European Union – Countervailing Duties on Imports of Biodiesel from Indonesia

(WT/DS618)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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Exhibit No.	Description
USA-01	Definitions from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.) (excerpts)
USA-02	Definition of "would" from englishpage.com
USA-03	Explanation of Present Conditionals from englishpage.com

I. INTRODUCTION

1. The United States welcomes the opportunity in this proceeding to provide its views of the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that have been raised in this dispute.

II. RULES OF INTERPRETATION AND STANDARD OF REVIEW

2. A WTO panel is established by the DSB and charged (DSU Article 7.1) to examine the matter identified by the complaining party in its panel request and to make such findings as will assist the DSB in making the recommendations set out in the covered agreements – that is, to bring a measure found to be inconsistent with a provision of a covered agreement into conformity with that agreement (DSU Article 19.1). Pursuant to Article 3.2 of the DSU, a WTO adjudicator is to interpret a provision of a covered agreement "in accordance with customary rules of interpretation of public international law." Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflect such customary rules of interpretation.[1] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

3. The applicable standard of review to be applied by WTO dispute settlement panels is that set forth in Article 11 of the DSU. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

4. Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") provides that, "in 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".

5. Article 11 of the DSU and Article 17.6 may together establish the standard of review for a dispute involving the SCM Agreement. Indeed, the 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

[1] *See, e.g., US – Gasoline (AB)*, p. 17.

recognizes "the need for the consistent resolution of disputes from anti-dumping and countervailing duty measures".

6. Past WTO disputes support this interpretation. The Article 21.5 panel in *US – Countervailing Measures on Certain EC Products* referred to the Appellate Body report in *US – Cotton Yarn*, as well as other reports concerning the AD Agreement, and observed that its role was to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner."[2] Numerous other WTO panels likewise have expressed this understanding of the role of the panel in a dispute involving claims under the SCM Agreement.[3]

7. Therefore, under the standard set forth in Article 11 of the DSU, the Panel's task in this dispute is to assess whether the EU Commission properly established the facts and evaluated them in an unbiased and objective way. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the Commission, could have – not would have – reached the same conclusions that the Commission reached.[4]

8. Under the standard of review set out in the WTO Agreement, the Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[5] Indeed, it would be inconsistent with a panel's function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.[6]

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

9. Indonesia argues that Oil Palm Plantation Fund ("OPPF") payments to biodiesel producers are not "direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement because the OPPF is funded by export levies paid by biodiesel exporters.[7] Indonesia contends that the reference to "direct transfer of funds" in Article 1.1(a)(1)(i) requires "financing by the

[2] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid.*, paras. 7.78-7.83.
[3] *See, e.g., US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.
[4] *See, e.g., US – Supercalendered Paper (Panel)*, para. 7.150; *US –Coated Paper (Indonesia)* (*Panel)*, para. 7.61, 7.83, 7.113, 7.193.
[5] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).
[6] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.
[7] *See* Indonesia's First Written Submission, paras. 75.

government," but that because the OPPF is funded by export levies, OPPF payments are financing which originates from biodiesel producers, not the government.[8]

10. The European Union ("EU") argues that "the evaluation of the existence of a financial contribution involves the consideration of the nature of the transaction through which something of economic value is transferred by a government or a public body".[9] The EU contends that what matters is that the transfer of funds is attributable to the government or public body.[10]

11. The United States generally agrees with the argument of the EU, which follows from the text of Article 1.1(a)(1)(i) of the SCM Agreement.

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

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

[8] Indonesia's First Written Submission, paras. 74, 75.
[9] EU's First Written Submission, para. 23.
[10] EU's First Written Submission, para. 23.

