Anti-Dumping Agreement lies with the party claiming the adjustment.[1083] The European Union submits that the Commission's analysis related to the economic relationship between the producer and its related traders for export, and that it made allowances to account for an expense that was found to function as a commission and that affected prices.[1084] The European Union contends that the findings relied on by the Commission are specific to the export channel alone, and that IRNC failed to assert during the investigation that similar evidence could be found for the domestic channel.[1085]

7.622. We are of the view that the record of the underlying proceeding indicates that the Commission: (a) treated IRNC's statement as a request for adjustment; (b) considered the request; and (c) determined that the request was unsubstantiated. For the reasons detailed below, the Panel concludes that the Commission's actions and findings in this respect are not inconsistent with the obligations imposed by the third sentence of Article 2.4 of the Anti-Dumping Agreement.

7.623. As a threshold matter, we note that the record appears to confirm that IRNC did not request an allowance be made for "commissions". Rather, IRNC objected to the commission-related adjustment that the Commission made to the export side and asserted that the Commission had failed to substantiate this adjustment. IRNC then closed this objection by asserting that: "The burden of proof is therefore on the Commission yet the Commission did not present any evidence, let alone evidence why an adjustment is required on the export side but not on the domestic side where sales are also made through related traders."[1086] IRNC's comment indicates that it understood the requirement to substantiate a claim for an adjustment, yet neither requested, nor substantiated, an allowance on the domestic side to account for the involvement of related traders. Instead, we understand that IRNC merely made note of a similarity of the involvement of related traders, but did not address the elements of the Commission's practice that would justify treating the related trader mark-ups as commissions, and did not cite to any supporting evidence to support its position.

7.624. We observe that IRNC's reference to "the domestic side" in its comments to the Commission appears to have been primarily intended to support its argument against making any adjustment on

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[1076] Indonesia's first written submission, paras. 1375-1396.
[1077] Indonesia's first written submission, para. 1375; second written submission, para. 928.
[1078] Indonesia's second written submission, para. 928.
[1079] Indonesia's first written submission, paras. 1387-1394.
[1080] Indonesia's first written submission, para. 1377.
[1081] European Union's first written submission, paras. 908 and 914.
[1082] European Union's first written submission, paras. 914-917.
[1083] European Union's first written submission, para. 919 (quoting Panel Report, *Korea – Certain Paper*, para. 7.147).
[1084] European Union's first written submission, para. 924.
[1085] European Union's first written submission, para. 922.
[1086] IRNC's comments on anti-dumping final disclosure (Exhibit IDN-213 (BCI)), p. 3.

the export side rather than constituting a formal request for an adjustment on the domestic side. We also note that, notwithstanding this, the Commission's final determination described the IRNC's "domestic side" reference as "a mere statement requesting an adjustment without providing any substantiated request in support [that] clearly falls short of the legal standard".[1087] We agree with the Commission. Specifically, we are of the view that the Commission provided a reasoned and adequate basis to conclude that IRNC had not satisfied its burden to demonstrate that an adjustment was appropriate on the normal value side. A mere assertion that the situation on the domestic side was the same as the export side does not, in our opinion, establish that an adjustment was appropriate. The Panel considers that assertions of sameness are not sufficient to justify an allowance on the domestic side when the evidence and analysis cited are specifically tied to the relationship between IRNC and the related traders who were active in export sales.

7.625. Given this, we conclude that Indonesia has not established that the Commission's decision not to adjust normal value to account for expenses associated with IRNC's related traders is inconsistent with the requirements of the third sentence of Article 2.4 of the Anti-Dumping Agreement.

7.8.4 Indication of information necessary to ensure a fair comparison

7.8.4.1 Introduction

7.626. Indonesia claims that the Commission never advised IRNC about the nature of the information that IRNC needed to produce to support its request that SG&A and profit for related traders involved in domestic transactions be taken into account to make an adjustment to domestic sales similar to an adjustment that was made to export transactions, and asserts that this dearth of information is inconsistent with the final sentence of Article 2.4 and Article 6.1 of the Anti-Dumping Agreement.[1088]

7.627. The European Union responds that IRNC never argued that a commission was being paid to related traders on domestic transactions and never substantiated such an assertion when it had an opportunity to do so.[1089] The European Union further maintains that IRNC was offered an opportunity to comment on the absence of an adjustment to the normal value for the involvement of related trading companies or to submit additional information, but that IRNC failed to do so.[1090]

