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**EUROPEAN UNION – ANTI-DUMPING AND COUNTERVAILING DUTIES
ON STAINLESS STEEL PRODUCTS FROM INDONESIA**

REQUEST FOR CONSULTATIONS BY INDONESIA

The following communication, dated 24 January 2023, from the delegation of Indonesia to the delegation of the European Union, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union ("EU") pursuant to Articles 1, 4, and 26 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"), concerning the imposition of countervailing and anti-dumping duties on Stainless Steel Cold-Rolled Flat Products ("SSCRFP") from Indonesia.

The measures that Indonesia would like to address in these consultations 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 investigation. This request also covers any future action or measures the EU may take in connection with these measures.

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");¹ 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")² 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

¹ Published in the Official Journal of the European Union, L-series number 88, page 24, dated 16 March 2022:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0433&from=EN>.

² Published in the Official Journal of the European Union, L-series number 410, page 153, dated 18 November 2021: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R2012&from=EN>.

products originating in India and Indonesia (hereafter "Provisional Anti-Dumping Regulation").³

With respect to the countervailing measures, Indonesia is concerned that the following elements of the Countervailing Regulation, and of the investigation leading to the imposition of these measures, appear to be inconsistent with the SCM Agreement and the GATT 1994:

1. In connection with the provision of preferential financing and other support by Chinese grantors to Indonesian SSCRFP producers:

- a. The EU's attribution of financial contributions by Chinese grantors to the Government of Indonesia, and the EU's decision to consider these attributed financial contributions as subsidies within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- b. The EU's determination that the Government of 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;
- c. The EU's determination that alleged subsidies, provided by Chinese grantors to certain enterprises which were not within their jurisdiction, were specific in accordance with Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement;
- d. The EU's decision to countervail alleged subsidies provided by Chinese grantors without demonstrating specificity in accordance with Articles 1.2, 2.1, and 2.2 of the SCM Agreement on the basis of positive evidence as required by Article 2.4 of the SCM Agreement;
- e. The EU's determination of a benefit and the EU's calculations of such benefit regarding, amongst others, the use of benchmarks that do not reflect prevailing market conditions in the country of provision and the absence of proper "pass through" determinations, as required by Articles 1.1(b), 10, 14, and 32.1 of the SCM Agreement;

2. In connection with the provision of nickel ore:

- a. The EU's determination that certain Indonesian regulatory measures constituted or led to a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- b. The EU's determination that nickel ore mining companies constituted public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- c. The EU's determination that nickel ore mining companies acted as private bodies entrusted or directed by the Government of Indonesia within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;
- d. The EU's determination that the provision of nickel ore conferred a benefit to SSCRFP producers and the calculation of the amount of that alleged benefit by relying on an external benchmark that did not reflect the prevailing market conditions for the goods in question in the country of provision, in contradiction with Articles 1.1, 10, 14, and 32.1 of the SCM Agreement;
- e. The EU's determination that the provision of nickel ore was specific in accordance with Articles 1.2, 2.1, and 2.2 of the SCM Agreement and shall be clearly substantiated on the basis of positive evidence as required by Article 2.4 of the SCM Agreement;

³ Published in the Official Journal of the European Union, L-series number 188, page 61, dated 28 May 2021:
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0854&from=EN>.

- f. The EU's decision to seek unilateral redress through countervailing measures for export restrictions on nickel ore for which the EU alleges, in WT/DS592, a violation of Article XI:1 of the GATT 1994, in contradiction with Article 23.1 of the DSU;

3. In connection with the provision of land:

- a. The EU's determination that the provision of land constituted a financial contribution by a government within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- b. The EU's reliance on a benchmark, which did not reflect prevailing market conditions for the goods in question in the country of provision, as the basis for establishing the existence and the amount of the benefit, in accordance with Articles 1.1, 10, 14, and 32.1 of the SCM Agreement;
- c. The EU's determination that the provision of land by the Government of Indonesia was specific in accordance with Articles 1.2, 2.1, and 2.2 of the SCM Agreement and shall be clearly substantiated on the basis of positive evidence as required by Article 2.4 of the SCM Agreement;

4. In connection with government revenue that is otherwise due which is foregone or not collected:

- a. The EU's determination that the income tax holiday and the income tax allowance facility were specific within the meaning of Articles 1.2, 2.1, 2.2, and 2.4 of the SCM Agreement;
- b. The EU's determination that the import duty exemption on raw materials used to manufacture exported goods constituted an export subsidy within the meaning of Article 3.1(a) and/or constituted a financial contribution in the form of revenue foregone by the Government of Indonesia within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement in disregard of footnote 1 to the SCM Agreement;
- c. The EU's determination that the import duty exemption for machinery and spare parts imported from China constituted an export subsidy within the meaning of Article 3.1(a) and/or constituted a financial contribution in the form of revenue foregone by the Government of Indonesia within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement;
- d. The EU's decision to countervail the alleged revenue foregone for imports of bonded zone spare parts from China without appropriately adjusting the anti-dumping duty in accordance with Article VI:5 of the GATT 1994, Article 9.2 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement;
- e. The EU's omission to determine that the import duty exemption for machinery, spare parts and raw materials were specific, as required by Articles 1.2, 2.1, 2.2, 2.3 of the SCM Agreement, and the EU's omission to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;
- f. The EU's omission to correctly determine the existence and the amount of the alleged benefit of the import duty exemption for machinery, spare parts and raw materials, in accordance with Articles 1.1, 10, 14, and 32.1 of the SCM Agreement;