13. In brief, *nothing* in Article 1.1(a)(1)(i) precludes a transfer of funds by a government or public body from constituting a financial contribution on the basis of the origin of the funds. As a matter of logic, levies and taxes owed to the government cease to be privately held once paid.[11]

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

15. As stated above, a subsidy is deemed to exist if "there is a financial contribution by a government or any public body within the territory of a Member."[12] Article 1.1(a)(1)(i) of the SCM Agreement provides that a financial contribution exists where "a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion)." The SCM Agreement does not define the terms set out in Article 1.1(a)(1)(i). Accordingly, the provision's terms should be interpreted based on their ordinary meaning in their context and in light of the object and purpose of the SCM Agreement.[13]

16. For Article 1.1(a)(1)(i), the ordinary meaning of the term "transfer" is defined as "Move, take or convey from one place, person, situation . . . to another; transmit, transport; give or hand over from one to another".[14] Definitions of the term "direct" as an adjective include "Straight, undeviating in course, not circuitous or crooked" and "Existing or occurring without intermediaries or intervention; immediate, uninterrupted".[15] Therefore, the phrase "direct transfer" indicates that the provision is focused on the manner or the method by which the funds are conveyed from the government to the recipient.[16] Relevant here, a "grant" is one example of

[11] *See, e.g.*, SCM Agreement, Art. 1.1(a)(1)(ii) (listing a tax credit as an example of "government revenue" forgone or not collected).
[12] SCM Agreement, Article 1.1(a)(1).
[13] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 3.2; Vienna Convention, Article 31.
[14] Definition of "transfer" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 3368 (Exhibit USA-01).
[15] Definition of "direct" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 679 (Exhibit USA-01).
[16] *See US – Carbon Steel (India) (AB)*, para. 4.89; *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 614.

a direct transfer of funds.[17] The ordinary meaning of "grant" includes "A formal gift or legal assignment of money, privilege, *etc*" and "a sum of money given for a specific purpose".[18]

17. As stated above, the United States does not consider the origin of program funding to be the dispositive factor regarding the financial contribution inquiry under Article 1.1(a)(1)(i).[19] Rather, the purpose of the analysis is to determine whether a transfer of value was made and can be attributed to the government.[20] The broad language used and multiple methods of conveying value described in Article 1.1(a)(1) reveal an intention to capture within the meaning of "financial contribution" a wide array of transfers of value. The examples listed in Article 1.1(a)(1)(i) indicate that a direct transfer of funds typically involves financing by the government to the recipient through transactions like *e.g.*, grants, loans, and equity infusions. There is no language indicating that the provision contemplates the origin of the funds transferred such that the origin of the funds would preclude consideration as a "financial contribution" under Article 1.1(a)(1)(i). Accordingly, based on the text of Article 1.1(a)(1)(i), the relevant inquiry is whether there is a government practice which involves a direct transfer of funds that is attributable to a government or public body.[21]

18. Previous disputes also support this interpretation of Article 1.1(a)(1)(i). The report in *US – Large Civil Aircraft (Second Complaint)(AB)* agreed that the focus of Article 1.1(a)(1) is the government conduct which constitutes a financial contribution.[22] Recognizing that the term "funds" is not limited to money, but encompasses "financial resources and other financial claims more generally," that report concluded that "direct transfer of funds" "captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient."[23]

19. Likewise, in *US – Carbon Steel (India) (AB*), the report similarly rejected that a "transfer of funds" under Article 1.1(a)(1)(i) refers only to situations where funds are drawn from government resources or a charge on a public account.[24] That report explained its reasoning as follows:

> We again note that Article 1.1(a)(1)(i) relates to a "government practice" that "involves" a direct transfer of funds. Thus, while we

[17] *See* SCM Agreement at Article 1.1(a)(1)(i) (listing "grants" in the parenthetical after "direct transfer of funds").
[18] Definition of "grant" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1131 (Exhibit USA-01).
[19] *See* Indonesia's First Written Submission, para. 74.
[20] *See* SCM Agreement, Article 1.1(a)(1)(i) (providing that a financial contribution may arise where "a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion) ….").
[21] *See US - Large Civil Aircraft (Second Complaint) (AB)*, para. 613.
[22] *US - Large Civil Aircraft (Second Complaint) (AB)*, para. 613.
[23] *US - Large Civil Aircraft (Second Complaint) (AB)*, para. 614.
[24] *See US – Carbon Steel (India) (AB)*, para. 4.96.

