

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**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ⁽¹⁾ ('the basic Regulation'), and in particular Articles 15 and 24(1) thereof,

Whereas:

1. PROCEDURE**1.1. Initiation**

- (1) On 17 February 2021 the European Commission ('the Commission') initiated an anti-subsidy investigation with regard to imports of stainless steel cold-rolled flat products ('SSCR' or 'the product under investigation') originating in India and Indonesia (together referred to as 'the countries concerned'). The Commission published a Notice of initiation in the *Official Journal of the European Union* ⁽²⁾ ('the Notice of initiation').
- (2) The Commission initiated the investigation following a complaint lodged on 4 January 2021 by the European Steel Association ('EUROFER' or 'the complainant') on behalf of the Union industry of stainless steel cold-rolled flat products in the sense of Article 10(6) of the basic Regulation. The complaint contained evidence of subsidisation and of a resulting injury that was sufficient to justify the initiation of the investigation.
- (3) Prior to the initiation of the anti-subsidy investigation, the Commission notified the Government of India ('GOI') ⁽³⁾ and the Government of Indonesia ('GOID') ⁽⁴⁾ that it had received a properly documented complaint, and invited the GOI and GOID for consultations in accordance with Article 10(7) of the basic Regulation. Consultations were held on 10 February 2021 with the GOI and on 15 February 2021 with the GOID. However, no mutually agreed solution could be reached with either government.
- (4) On 18 November 2021, the Commission imposed definitive anti-dumping duties and definitively collected provisional duties imposed on imports of the same product originating in India and Indonesia ⁽⁵⁾ ('the anti-dumping Regulation') in an investigation which had been initiated by a Notice of initiation published on 30 September 2020 ('the separate anti-dumping investigation') ⁽⁶⁾.
- (5) The injury, causation and Union interest analyses performed in the present anti-subsidy investigation and the separate anti-dumping investigation are *mutatis mutandis* identical, since the definition of the Union industry, the sampled Union producers, the period considered and the investigation period are the same in both investigations.

⁽¹⁾ OJ L 176, 30.6.2016, p. 55.

⁽²⁾ Notice of initiation of an anti-subsidy proceeding concerning imports of stainless steel cold-rolled flat products originating in India and Indonesia (OJ C 57, 17.2.2021, p. 16).

⁽³⁾ The term 'GOI' is used in this Regulation in a broad sense, including all Ministries, Departments, Agencies and Administrations at central, regional or local level.

⁽⁴⁾ The term 'GOID' is used in this Regulation in a broad sense, including all Ministries, Departments, Agencies and Administrations at central, regional or local level.

⁽⁵⁾ Commission Implementing Regulation (EU) 2021/2012 of 17 November 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty on imports of stainless steel cold-rolled flat products originating in India and Indonesia (OJ L 410, 18.11.2021, p. 153).

⁽⁶⁾ Notice of initiation of an anti-dumping proceeding concerning imports of stainless steel cold-rolled flat products originating in India and Indonesia (OJ C 322, 30.9.2020, p. 17).

1.2. Registration

- (6) On 7 April 2021, the complainant filed a request for the registration of imports. The Commission analysed the request, but found that no massive imports in a relatively short period of a product benefiting from countervailable subsidies in the countries concerned had taken place. The imports of SSCR from India and Indonesia showed a decrease by 46 % in the seven months after initiation as compared to the imports during the investigation period. Therefore, the conditions to register imports according to Article 24(5) of the basic Regulation were not met and the Commission did not make imports of the product concerned subject to registration.

1.3. Investigation period and period considered

- (7) The investigation of subsidies and injury covered the period from 1 July 2019 to 30 June 2020 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2017 to the end of the investigation period ('the period considered'). Both periods are identical to those in the separate anti-dumping investigation.

1.4. Interested parties

- (8) In the Notice of initiation, the Commission invited interested parties to contact it in order to participate in the investigation. In addition, the Commission specifically informed the complainant, the GOI, 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.
- (9) Interested parties had the opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings. Hearings were held with EUROFER and another company.
- (10) In the Notice of initiation, the Commission also invited the authorities of the People's Republic of China ('GOC') to participate in the investigation as an interested party. Additionally, the Commission informed the GOC about the initiation of the investigation and specifically referred to the invitation to participate as an interested party contained in the Notice of initiation. Subsequently, the GOC informed the Commission that it had registered as an interested party to this investigation.
- (11) On 11 October 2021, the Commission sent a request for information to the GOC.
- (12) The GOC did not reply to the request for information of the Commission and instead on 21 October 2021 submitted its comments on the request for information itself.
- (13) In this submission, on the one side, the GOC stated that the Commission's procedures may be in violation of WTO rules and EU law.
- (14) First, the GOC stated that the Commission did not inform the GOC of the lodging of the complaint, did not hold pre-initiation consultations with the GOC, did not inform it about the initiation and did not invite it directly to become an interested party to the investigation. As the GOC is not an exporting country, the GOC is not an interested Member or party within the meaning of WTO rules and the invitation lacks legal basis and basic procedural requirements.
- (15) The Commission noted that these allegations are factually incorrect. In fact, once the invitation to become an interested party was included in the Notice of initiation, which was published in the *Official Journal of the European Union* on 17 February 2021, the Commission sent the Notice of initiation to the GOC on the same day, expressly drawing its attention to the invitation. Initially, the GOC requested access to the open file by email of 19 February 2021. In reply to that email, on the same day, the Commission explicitly asked again to the GOC whether, by requesting access to the open file, it intended to register as an interested party. On the same day, the GOC confirmed that it had registered as an interested party. The whole email exchange is available in the open file. Therefore, the Commission informed directly the GOC of the Notice of initiation and invited it to become an interested party even twice. Moreover, the Commission did not invite the GOC to hold pre-initiation consultations since the Commission expected the GOID to clarify the involvement of the GOC in providing indirectly financial support to the exporting