5. In connection with actions taken or omitted during the course of – or in relation to – the investigation, and other cross-cutting issues:

- a. The EU's decision to require the interested Member (Indonesia) to conduct a part of the investigation on behalf of the European Commission, in

contradiction with Articles 10 and 12 of the SCM Agreement. The EU's action also nullified and/or impaired a benefit accruing to Indonesia and/or impeded the attainment of an objective of the SCM Agreement;

- b. The EU's decision to resort to facts available against nickel ore mining companies, in contradiction with Article 12.7 of the SCM Agreement, since: (i) these companies were not "interested parties" in the sense of Article 12.9 of the SCM Agreement; (ii) if they were, they were not directly informed of the information required from them, in accordance with Article 12.1 of the SCM Agreement; and (iii) if they were, the Commission did not demonstrate that these companies had failed or refused to cooperate with the Commission;
- c. The EU's decision to resort to facts available against certain SSCRFP producers, and against the Government of Indonesia, on the basis of an incorrect determination that these producers and the Government failed or refused to cooperate with the Commission, in contradiction with Article 12.7 of the SCM Agreement;
- d. The EU's use of facts available in a way that did not reasonably replace the allegedly missing information (for example, with respect to the benchmark for purchases of machinery), in contradiction with Article 12.7 of the SCM Agreement;
- e. The timing of the EU's release of essential facts under consideration in the definitive disclosure documents, which did not provide interested parties sufficient time to defend their interests and did not allow the parties to present in writing all evidence that they considered relevant, in contradiction with Articles 12.1 and 12.8 of the SCM Agreement;
- f. The EU's omission to inform Indonesia and other interested parties of certain essential facts under consideration and to provide sufficient details in the Countervailing Regulation, for example, with respect to the benchmark for purchases of machinery, as required by Articles 12.8 and 22.3 of the SCM Agreement; and
- g. In case the EU asserts, in connection with points 1 through 4 above, that the Commission did conduct "pass through" and specificity analyses, the EU's omission to inform Indonesia and other interested parties of the essential facts under consideration, as required by Article 12.8 of the SCM Agreement; to calculate the benefit in a transparent and adequately explained manner, as required by Article 14 of the SCM Agreement; and to explain in sufficient detail in the Countervailing Regulation, the Commission's conclusions on all issues of fact and law that were considered material by the Commission, as required by Article 22.3 of the SCM Agreement.

Accordingly, the EU's imposition of countervailing measures on the imports of SSCRFP from Indonesia also appears inconsistent with Articles II:1(b), VI:3, VI:4, and VI:5 of the GATT 1994 and Articles 10, 19, and 32.1 of the SCM Agreement.

With respect to the anti-dumping measures, Indonesia is concerned that the following elements of the Definitive and Provisional Anti-Dumping Regulation and of the investigation leading to the imposition of these measures appear to be inconsistent with the Anti-Dumping Agreement and GATT 1994:

6. In connection with the obligations to make a fair comparison between the export price and the normal value and to make due allowance for differences affecting price comparability:

- a. The EU's omission to make due allowance for differences in price comparability as required by Article 2.4 of the Anti-Dumping Agreement. Amongst others,

- i. the EU deducted certain handling and loading costs, freight and insurance expenses and port costs, demurrage and dispatch costs from the export price, while it did not deduct similar expenses such as transport, handling, and loading costs from the domestic sales price and the normal value; and
 - ii. the EU deducted SG&A expenses and a notional profit from the export price for export sales through related traders while not deducting such SG&A expenses and a notional profit from the domestic sales price and the normal value when domestic sales were made through related traders;
- b. The EU's omission to make a fair comparison between the export price and the normal value, and to make the comparison at the same level of trade as required by Article 2.4 of the Anti-Dumping Agreement. Amongst others, the EU compared export sales at the *ex-works* level with a normal value at the *ex-warehouse* level;
 - c. The EU's omission to indicate what information was necessary to ensure a fair comparison and the imposition of an unreasonable burden of proof, thereby not acting in an objective and unbiased manner as required by Articles 2.4, 6.1, and 6.6 of the Anti-Dumping Agreement and the standard expected from investigating authorities as expressed in Article 17.6(i) of the Anti-Dumping Agreement; and
 - d. The EU's omission to appropriately adjust the anti-dumping duty to take account of the countervailing duty for imports of bonded zone spare parts from China, as required by Article VI:5 of the GATT 1994, Article 9.2 of the Anti-Dumping Agreement, and Article 19.3 of the SCM Agreement.

Accordingly, the EU's imposition of anti-dumping measures on the imports of SSCRFP from Indonesia also appears inconsistent with Articles 1, 2.1, 9.1, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994.

As a result of these above inconsistencies, the EU's measures also appear to nullify or impair the benefits accruing to Indonesia, directly or indirectly, under the covered agreements.

Indonesia reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the consultations, and in any request for the establishment of a Panel, in light of the information the European Union may provide.

Indonesia looks forward to receiving the EU's reply to this request and expresses its readiness to consider a mutually convenient format, date, and place for the consultations.