> would agree that a "transfer" indicates that funds are moved from a transferor to a transferee, we do not consider that Article 1.1(a)(1)(i) prescribes that the resources must necessarily be drawn from government resources or result in a charge on the public account. Moreover, an interpretation that limits the scope of subparagraph (i) to funds drawn from government resources or charged on the public account would accord little relevance to the fact that subparagraph (i) refers only to a "government practice" that "involves" direct transfers of funds.[25]

20. This reasoning reflects a correct understanding and reasonable interpretation of the terms of Article 1.1(a)(1)(i). And, as explained above, as a matter of logic, levies or taxes do in fact become "government resources" once they are paid to the government and, most, if not nearly all funding for government and public programs derives from sources outside the government.

21. Therefore, the text makes clear that the origin of funds is not dispositive to determining the existence of a financial contribution under Article 1.1(a)(1). Indeed, a restrictive interpretation of Article 1.1(a)(1)(i), as proposed by Indonesia would frustrate the object and purpose of the SCM Agreement by creating an obvious circumvention risk where an otherwise actionable subsidy could be converted to a non-actionable subsidy simply because the government used revenues generated by private funds, *e.g.*, the collection of taxes and levies. This approach to Article 1.1(a)(1)(i) would create a loophole for tax- or levy-paying recipients to shield unfair subsidization.

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

22. Indonesia contends that OPPF payments do not confer a benefit on biodiesel producers and, therefore, the Commission's determination otherwise is inconsistent with Article 1.1(b) of the SCM Agreement.[26] According to Indonesia, the Commission failed to consider the export levies "paid *inter alia* on exports of biodiesel" by biodiesel producers in its benefit analysis.[27]

23. The EU disagrees, arguing that the SCM Agreement does not require the Commission to "offset" the amount of export tax from the benefit received through the OPPF payments.[28]

24. The United States offers the following views on the proper interpretation of Article 1.1(b) below.

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[25] *See US – Carbon Steel (India) (AB)*, para. 4.96.
[26] Indonesia's First Written Submission, para. 110.
[27] Indonesia's First Written Submission, para. 124.
[28] EU's First Written Submission, paras. 96, 99-100.

25. Article 1.1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is a "financial contribution by a government" and "a benefit is thereby conferred." Once a determination regarding the existence of a "financial contribution" under Article 1.1(a)(1) has been made, Article 1.1(b) sets forth the second step of the subsidy analysis: whether the financial contribution identified under Article 1.1(a)(1) confers "a benefit." In its entirety, Article 1.1(b) provides only that "a benefit is thereby conferred." Notably, Article 1.1(b) says nothing about how to determine whether a benefit has been conferred, or how to measure the benefit.

26. It is Article 14 of the SCM Agreement which governs the "calculation of the amount of a subsidy in terms of the benefit to the recipient."[29] The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient . . . shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained." Further, "any such method shall be consistent with the . . . guidelines" found in subparagraphs (a) through (d) of Article 14. However, Article 14 lacks any "guideline" for the financial contribution in the present dispute, *i.e.*, a "direct transfer of funds" in the form of a grant.

27. Moreover, the term "benefit" is not defined by the SCM Agreement.[30] Therefore, Article 14 of the SCM Agreement "constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b)."[31] With regard to the ordinary meaning, "benefit" is defined as "do good to, be of advantage to; improve" and "receive benefit; profit".[32] The title of Article 14 – " Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" – similarly reflects the advantage provided to the recipient of a financial contribution. As such, the concept of "benefit" relates to situations in which a firm receives "an improvement" or "an advantage," rather than a detriment or disadvantage.

28. Therefore, based on the ordinary meaning of the term and the context provided by Article 14, outlined above, a "benefit" arises when the recipient has received something that makes the recipient better off than it otherwise would have been absent that financial contribution.[33] Thus, the focus of the benefit analysis centers on "benefit to the recipient."

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[29] *See* SCM Agreement, Article 14.

[30] As discussed above, when terms are not defined, they should be interpreted based on their ordinary meaning in their context and in light of the object and purpose of the SCM Agreement. *See* DSU, Article 3.2; *US – Large Civil Aircraft (Second Complaint) (Panel)*, p. 187.