7.628. Article 2.4 of the Anti-Dumping Agreement, in relevant part, provides that:

> The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

7.629. Article 6.1 of the Anti-Dumping Agreement, in relevant part, reads as follows:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.8.4.2 Evaluation

7.630. Indonesia submits that the Commission violated the final sentence of Article 2.4 of the Anti-Dumping Agreement by not entering into a dialogue with IRNC once IRNC had filed its request for an adjustment to the normal value and by not advising IRNC what information it needed to provide to support its adjustment request.[1091] According to Indonesia, from the time that IRNC raised its request (in its comments on the provisional disclosure), the Commission was obligated to indicate what information it would need in order to ensure a fair comparison and to "take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment

[1087] Anti-dumping final determination (Exhibit IDN-2), recital 87.
[1088] Indonesia's first written submission, paras. 1405-1414.
[1089] European Union's first written submission, para. 932.
[1090] European Union's first written submission, para. 934.
[1091] Indonesia's second written submission, para. 933.

is merited".[1092] Indonesia submits that it was only in the Commission's final determination that the requested adjustment was rejected as unsubstantiated, at a time when IRNC no longer had an opportunity to request or substantiate the adjustment.[1093]

7.631. The European Union responds that IRNC never argued that a commission was being paid to related traders on domestic transactions and never substantiated such assertion when it had an opportunity to do so.[1094] The European Union contends that IRNC's comments on the final disclosure demonstrate that IRNC knew what elements must be demonstrated in order to make an adjustment for commissions to the normal value ("evidence showing that the functions of the related companies are in fact similar to those of an agent working on a commission basis") and also knew that the burden was on the party claiming the adjustment. The European Union submits that IRNC did not attempt to substantiate the alleged request in the manner that it contended the Commission must do.

7.632. Indonesia submits that the Commission failed to engage with IRNC's request for a domestic side allowance because the additional final disclosure was limited to disclosing the Commission's reasons for adjusting the export price only and did not address why such an adjustment was only made to the export price but not to the normal value.[1095] In particular, Indonesia contends that IRNC was not offered an opportunity to comment on the absence of an adjustment to the normal value for the involvement of related trading companies or to submit additional information due to the Commission's explicit instruction that comments on the additional final disclosure "should be limited to this additional disclosure".[1096] Thus, Indonesia argues that IRNC was not offered an opportunity to comment on the absence of an adjustment to the normal value for the involvement of related trading companies or to submit additional information.[1097]

7.633. According to the European Union, the additional disclosure explained the basis for the adjustment to the export price, and explained which information was necessary to make the adjustment and invited comment.[1098] The European Union contends that IRNC should have commented on this disclosure if it believed that the adjustment was not warranted, or that an asymmetry in the comparison would be created by the adjustment due to similar circumstances existing also in the domestic sales channels, or any other reasons for which the adjustment was problematic.[1099] The European Union, therefore, maintains that IRNC was offered an opportunity to comment on the absence of an adjustment to the normal value for the involvement of related trading companies or to submit additional information.[1100] The European Union contends that the additional final disclosure was in fact part of a dialogue that explained clearly which elements were used for the adjustment for commission and which facts were relevant, giving IRNC a meaningful opportunity to request adjustments.[1101]

7.634. The Panel considers that the additional final disclosure responded to IRNC's comments on the final disclosure, which were focused on the absence of substantiating evidence for the export side allowance but also included IRNC's statement relating to an allowance on the domestic side. The Panel considers that the disclosure showed, by way of example, how the same or similar allowance could be substantiated on the domestic side. IRNC was invited to comment on the additional disclosure. The Panel does not consider the instruction that comments "should be limited to this additional disclosure" precluded comments on matters in the investigation that were not extraneous to the contents of the disclosure. This would not have precluded comments that an asymmetry in the comparison would be created by the adjustment due to similar circumstances existing also in the domestic sales channels, or any other reasons for which the export side

[1092] Indonesia's first written submission, para. 1410 (quoting Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.201, and referring to Appellate Body Reports*, EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204; *EC – Fasteners (China)*, para. 489).
[1093] Indonesia's first written submission, para. 1413; second written submission, para. 936.
[1094] European Union's first written submission, para. 932.
[1095] Indonesia's first written submission, para. 1411.
[1096] Indonesia's first written submission, para. 1411 (quoting IRNC Group additional anti-dumping final disclosure cover letter (Exhibit IDN-224)).
[1097] Indonesia's second written submission, para. 937.
[1098] European Union's first written submission, para. 933.
[1099] European Union's first written submission, para. 933.
[1100] European Union's first written submission, para. 934.
[1101] European Union's first written submission, para. 934 (quoting Appellate Body Report, *EC – Fasteners* (*China*) (*Article 21.5 – China*)), para. 5.191).

adjustment was problematic. As such, the Panel considers that IRNC had – but did not take – the opportunity to comment on the additional disclosure by substantiating its claim for an adjustment on the normal value side of the comparison. Alternatively, IRNC could have sought to clarify the scope of the instruction limiting comments and could have noted its interest in filing additional comments on the relationship between the export side allowance and the domestic side allowance.

