WORLD TRADE ORGANIZATION

WT/DS618/1, G/L/1486
G/SCM/D136/1

15 August 2023

(23-5532)

Original: English

EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

REQUEST FOR CONSULTATIONS BY INDONESIA

The following communication, dated 11 August 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 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"), and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), concerning the imposition of countervailing duties on imports of biodiesel from Indonesia.

The measures that Indonesia would like to address in these consultations are the definitive countervailing duties on imports of biodiesel from Indonesia as well as the underlying investigation that led to the imposition of these measures (hereafter "countervailing measures"). This request also covers any future action or measures the EU may take in connection with these measures.

The countervailing measures are evidenced by the Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia[1] ("the Biodiesel Definitive CVD Regulation") as well as the Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia ("the Biodiesel Provisional CVD Regulation")[2]

Indonesia is concerned that the Biodiesel Definitive CVD Regulation, the Biodiesel Provisional CVD Regulation and the investigation leading to the imposition of the countervailing measures are inconsistent with the following provisions of the SCM Agreement and the GATT 1994:

1. DETERMINATIONS CONCERNING THE OIL PALM PLANTATION FUND ("OPPF")

(a) Article 1.1(a)(1)(i) of the SCM Agreement because the EU determined that OPPF payments constituted a financial contribution by a public body;

(b) Article 1.1(a)(1)(i) of the SCM Agreement because the EU determined that OPPF payments constituted grants and not purchases of biodiesel by the Government of Indonesia;

(c) Article 1.1(b) of the SCM Agreement because the EU determined that OPPF payments conferred a benefit on biodiesel producers and in particular because the

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[1] Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, Official Journal of the European Union, L 317, p. 42-95, dated 9 December 2019.

[2] Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, Official Journal of the European Union, L 212, p. 1-52, dated 13 August 2023.

EU selected a wrong counterfactual to analyse the situation of the recipient on the marketplace, absent the financial contribution; wrongly concluded that absent the OPPF payments, the biodiesel reference price would be lower; failed to consider the export levies paid by biodiesel producers; and failed to consider that the benefit, if any, was passed through to biodiesel blenders;

(d) Articles 19.1, 19.4 and 21.1 of the SCM Agreement, Article VI:3 and Article XVI:1 of the GATT 1994 because the EU failed to properly allocate the alleged subsidy amounts resulting from OPPF payments and thus failed to accurately determine the per unit subsidy amount and to impose countervailing duties at the level not exceeding that amount;

(e) Articles 1.1(a)(1)(ii), 14, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 because the EU failed to adjust the amount of the alleged subsidy to account for discounts granted as well as export levies, transport and credit costs and thus failed to adequately explain its benefit calculation method, to ascertain as accurately as possible the amount of subsidization bestowed on the investigated products and to levy countervailing duties in the appropriate amounts;

(f) Articles 1.2, 2.1 and 2.4 of the SCM Agreement because the EU determined that through a set of measures the Government of Indonesia provided support to the biodiesel industry including through direct transfer of funds via the 'Biodiesel Subsidy Fund' conferring a benefit to the recipients which is *de jure* and *de facto* specific;

(g) Articles 22.3, 22.4 and 22.5 of the SCM Agreement because on multiple occasions throughout its analysis of OPPF payments the EU failed to adequately state the reasons on which its conclusions are based and failed to provide sufficient explanations why certain claims made by interested parties were rejected.

2. DETERMINATIONS CONCERNING THE ALLEGED GOVERNMENT SUPPORT FOR THE PROVISION OF CRUDE PALM OIL ("CPO")

(a) Article 1.1(a)(1)(iv) of the SCM Agreement because the EU determined that the provision of CPO located on Indonesian soil to the Indonesian biodiesel industry is a function which is normally vested in the government;

(b) Article 1.1(a)(1)(iv) of the SCM Agreement because the EU determined that through a set of measures, including the export taxes and levy, and by *de facto* acting as a price setter on the market the Government of Indonesia 'induced' the domestic CPO producers to sell CPO locally and 'entrusted' or 'directed' them to provide CPO to biodiesel producers in Indonesia for less than adequate remuneration;

(c) Article 1.1(b) and Article 14(d) of the SCM Agreement because the EU disregarded, without a reasoned and adequate explanation, domestic prices for CPO in Indonesia; selected a benchmark that neither reflects the prevailing market conditions in Indonesia, nor the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged in Indonesia; and thus determined that CPO suppliers and producers provided CPO for less than adequate remuneration resulting in a benefit being conferred;

(d) Articles 12.7 and 12.11 of the SCM Agreement because the EU decided to resort to facts available with regard to PT Perkebunan Nusantara ("PTPN") as well as with regard to all producers and distributors of CPO based, in particular, on PTPN's alleged non-cooperation and because the EU established facts available in a way that did not reasonably replace the allegedly missing information;

(e) Articles 1.1(a)(2) and 32.1 of the SCM Agreement and Article XVI:1 of the GATT 1994 because the EU determined that the Government of Indonesia put in place a set of measures, including direct subsidies to CPO producers, in order to intervene in the market ensuring a particular result, i.e. that the biodiesel producers benefit

from artificially low prices for CPO and that through that set of measures, the Government of Indonesia provides income or price support to the biodiesel industry;

(f) Articles 1.2, 2.1 and 2.4 of the SCM Agreement because the EU determined that the provision of CPO and provision of income or price support to the biodiesel industry are specific.