[31] *See Canada – Aircraft (AB)*, para. 155.

[32] Definition of "benefit" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 214 (Exhibit USA-01).

[33] SCM Agreement, Art. 14 (Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient). *See Canada – Aircraft (AB)*, para. 157; *EC – Large Civil Aircraft (AB)*, para. 973.

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

30. Previous WTO panels have agreed with this interpretation. As the panel in *EC – Large Civil Aircraft* explained:

> [I]n the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant. In other words, where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same.[34]

Likewise, the panel in *US – Lead and Bismuth II* similarly explained that the benefit calculation for grants is straightforward because "the act of identifying the 'benefit' (under Article 1.1) is normally the same as the act of measuring the 'benefit' (under Article 14)."[35]

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

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

32. Indonesia argues that the Commission's determination is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement by finding that the Government of Indonesia (GOI) entrusted or directed crude palm oil ("CPO") producers to sell CPO for less than adequate remuneration (LTAR) to biodiesel producers.[36] Indonesia contends that the Commission erroneously determined that the provision of CPO is a function normally vested in government.[37] Further, Indonesia argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires the investigating authority to establish that there is an explicit and affirmative action of delegation or command in order to reach a finding of entrustment or direction.[38]

33. The EU counters that the Commission's determination that the provision of CPO for LTAR is a function "normally vested in the government" is consistent with Article 1.1(a)(1)(iv)

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[34] See *EC – Large Civil Aircraft (Panel)*, para. 7.1969, n. 5724.
[35] *See US – Lead and Bismuth II (Panel)*, para. 122.
[36] Indonesia's First Written Submission, paras. 176-233.
[37] Indonesia's First Written Submissions, paras. 176-207.
[38] Indonesia's First Written Submission, para. 211.

of the SCM Agreement.[39] According to the EU, the Commission concluded that the GOI "entrusted or directed" domestic CPO producers to provide CPO for LTAR to the domestic biodiesel industry in order to support the industry.[40]

34. Any interpretation of Article 1.1 of the SCM Agreement must begin with an examination of the text "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[41] Article 1.1(a)(1) provides that a "financial contribution" exists 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.[42]

35. First, it is evident from the text of Article 1.1(a)(1) that Members recognized that governments have a wide variety of mechanisms at their disposal to provide a financial contribution to domestic enterprises or industries, and that Members intended to bring those mechanisms within the disciplines of the SCM Agreement. Furthermore, the text of subparagraph (iv) of Article 1.1(a)(1) recognizes that, in addition to conferring subsidies directly, governments may confer subsidies indirectly by "entrust[ing] or direct[ing]" private actors.

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

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[39] EU's First Written Submission, paras. 253, 249-253.
[40] EU's First Written Submission, paras. 143, 173.
[41] Vienna Convention, Article 31.
[42] SCM Agreement, Art. 1.1(a)(1) (footnote omitted).

A. The Term "Entrusts or Directs" Encompasses Actions That Would Normally Be Vested in the Government

37. Indonesia argues that the Commission was required to "establish unequivocally" that the function at issue – the provision of CPO by CPO producers – was "normally vested in the government" *in Indonesia* and that the supply of CPO is "a practice that, in no real sense, differs from practices normally followed by governments."[43] That is, Indonesia contends that the Commission was required to establish that the GOI engaged in the provision of CPO.[44]

38. The EU counters that Indonesia has applied the incorrect legal standard to determine whether a function is normally vested in the government under Article 1.1(a)(1)(iv) of the SCM Agreement.[45] The EU argues that an entirely Member-specific or "self-referential" interpretation of Article 1.1(a)(1)(iv), as advocated for by Indonesia, would narrow the scope of the provision and undermine its purpose.[46]

39. The United States agrees that the text of Article 1.1(a)(1)(iv) of the SCM Agreement does not support Indonesia's interpretation.