7.635. For the above reasons, the Panel finds that Indonesia has not established that the Commission failed to indicate what information was necessary to ensure a fair comparison inconsistently with the final sentence of Article 2.4 and Article 6.1 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set out in this Report, we conclude as follows:

a. With respect to Indonesia's claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged provision of preferential financing and other support by Chinese grantors to Indonesian SSCRFP producers:

   i. We find that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by: (a) relying on its finding of "inducement" to attribute to the GOID the financial contributions that Chinese grantors provided to the IRNC Group in Indonesia; and (b) considering these attributed financial contributions to be subsidies within the meaning of that provision.

   ii. Having found that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by attributing to the GOID the financial contributions provided by the Chinese grantors to the IRNC Group in Indonesia, we decline to make findings on Indonesia's claims under Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement challenging the Commission's specificity determination.

   iii. Given the conditional nature of Indonesia's challenge and having found that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by attributing to the GOID the financial contributions provided by the Chinese grantors to the IRNC Group in Indonesia, we decline to make findings on Indonesia's claims under Articles 1.1(b), 10, 14, and 32.1 of the SCM Agreement challenging the Commission's benefit determination.

b. With respect to Indonesia's claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged provision of nickel ore for less than adequate remuneration:

   i. We find that the Commission acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by concluding that all nickel ore mining companies in Indonesia are "public bodies".

   ii. We find that the Commission acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by concluding that the GOID entrusted or directed nickel ore mining companies – as private bodies – to provide nickel ore to the stainless steel producers in Indonesia.

   iii. Having found that the Commission's public body and entrustment or direction findings, that formed the basis for its financial contribution determination, are inconsistent with Article 1.1(a)(1) of the SCM Agreement, we decline to make findings on Indonesia's claims under Articles 1.1, 10, 14, 19, and 32.1 of the SCM Agreement challenging: (a) the benchmark that the Commission selected for its benefit analysis; and (b) the duty rate that the Commission determined for the sole non-sampled cooperating steel producer. For the same reason, we also decline to make findings on Indonesia's claims under Articles 1.2, 2.1, and 2.4 of the SCM Agreement challenging the Commission's specificity determination.

c. With respect to Indonesia's claims concerning the Commission's findings in the underlying countervailing duty investigation regarding the alleged government revenue foregone that is otherwise due:

   i. We find that the Commission acted inconsistently with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement by deeming import duty exemptions for raw materials imported into bonded zones to be financial contributions and subsidies without providing Indonesia an appropriate opportunity to undertake a "further examination" pursuant to Annex II(II)(2) of the SCM Agreement.

   ii. Having found that the Commission's financial contribution and subsidy determination with respect to import duty exemptions for raw materials imported into bonded zones is inconsistent with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement, we decline to make findings on Indonesia's consequential claims under Articles 1.1(b), 3.1(a), 10, 14, and 32.1 of the SCM Agreement and Articles VI:3 and VI:4 of the GATT 1994.

   iii. We decline to make findings with respect to Indonesia's claim under Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement that the Commission was obligated to determine whether excess exemptions were granted even if the exemptions were ineligible to "not be deemed to be a subsidy" pursuant to Footnote 1. Having found that the Commission's financial contribution and subsidy determination with respect to import duty exemptions for raw materials imported into bonded zones is inconsistent with Article 1.1(a)(1)(ii) and Footnote 1, we find that the circumstance contemplated by this claim does not exist.

   iv. Having found that the Commission's financial contribution and subsidy determination with respect to import duty exemptions for raw materials imported into bonded zones is inconsistent with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement, we decline to make findings on Indonesia's claim that this alleged subsidy was determined to be specific inconsistently with Articles 1.2, 2.1, 2.2, 2.3, and 2.4 of the SCM Agreement.

   v. We find that Indonesia has not established that the Commission's specificity determination with respect to the income tax holiday is inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement.

   vi. We find that the Commission acted inconsistently with Articles 1.2 and 2.1 of the SCM Agreement because it did not provide a reasoned and adequate explanation sufficient to justify its determination that the income tax allowance facility is specific.