producers in Indonesia. Thus, since the Commission did not intend to investigate potential countervailable subsidies granted by the PRC, but only the subsidies provided by the GOID through the GOC's financial support, there was no legal requirement to hold pre-initiation consultations with the GOC.

- (16) Second, the GOC stated that it requested to follow the progress of the case out of concern that the Commission may violate WTO rules and EU law, but the GOC is not subject to this investigation and not obliged to provide any information in the investigation. In fact, according to the GOC, the Commission already violated the WTO Agreement on Subsidies and Countervailing Measures ('SCM Agreement') and the basic Regulation in the anti-subsidy investigation concerning imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China ('PRC' or 'China') and Egypt, initiated on 16 May 2019 ⁽⁷⁾ and resulted in the imposition of definitive countervailing duties published on 15 June 2020 ⁽⁸⁾ ('the GFF anti-subsidy investigation'), by including the normal bilateral economic and trade cooperation between China and Egypt into the scope of the so-called cross-country subsidies.
- (17) The Commission recalled that it was not the GOC which requested to follow the progress of the case, but it was the Commission itself which invited the GOC to register as an interested party in the Notice of initiation. As concerns the allegations on the GFF anti-subsidy investigation, the Commission considered them to be generic and unsubstantiated, and not the subject matter of this investigation anyway. In any event, the Commission noted that the financial support granted by the GOC, insofar such support is attributable to the GOID, falls under the scope of this investigation. Thus, the information about the financial support granted by the GOC is necessary in this context.
- (18) Third, the GOC noted that the Commission did not send to it any request for information in the first eight months after initiation, contrary to the WTO's requirement that investigating authorities should set out the information required from interested parties as soon as possible, and that the timeframe for the reply was 10 days instead of the 37 days provided by Art. 12.1.1 of the SCM Agreement and Art. 11(2) of the basic Regulation.
- (19) The Commission noted that the timing for sending the request for information to the GOC was due to the development of the investigation. Elements asked to the GOC were not fully apparent at the beginning of the investigation and the information requested was based upon aspects that required further investigation after the first RCC session with Indonesian parties. In addition, the Commission replied that it had sent to the GOC a 'request for information', not a 'questionnaire'. The timeframe requirements referred to by the GOC concern only questionnaires. The timeframe envisaged in the request for information was sufficient to provide the information requested. In any case, if the GOC had deemed the timeframe to be too stringent, the GOC could have requested a deadline extension, which it did not.

1.5. Comments on initiation

1.5.1. Comments by the GOI concerning initiation

- (20) The GOI did not submit written comments before or after pre-initiation consultations. However, during the consultation, the GOI argued that in general the complaint does not contain sufficient evidence of the existence of the alleged subsidy programmes.

⁽⁷⁾ Notice of initiation of an anti-subsidy proceeding concerning imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ C 167, 16.5.2019, p. 11).

⁽⁸⁾ Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ L 189, 15.6.2020, p. 1).

- (21) The Commission took into account the comments of the GOI. However, as detailed in the Memorandum on sufficiency of evidence ("Memorandum") ⁽⁹⁾, the Commission concluded after examination of the subsidy allegations, that the complaint, together with the evidence available to the Commission and listed in the Memorandum, contained sufficient evidence tending to show the existence of subsidisation for the product concerned originating in India.

1.5.2. *Comments by the GOID concerning initiation*

- (22) On 15 February 2021 the GOID submitted the written version of its statements delivered at the pre-initiation consultations held the same day. This submission argued that, in general, the complaint did not contain sufficient evidence of the existence of the alleged subsidy programmes.
- (23) The Commission took into account this submission at the stage of drafting the Memorandum on sufficiency of evidence and respectfully disagreed with the GOID's comments. Indeed, the Commission concluded that the complaint, together with the evidence available to the Commission and listed in the Memorandum on sufficiency of evidence, contained sufficient evidence tending to show the existence of subsidisation. In any event, particular attention was paid to the elements highlighted by the GOID during the investigation.

1.6. **Sampling**

- (24) In the Notice of initiation, the Commission stated that it might sample the interested parties in accordance with Article 27 of the basic Regulation.