40. Specifically, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[47] Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The term "would" as it is used in Article 1.1(a)(1)(iv) is a modal verb[48] in the present unreal conditional form.[49] The present unreal conditional form "is used to talk about what you would generally do [or what would generally be the case] in imaginary situations."[50] The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments."[51]

41. The phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but

[43] Indonesia's First Written Submission, para 186.
[44] Indonesia's First Written Submission, paras. 186, 190.
[45] EU's First Written Submission, para. 239.
[46] EU's First Written Submission, para. 239.
[47] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).
[48] *See* Definition of "would" from englishpage.com (Exhibit USA-02).
[49] *See* Explanation of Present Conditionals from englishpage.com (Exhibit USA-03).
[50] Explanation of Present Conditionals from englishpage.com (Exhibit USA-03).
[51] SCM Agreement, Art. 1.1(a)(1)(iv).

rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense. This contextual element supports an interpretation of "entrusts or directs" that gives effect to its full range of meanings. Entrustment or direction in Article 1.1(a)(1)(iv) captures subsidies that differ "in no real sense" from those provided by a government itself, except for the fact that they are provided through private bodies.

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

B. The Ordinary Meaning of "Entrusts or Directs" Encompasses a Range of Actions and Does Not Require an Explicit and Affirmative Action of Delegation or Command

43. Indonesia also argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires the investigating authority to establish the existence of an explicit and affirmative action of delegation or command to make a finding of entrustment or direction.[52] Further, Indonesia suggests that the exercise or presence of free choice forecloses the Commission's entrustment determination.[53]

44. The EU contends that "entrustment and direction – through the giving of responsibility to or exercise of authority over a private body – imply a more active role than mere acts of encouragement."[54] However, the EU asserts that there is no requirement on the "WTO member to demonstrate that there was both 'control' and 'command'" to make a finding under Article 1.1(a)(1)(iv).[55] The United States considers the EU understanding to be correct.

45. Neither the ordinary meaning nor context of "entrusts or directs" supports the interpretation that an investigating authority is required to establish the existence of an explicit and affirmative action of delegation or command to make a finding of entrustment or direction. Further, the United States agrees that there is no requirement on WTO Members to demonstrate both control and command under Article 1.1(a)(1)(iv) of the SCM Agreement.

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[52] Indonesia's First Written Submission, para. 211 (arguing that, considering the panel's decision in *US – Export Restraints*, the Commission was required to establish that the Indonesian CPO producers were explicitly and affirmatively tasked with the provision of CPO by the GOI (citing Panel Report, *US – Export Restraints*, paras. 8.29-8.31)).
[53] Indonesia's First Written Submission, para. 225.
[54] EU's First Written Submission, para. 264.
[55] EU's First Written Submission, para. 264.

46. An examination of the ordinary meaning of "entrusts" or "directs" establishes that explicit and affirmative action is not required. "Entrust" is defined, in relevant part, as "[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person."[56] This definition encompasses a range of actions. The word "entrust" implies that a degree of discretion is given to the person being entrusted. It is not necessary that the government spell out in minute detail the task which it is entrusting. Rather, the ordinary meaning of "entrust" captures situations in which the government leaves a certain amount of responsibility to the private body that is entrusted.

47. Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target;" "Give authoritative instructions to; to ordain, order (a person) *to do,* (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice."[57] Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to);" and "govern the actions ... of."[58] Thus, the ordinary meaning of "direct" also encompasses a wide range of actions. These actions are not limited to commanding a person or entity to do something in particular.

48. The proper interpretation of "entrusts or directs" is one that takes account of the full range of government actions that fall within the ordinary meaning of this term, including: a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private body as to how to carry out a task, a government regulating the course of a private body's conduct, as well as a government delegating or commanding a private body to carry out a task.

