

*European Union – Countervailing Duties on Imports of Biodiesel
from Indonesia*

(WT/DS618)

**ORAL STATEMENT OF THE UNITED STATES OF AMERICA
AT THE THIRD-PARTY SESSION OF
THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

October 9, 2024

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

I. ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT – THE ORIGIN OF FUNDS

2. As discussed in the U.S. third party submission, there are several errors with Indonesia's interpretation of Article 1.1(a)(1) of the SCM Agreement. Indeed, accepting Indonesia's proposed interpretations would create drastic consequences for existing government and public funds.

3. Indonesia argues that because the funds at issue in the Oil Palm Plantation Fund (OPPF) originated from biodiesel producers (sources outside the government), the funds do not constitute a direct transfer of funds by the government, and therefore, a financial contribution within the meaning of the SCM Agreement did not take place. However, the text of Article 1.1(a)(1) does not limit a relevant financial contribution by the government or public body on the basis of the origin of the funds. The text of Article 1.1(a)(1) simply provides that an element of a subsidy exists if "there is a financial contribution by a government or any public body within the territory of a Member."

4. Subparagraph (i) similarly provides that there is a financial contribution by a government or any public body where "a government practice involves a direct transfer of funds." The provision goes on to provide a few examples of the ways in which a direct transfer of funds may be made (for example, grants, loans and equity infusions). The language used and multiple methods of conveying value described in Article 1.1(a)(1)(i) capture within the meaning of "financial contribution" a wide array of transfers of value. Contrary to Indonesia's interpretation, there is no language indicating that the funds must have originated with or been

generated by the government under Article 1.1(a)(1)(i). Rather, what matters is that a government practice “involves” a direct transfer of funds, such that the transfer is attributable to a government or public body.

5. Indeed, the implications of Indonesia’s argument would mean that government grants and loans which are funded by the government’s collection of taxes and levies on private individuals and entities could escape consideration as a financial contribution under Article 1.1(a)(1)(i), based on the fact that the funds originated *not* in the government, but in private individuals and entities. This cannot be the rule. Nearly all funding for government and public programs derives from sources other than the government, including revenues generated by the collection of levies and taxes.

6. Indonesia’s interpretation of Article 1.1(a)(1) would effectively mean that many types of government and public programs would no longer be considered a subsidy, thereby shielding numerous programs from being disciplined by the SCM Agreement. But, as explained, the origin of the funds from a source outside the government is not dispositive to the question of whether a government’s transfer of value constitutes a “financial contribution.” Rather, so long as the evidence before an investigating authority supports that there is a government practice which involves a direct transfer of funds that is attributable to a government or public body, it may find a “financial contribution” under Article 1.1(a)(1)(i).

7. Therefore, the United States considers that the EU Commission’s finding – that the OPPF funds constitute a “direct transfer of funds” within the meaning of Article 1.1(a)(1) of the SCM Agreement – appears to be a determination that an objective and unbiased investigating authority could properly have reached.

II. ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT – ENTRUSTMENT OR DIRECTION

8. Turning next to Article 1.1(a)(1)(iv), the United States observes that a proper interpretation of the provision permits an investigating authority to reach a finding of entrustment or direction after considering a range of government action that would normally be vested in government, and does not require an explicit and affirmative action of delegation or command.

9. The text of Article 1.1(a)(1)(iv) refers to “one or more of the type of functions ... which would normally be vested in the government.”¹ Notably, the text does not refer to functions which are vested in the government. Therefore, the text makes clear that it is not necessary to establish that the government actually performs the precise function carried out by the private body. Rather, it is sufficient to demonstrate that the government normally would perform that type of function.

10. This interpretation is also supported by the end of subparagraph (iv), which ends with the phrase, “the practice, in no real sense, differs from the practices normally followed by governments.” The phrase “in no real sense” also suggests that the practice of a private body does not need to be identical to a practice of the particular government at issue, or even the practices that would normally be followed by governments. Rather, the practice must, “in no real sense,” differ from the practices that would normally be followed by governments.

11. Therefore, a determination of entrustment or direction involves consideration of both the types of functions that “would normally be vested in the government,” and also “practices normally followed by governments” other than the government at issue.

¹ SCM Agreement, Article 1.1(a)(1)(iv) (underline added).

12. Article 1.1(a)(1)(iv) of the SCM Agreement also does not require an investigating authority to establish the existence of an explicit and affirmative action of delegation or command. As the United States detailed in its third party submission, neither the ordinary meaning nor context of “entrusts or directs” supports Indonesia’s interpretation.

13. The Oxford English Dictionary defines “entrust” as “[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person.”² This definition encompasses a range of actions to fulfill the responsibility, and does not require that the government set out in minute detail how the task is to be carried out.

14. The definition of “direct” likewise also includes a wide range of actions that are not limited to commanding a person or entity to do something in particular. The definitions include, “Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of, Regulate the course of; guide with advice,” “Inform or guide (a person) as to the way; show or tell (a person) the way (to);” and “govern the actions ... of.”³

15. It is clear from these definitions that the ordinary meaning of “entrusts or directs” does not support the interpretation that explicit and affirmative action is required.

16. Nor does the ordinary meaning support Indonesia’s argument that the exercise of “free choice” by actors in the market would preclude a finding of entrustment or direction.⁴ Such an interpretation would be contrary to the element of discretion in the meaning of “entrust” and the element of inform or guide in “direct”. Thus, the presence of so-called “free choice” by market actors does not in and of itself preclude a finding of entrustment or direction. Rather, a finding

² Definition of “entrust” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 831 (Exhibit USA-01).

³ Definition of “direct” from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679 (Exhibit USA-01).

⁴ Indonesia’s First Written Submission, paras. 182, 196.

of entrustment or direction is a determination being made based on the facts and circumstances of a case.

17. Therefore, the United States considers that the EU Commission’s finding of entrustment or direction for crude palm oil for less than adequate remuneration appears to be a determination that an unbiased and objective investigating authority could properly have reached.

III. CONCLUSION

18. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views and looks forward to responding to the Panel’s questions.

Thank you.