(g) Articles 22.3, 22.4 and 22.5 of the SCM Agreement because on multiple occasions throughout its analysis of alleged provision of CPO and income or price support to the biodiesel industry the EU failed to adequately state the reasons on which its conclusions are based and by failing to provide sufficient explanations why certain claims made by interested parties were rejected.

3. DETERMINATIONS CONCERNING THE EXISTENCE OF A THREAT OF MATERIAL INJURY AND A CAUSAL LINK

(a) Articles 15.1 and 15.2 of the SCM Agreement because the EU failed to ensure price comparability when examining the effect of imports from Indonesia on the prices of domestic like products, failed to establish price undercutting for the product as a whole and thus failed to establish the existence of significant price undercutting by means of Indonesian imports;

(b) Articles 15.1 and 15.2 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of the effect of the allegedly subsidized imports on prices of EU producers, and thus improperly found significant price undercutting and price depression;

(c) Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of a threat of injury and of a fragile economic condition of its domestic industry, in particular by failing to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry, including those listed in Articles 15.4 and 15.7 of the SCM Agreement;

(d) Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of the nature of the subsidies in question and the trade effects likely to arise therefrom;

(e) Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of whether Indonesian imports were entering the EU at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;

(f) Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of a rate of increase of Indonesian imports into the EU market indicating the likelihood of substantially increased importation;

(g) Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of freely disposable production capacity in Indonesia and because the EU improperly determined that Indonesian producers are likely to direct their spare capacities to the Union market, causing further injury to the Union industry;

(h) Articles 15.1, 15.2, 15.5 and 15.7 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of the volume of allegedly subsidized imports from Indonesia, in particular, by disregarding the fact that there was no correlation between the evolution of Indonesian imports and the evolution of the Union industry's market shares or profitability, either during or after the period under consideration;

(i) Articles 15.1, 15.5, 15.7 and 15.8 of the SCM Agreement because the EU failed to make an objective examination, on the basis of positive evidence, that allegedly subsidized imports are, through the effects of subsidization, threatening to cause injury to the domestic industry; and because the EU failed to ensure that the threat of injury caused to the domestic industry by other factors, such as imports from Argentina, was not attributed to allegedly subsidized imports;

(j) Articles 12.1, 12.3 and 15.1 of the SCM Agreement because the EU failed to provide the necessary information to interested parties, including necessary information to propose alternative methodologies to determine the existence of price undercutting and because the EU provided a late disclosure of essential information concerning, among others, price elasticity and changes in the Union market;

(k) Articles 12.1, 12.3, 12.4 and 12.4.1 of the SCM Agreement because the EU failed to provide a meaningful non-confidential summary of the EU producers' responses to the post-investigation period questionnaire;

(l) Articles 15.1, 15.8, 22.3, 22.4 and 22.5 of the SCM Agreement because the EU based its threat of injury determination on information provided by one interested party, the European Biodiesel Board ("EBB"), while disregarding contradictory information provided by the Government of Indonesia and Indonesian exporters;

(m) Articles 12.3, 22.3, 22.4 and 22.5 of the SCM Agreement because in its threat of injury determination the EU provided explanations for some trends concerning the Union industry's profitability, when they supported its conclusion of a threat of injury while ignoring other trends that did not support this conclusion and because the EU failed to explain why arguments made by interested parties in this regard were rejected.

4. REJECTION OF A PRICE UNDERTAKING OFFER

(a) Articles 15.8, 18.3, and 19.3 of the SCM Agreement and Articles I:1 and VI of the GATT 1994 because the EU considered that the monitoring of the undertaking offered by an Indonesian exporting producer to be impracticable and unworkable and because the EU rejected such offer while accepting it from Argentinean exporting producers, thus treating imports of the same product from different WTO Members differently.

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

The Government of Indonesia reserves the right to raise additional factual and legal issues during the course of the consultations and in any request for the establishment of a Panel, in light of the information the European Union may provide.

This consultation request relates to the countervailing measures at issue and to any amendments, re-opening or extensions of such measures.

The Government of Indonesia looks forward to receiving a reply of the European Union to this Request, and is ready to consider with the European Union a mutually convenient date for consultations.

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