49. The panel report in *US – Export Restraints*, on which Indonesia relies,[59] defined "entrusts or directs" simply as "delegation or command."[60] As discussed above, such an interpretation is not consistent with the ordinary meaning of "entrust" or "direct". Indeed, numerous other reports have correctly rejected that interpretation as being too "narrow."[61] For example, as highlighted by the EU, the report in *US – Countervailing Duty Investigation on DRAMS* reasoned that "[d]elegation is usually achieved by formal means, but delegation also could be informal. Moreover, there may be other means, be they formal or informal, that governments

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[56] 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).
[57] 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).
[58] 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).
[59] *See* Indonesia's First Written Submission, para. 210.
[60] *See, e.g., US – Export Restraints (Panel)*, para. 8.44.
[61] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110, 111. *See also Japan – DRAMs (Korea) (Panel)*, para 7.73; *Korea – Commercial Vessels (Panel)*, para. 7.370; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.

could employ for the same purpose."[62] As for the term "direct," that report reasoned that a "command" "is certainly *one way* in which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv), but governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a 'command' or may not involve the same degree of compulsion."[63] This reasoning reflects a correct understanding of the relevant provisions.

50. Other panels likewise have rejected the *US – Export Restraints* panel's interpretation that "entrusts" or "directs" must be "an explicit and affirmative action."[64] For instance, in *Japan – DRAMs (Korea)*, the panel recognized that, "the entrustment or direction of a private body will rarely be formal, or explicit."[65] In *Korea – Commercial Vessels*, the panel stated that it saw "nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be 'explicit.' . . . In [its] view, the affirmative act of delegation or command could be explicit or implicit, formal or informal."[66] The panel in *EC – Countervailing Measures on DRAM Chips* similarly reasoned that, "[i]n the absence of a clear and explicit government order, the evidence to be relied on will inevitably be circumstantial."[67] The panel in *US – Softwood Lumber VII* stated, "[w]e, like the Appellate Body, disagree with the panel in *US – Export Restraints* that entrustment and direction occur only when there is an explicit and affirmative delegation or command from the government to a private body."[68]

51. As correctly noted by these panel reports, the ordinary meaning of the term "entrusts or directs" supports the conclusion that the term encompasses a range of possible government actions, and does not require explicit and affirmative action by the government.

52. Lastly, the United States observes that Indonesia's interpretation, which would preclude an investigating authority from finding entrustment or direction based on the presence of free choice by market actors, is inconsistent with the ordinary meaning of the terms under Article 1.1(a)(1)(iv) of the SCM Agreement as discussed above. That is, adopting an interpretation of "entrusts" or "directs" which requires the elimination of the possibility of free choice by private

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[62] EU's First Written Submission, para. 263 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 108, 110-111, 116). *See also Japan – DRAMs (Korea) (Panel)*, para 7.73.
[63] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 111.
[64] The *US – Export Restraints* panel stated that, "[t]o [their] minds, both the act of entrusting and that of directing . . . necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty." *US – Export Restraints (Panel)*, para. 8.29. Based on its finding that entrustment or direction must be achieved through an "explicit and affirmative action of delegation or command," the panel found that an export restraint as defined in *US – Export Restraints* could not meet the subsection (iv) entrustment or direction standard for indirect subsidies.
[65] *Japan – DRAMs (Korea) (Panel)*, para. 7.73.
[66] *Korea – Commercial Vessels (Panel)*, para. 7.370.
[67] *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.105.
[68] *US – Softwood Lumber VII (Panel)*, para. 7.603 n. 1190.

entities would be contrary to the element of discretion in the meaning of "entrust" and the element of inform or guide in "direct". This would narrow the terms' scope to a very limited range of government actions, inconsistent with the ordinary meaning of "entrusts or directs".

IV. CLAIMS REGARDING ARTICLE 12.7 OF THE SCM AGREEMENT

53. Indonesia argues that the requirements of Article 12.7 of the SCM Agreement "significantly constrain[]" the investigating authority's discretion to resort to "facts available" and to disregard evidence that has been provided.[69] Indonesia adds that Article 12.7 does not allow investigating authorities to "simply reject" information that has been submitted solely because certain requested information is allegedly missing from the submissions or because the investigating authority is displeased with the content of the information that has been submitted.[70]

54. The EU contests Indonesia's portrayal of the requirements under Article 12.7 of the SCM Agreement, and asserts that Article 12.7 plays an important role in enabling investigating authorities to effectively reach determinations, including in situations in which there has not been full cooperation by interested parties.[71]