   vii. Having found that the Commission did not provide a reasoned and adequate explanation sufficient to justify its determination that the income tax allowance facility is specific, we decline to make further findings with respect to Indonesia's claim that the Commission's specificity determination with respect to the income tax allowance facility is also inconsistent with Article 2.4 of the SCM Agreement.

d. With respect to Indonesia's claims concerning the Commission's alleged actions and omissions in the underlying countervailing duty investigation:

   i. We find that Indonesia has not established that, by not designating nickel ore mining companies as "interested parties", the Commission acted inconsistently with Article 12.9 of the SCM Agreement.

   ii. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.1 of the SCM Agreement because it did not directly notify the nickel ore mining companies of the information that was required from them, or because it allegedly transferred its fact-finding responsibilities as an investigating authority to the GOID.

iii. Given our findings with respect to Indonesia's claims under Articles 12.9 and 12.1 of the SCM Agreement, we also find that Indonesia has not established its consequential claim that the Commission acted inconsistently with Article 10 of the SCM Agreement.

iv. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.7 by improperly: (a) applying facts available "against" or "with respect to" the nickel ore mining companies; or (b) attributing these companies' non-cooperation to the GOID.

v. Having found that the Commission's public body determination regarding the alleged provision of nickel ore at less than adequate remuneration is inconsistent with Article 1.1(a)(1) of the SCM Agreement, we decline to make findings on Indonesia's Article 12.7 claims challenging the Commission's resort to facts available with respect to: (a) Antam's response to the Appendix B questionnaire; (b) information regarding the nickel ore mining companies' shareholding structure; (c) Gag Nikel's RKABs; (d) information about Vale; (e) the translation of certain documents; and (f) the provision of feasibility studies. We also decline to make findings on Indonesia's Article 12.7 claims that the replacement facts that the Commission used in its determination that nickel ore was provided to the SSCRFP producers for less than adequate remuneration did not reasonably replace the missing information concerning the share of total production of nickel ore held by state-owned mining companies and the production targets set out in the RKABs.

vi. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement with respect to the data that the GOID submitted regarding the domestic consumption of nickel ore.

vii. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.7 of the SCM Agreement with respect to the Commission's conclusion that the GOID failed to provide information about nickel ore prices in Indonesia.

viii. We find that Indonesia has not established that the Commission was not permitted to apply facts available under Article 12.7 of the SCM Agreement because "the GOID cooperated to the best of its abilities, despite the unreasonable burdens placed upon it by the Commission".

ix. Having found that the Commission's determination that the preferential financing and other support by Chinese grantors can be attributed to the GOID is inconsistent with Article 1.1(a)(1) of the SCM Agreement, we decline to make findings on Indonesia's Article 12.7 claims challenging the Commission's applications of facts available regarding the alleged provision of preferential financing and other support by the Chinese grantors.

x. Having found that the Commission's determination regarding the import duty exemptions for raw materials imported into bonded zones is inconsistent with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement, we decline to make findings on Indonesia's Article 12.7 claim challenging the Commission's application of facts available with respect to the BC forms.

xi. We find that the Commission acted inconsistently with Article 12.7 of the SCM Agreement in determining to apply facts available on the grounds that the IRNC Group did not provide necessary information with respect to the origin of the machinery imported from the Chinese parent companies.

xii. We find that Indonesia has not established that the Commission acted inconsistently with Articles 12.1 and 12.8 of the SCM Agreement in establishing a period of 21 calendar days to comment on the disclosure of essential facts.

xiii. We decline to make findings on Indonesia's Article 12.8 claims challenging the Commission's disclosure with respect to: (a) the 27% share of state-ownership; and

(b) control of PT Tonia Mitra Sejahtera and Antam, as these matters were not ultimately at the core of the Commission's public body determination.

xiv. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.8 of the SCM Agreement when it determined it was unable to reconcile the data that the GOID submitted regarding the domestic consumption of nickel ore with IRNC's purchases of nickel ore.

xv. Having found that the Commission's public body and entrustment or direction findings, that formed the basis for its financial contribution determination, are inconsistent with Article 1.1(a)(1) of the SCM Agreement, we decline to make findings on Indonesia's claims under Articles 12.1 and 12.8 of the SCM Agreement challenging: (a) the Philippines benchmark price; and (b) the Philippines benchmark adjustment, as these matters ultimately relate to determining the benefit associated with the provision of nickel ore at less than adequate remuneration.