55. Article 12.7 of the SCM Agreement provides 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.

56. Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement.[72] Unlike the AD Agreement, however, the SCM Agreement does not contain an Annex with detailed rights and obligations regarding the use of facts available. In these circumstances, the detailed rules in the AD Agreement may be considered as context in interpreting Article 12.7 of the SCM Agreement.[73] At the same time, the specific rules in Annex II of the AD Agreement cannot be imported directly into the SCM Agreement; if this were the

[69] Indonesia's First Written Submission, para 518.
[70] Indonesia's First Written Submission, para. 518.
[71] EU's First Written Submission, para. 967.
[72] *See, e.g., Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[73] *See also Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295 ("[I]t would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.").

intent of the drafters, the SCM Agreement would have repeated those same rules in the text of the SCM Agreement.

57. At least one prior report has reasonably observed that Article 12.7 is "intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[74] This observation reflects a reasonable understanding of the relevant provisions. The requisite flexibility of investigating authorities to effectively conclude investigations even in the face of non-cooperative parties is further acknowledged and ensured by Article 12.1.1, which implicitly recognizes the flexibility investigating authorities require to set deadlines for submissions.

58. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within "a reasonable period." Definitions of "reasonable" include "Proportionate" and "Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate".[75] Therefore, the use of the term "reasonable" implies a degree of flexibility that is determined on a case-by-case basis. What will constitute a "reasonable period" will be based on the circumstances of a particular case.[76]

59. Simultaneously, the SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. Although it does not explicitly use the word "deadlines," the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits. Indeed, investigating authorities must be able to control the conduct of their investigation to effectively reach a final determination.[77]

60. The "facts available" refer to those facts that are in the possession of the investigating authority and on its written record. Thus, an Article 12.7 determination "'cannot be made on the basis of non-factual assumptions or speculation.'"[78] The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case, including the nature, quality, and

[74] *Mexico – Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.
[75] Definition of "reasonable" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2496 (Exhibit USA-01).
[76] *See also US – Hot-Rolled Steel (AB)*, para. 84.
[77] *US – Hot-Rolled Steel (AB)*, para. 73.
[78] *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417). *See also US – Carbon Steel (India) (AB)*, para. 4.428.

amount of the evidence on the record, and the particular determinations to be made in the course of an investigation."[79]

61. In addition, the fact of an interested party's non-cooperation may be relevant to the investigating authority's selection of "facts available" under Article 12.7. Indeed, a non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by the investigating authority when relying on "facts available" to reach a determination.[80]

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

VI. CLAIMS REGARDING ARTICLE 15.5 OF THE SCM AGREEMENT

63. Indonesia argues that the Commission acted inconsistently with, *inter alia* Article 15.5 of the SCM Agreement in determining that Indonesian biodiesel threatened to injure the EU industry when the Commission found in a separate investigation with nearly overlapping periods of investigation that Argentinian biodiesel threatened to injure the EU industry.[81] Indonesia contends that Article 15.5 of the SCM Agreement requires investigating authorities to "separate and distinguish" the injury caused by factors other than subsidized imports.[82]

64. The EU contends that its determination on attribution and subsidized imports and the threat of injury is not exclusively tied to the situation prevailing during the investigation period.[83] Instead, the EU argues that in a threat of injury case, the determination is based on the second half of the investigation period and the relevant inquiry is whether subject imports are a likely cause of injury in the imminent future.[84]

65. Article 15.5 of the SCM Agreement defines the investigating authority's obligation to conduct an examination of known factors other than dumped imports as follows:

> The authorities shall … examine any known factors other than the subsidized imports which at the same time are injuring the

[79] *US – Carbon Steel (India) (AB)*, para. 4.421 ("[T]he nature and extent of the explanation and analysis required will necessarily vary from determination to determination"). *See also US – Countervailing Measures (China) (AB)*, para. 4.179.
[80] *See* AD Agreement, Annex II, para. 7 ("It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."). *See also US – Carbon Steel (India) (AB)*, para. 4.426.
[81] Indonesia's First Written Submission, paras. 474-477.
[82] Indonesia's First Written Submission, para. 464.
[83] EU's First Written Submission, para. 889.
[84] EU's First Written Submission, para. 889.

> domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of non-subsidized imports, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[85]

66. The purpose of the examination of other known factors is to ensure the existence of a causal link between the subsidized imports and the injury to the domestic industry. As the report in *EC – Tube or Pipe Fittings (AB)* explained in the context of Article 3.5 of the AD Agreement, the requirement "obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, 'causing injury' to the domestic industry."[86] The investigating authority's examination of other known factors thus ensures that subsidized imports are causing material injury to the domestic industry and that the injury attributed to subject imports is not actually caused by these other factors.

67. The premise of Article 15.5 is that other known factors may "at the same time [be] injuring the domestic industry" – that is, there can be multiple causes of injury. The provision is to ensure the imports remain "a" cause of injury despite consideration of the contributions from other sources – not to ensure imports are the sole or primary cause of injury.[87] "Separate and distinguish", however, is not text found in Article 15.5 of the SCM Agreement. In fact, Article 15.5 does not dictate the methodology that an investigating authority must employ for its examination of other known factors.[88] An investigating authority has the flexibility to base its conclusions on a qualitative assessment, a quantitative assessment, or another type of assessment that it considers appropriate so long as the assessment results in a demonstration of the causal link between subsidized imports and material injury that does not attribute to subsidized imports

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[85] SCM Agreement, Article 15.5.

[86] *EC – Tube or Pipe Fittings (AB)*, para. 188. The text of Article 3.5 of the AD Agreement is almost identical to Article 15.5 of the SCM Agreement. Consequently, interpretations of Article 3.5 of the AD Agreement can be considered as relevant in interpreting Article 15.5 of the SCM Agreement.

[87] *See China – Autos (US)*, para. 7.322 (citing *US – Wheat Gluten (AB)*, para. 67) (While an investigating authority's analysis "must demonstrate a relationship of cause and effect, such that imports are shown to have contributed to the injury to the domestic industry[,] … subject imports need not be 'the' cause of the injury suffered by the domestic industry, provided they are 'a' cause of such injury").

[88] *See US – Ripe Olives (Spain)*, para. 7.306 (observing that Article 3.5 of the AD Agreement, "do[es] not set out a specific methodology for investigating authorities when undertaking a non-attribution analysis. However, the methods applied by an investigating authority must comport with the overarching obligation in Article 3.1 … to undertake an objective examination based on positive evidence"). Articles 3.1 and 3.5 of the AD Agreement are parallel to Articles 15.1 and 15.5 of the SCM Agreement, respectively.

the injury caused by other factors. Finally, as the report in *US – Tyres (China) (AB)* recognized, "a temporal coincidence between upward trends in imports and a decline in the performance indicators of the domestic industry may evidence the existence of a causal link between rapidly increasing imports and material injury to the domestic industry."[89]

68. In some cases, factors cited by a party are found by the investigating authority to either not be causing injury at all to the domestic industry, or not to be causing injury "at the same time" as the dumped or subsidized imports. In such cases, the investigating authorities are not obligated under Article 15.5 of the SCM Agreement to undertake an additional analysis of those factors since there would be no injury to attribute to them.[90]

69. Based on the above discussion, the United States observes that the Panel must determine if the investigating authority demonstrated in its investigation that it examined other "known factors" within the meaning of Article 15.5 of the SCM Agreement, i.e. factors that were also causing injury to the domestic industry "at the same time" as were the subject imports, and based its causation analysis on an examination of all relevant evidence. The conclusions must be those an unbiased and objective investigating authority could have reached.[91]

VII. CONCLUSION

70. The United States appreciates the opportunity to provide its views in this third-party submission and hopes that its comments will be useful to the Panel.

[89] *US – Tyres (China) (AB)*, para. 192.
[90] *US – Carbon Steel (Article 21.5 – India) (Panel)*, para. 7.381 (finding the investigating authority's analysis proper because injurious effects of subject imports materialized "after" and not at "same time" as injury caused by imports from non-subject countries).
[91] *See US – Countervailing Measures on Certain EC Products (21.5 –EC)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn (Panel)*, as well as other reports concerning the parallel provision in the AD Agreement, and observing that its role was to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.").