xvi. We find that Indonesia has not established that the Commission acted inconsistently with Article 12.8 of the SCM Agreement when it disclosed the essential fact that the Commission considered that the GOID had owned and provided land.

xvii. We decline to make findings on Indonesia's Article 12.8 claims regarding the Commission's disclosure of essential facts relating to preferential financing that the Chinese grantors allegedly provided to the IRNC Group as: (a) these claims ultimately relate to the benefit determination that the Commission made when it concluded that this financing was attributable to the GOID; and (b) we have found this attribution to be inconsistent with Article 1.1(a)(1) of the SCM Agreement.

xviii. We find that Indonesia has not demonstrated that the Commission's general disclosure of essential facts did not comply with Article 12.8 based on the fact that it did not state that the analysis of competitive conditions was conducted using PCNs.

xix. Having found that the Commission was not under a general requirement to seek information directly from the entity that possesses such information or to whom it relates and could have elected to "channel" a request for information through an interested party or an interested Member, we find that Indonesia has not demonstrated that the Commission was obligated under Article 22.3 of the SCM Agreement to explain why it did not conform with such a requirement.

xx. We decline to make findings on Indonesia's Article 22.3 claims challenging the Commission's disclosure with respect to the GOID's ownership and control of the nickel ore mining companies as we have found that these matters did not form the basis for the Commission's public body findings.

xxi. We decline to make findings on Indonesia's Article 22.3 claim regarding the level of detail that the Commission's final determination provides with respect to the nature of the cooperation between the GOID and the GOC, as: (a) this matter ultimately relates to the question of whether the allegedly preferential financing and other support that the Chinese grantors provided to the IRNC Group can be attributed to the GOID; and (b) we have found that the Commission's decision to attribute this financing and support to the IRNC Group is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

xxii. Having found that the Commission's determination that the preferential financing and other support by the Chinese grantors can be attributed to the GOID is inconsistent with Article 1.1(a)(1) of the SCM Agreement, we decline to make findings on Indonesia's Article 22.3 claims regarding the sufficiency of detail in the Commission's final determination related to this preferential financing.

xxiii. Having found that the Commission acted inconsistently with Article 1.1(a)(1)(ii) and Footnote 1 of the SCM Agreement by determining that the import duty exemptions constituted a subsidy without providing Indonesia an appropriate opportunity to undertake a "further examination" pursuant to Annex II(II)(2) of the SCM Agreement,

we decline to make findings on Indonesia's Article 22.3 claim relating to the Commission's determination to countervail import duty exemptions for raw materials imported into bonded zones.

xxiv. We find that Indonesia has not demonstrated that the Commission's final determination with respect to the income tax holiday is inconsistent with Article 22.3.

xxv. We decline to make a finding on Indonesia's Article 22.3 claims regarding the sufficiency of detail in the Commission's final determination on the income tax allowance facility as we have found that the Commission's determination that the income tax allowance facility is specific is inconsistent with Articles 1.2 and 2.1 of the SCM Agreement.

xxvi. Given that neither of the conditions Indonesia posits for asserting its conditional claims under Articles 12.8, 14, and 22.3 of the SCM Agreement regarding pass-through analysis are satisfied, we do not address these conditional claims.

e. With respect to Indonesia's claims concerning the Commission's findings in the underlying anti-dumping investigation in connection with fair comparison and due allowances:

i. We find that Indonesia has not established that the Commission acted inconsistently with its obligation to make comparisons at the same level of trade within the meaning of the second sentence of Article 2.4.

ii. We find that Indonesia has not established that the Commission acted inconsistently with the third sentence of Article 2.4 of the Anti-Dumping Agreement and the *chaussette* of Article VI:1 of the GATT 1994 when rejecting adjustments to the normal value to reflect transport-related expenses between a party's warehouses.

iii. We find that Indonesia has not established that the Commission's downward adjustment to the export price for the involvement of related traders in the export sales was inconsistent with the third sentence of Article 2.4 of the Anti-Dumping Agreement.

iv. We find that Indonesia has not established that the Commission's decision not to make adjustments to the normal value for the involvement of related traders in domestic sales is inconsistent with the third sentence of Article 2.4 of the Anti-Dumping Agreement.

v. We find that Indonesia has not established that the Commission failed to indicate what information was necessary to ensure a fair comparison inconsistently with the final sentence of Article 2.4 and Article 6.1 of the Anti-Dumping Agreement.

8.2. Pursuant to Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, we conclude that, to the extent the Commission has acted inconsistently with certain provisions of the SCM Agreement the European Union has nullified or impaired benefits accruing to Indonesia under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the SCM Agreement.