1.6.1. *Sampling of Union producers*

- (25) In the Notice of initiation, the Commission stated that it had decided to limit the investigation to a reasonable number of Union producers by applying sampling, and that it had provisionally selected a sample of Union producers. The Commission selected the provisional sample on the basis of production and Union sales volumes reported by the Union producers in the context of the pre-initiation standing assessment analysis, taking also into account their geographical location. The provisional sample thus established consisted of three Union producers accounting for more than 60 % of production and around 70 % of sales in the Union of the like product, and located in four different Member States. Details of this provisional sample were made available in the file for inspection by interested parties, with the possibility for them to make comments. No comments were made.
- (26) Since no comments were received within the prescribed timeframe, the provisional sample of Union producers was confirmed. It consisted of Acciai Speciali Terni S.p.A., Aperam Stainless Europe and Outokumpu Stainless OY. The definitive sample is representative of the Union industry. This sample coincided with the sample of Union producers in the separate anti-dumping investigation.

1.6.2. *Sampling of importers*

- (27) To decide whether sampling was necessary and, if so, to select a sample, the Commission asked all known unrelated importers to provide the information specified in the Notice of initiation.
- (28) One unrelated importer made itself known as interested party and provided the requested information. In view of the low number of replies received, sampling was not necessary. No comments were made on this decision. This importer was invited to complete a questionnaire.

⁽⁹⁾ Sherlock document no t21.001429 of 17 February 2021.

1.6.3. *Sampling of exporting producers in the countries concerned*

- (29) In view of the potentially large number of exporting producers in the countries concerned, the Notice of initiation provided for sampling in India and Indonesia. Therefore, the Commission asked all known exporting producers in India and Indonesia to provide the information specified in the Notice of initiation to decide whether sampling was necessary and, if so, to select a sample.
- (30) In addition, the Commission asked the Mission of India to the European Union and the Embassy of the Republic of Indonesia in Brussels to identify and/or contact other exporting producers, if any, that could be interested in participating in the investigation.

1.6.3.1. India

- (31) Two (groups of) Indian companies submitted a sampling reply within the time limit provided for. The two exporting producers in question: Chromeni Steels Private Limited ('Chromeni') and Jindal Group accounted for 100 % of the Indian export volume of SSCR from India to the Union during the investigation period. The Commission therefore abandoned sampling with regard to India.
- (32) The part of the Jindal Group (India) which is involved in the production and sales of SSCR consists of two exporting producers, two traders, one service supplier and one raw-material supplier.
- (33) Jindal Group is vertically integrated from the production of coke, gas and ferrochromium, through production of liquid stainless steel, slabs, hot-rolled coils, down to production of SSCR.
- (34) Chromeni is not vertically integrated. It starts manufacturing SSCR from hot-rolled stainless steel coils.

1.6.3.2. Indonesia

- (35) Three exporting producers or groups of exporting producers in Indonesia provided the requested information and agreed to be included in the sample. In accordance with Article 27(1) of the basic Regulation, the Commission selected a sample of two groups of exporting producers on the basis of the largest representative volume of exports from Indonesia to the Union during the investigation period, which could reasonably be investigated within the time available: PT. Indonesia Ruipu Nickel and Chrome Alloy ('IRNC') and PT. Jindal Stainless Indonesia ('Jindal Indonesia'). The sampled groups of exporting producers accounted for 71 % of the estimated total export volume of SSCR from Indonesia to the Union during the investigation period.
- (36) IRNC is a vertically integrated company. The company starts manufacturing SSCR from nickel ore and therefore it has its own smelters. Furthermore, IRNC is part of a group of companies that manufacture different type of steel products, which are also vertically integrated (they start from nickel ore and therefore have their own smelters) and provide upstream steel products to IRNC for the manufacturing of SSCR. These companies (together with IRNC, jointly referred to as 'the IRNC Group') are 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'). They are all located in the Morowali Industrial Park in Indonesia.
- (37) Jindal Indonesia is not vertically integrated. It starts manufacturing SSCR from stainless steel coils.
- (38) In accordance with Article 27(2) of the basic Regulation, the Commission consulted all known exporting producers concerned and the GOID on the selection of the sample. No comments were received and the sample was thus confirmed.

1.7. Individual examination

- (39) The third Indonesian exporting producer that returned the sampling form informed the Commission that it did not intend to request individual examination under Article 27(3) of the basic Regulation. Nevertheless, the Commission informed this non-sampled exporting producer that it was required to provide a questionnaire reply if it wished to be examined individually. However, it did not provide a questionnaire reply. As a result, no individual examinations were possible.

1.8. Questionnaire replies

- (40) The Commission sent questionnaires to the three sampled Union producers, the complainant, the one unrelated importer that had made itself known, and the four exporting producers in the countries concerned. The same questionnaires had also been made available online ⁽¹⁰⁾ on the day of initiation.
- (41) Questionnaire replies were received from the three sampled Union producers, the complainant, one unrelated importer, two exporting producers from India and the two sampled exporting producers from Indonesia.
- (42) The Commission also sent a questionnaire to the GOI and the GOID.
- (43) The questionnaire for GOI included specific questionnaires to (i) any financial institution that provided loans or export credits to the companies under investigation or to their buyers (in the context of export buyer credits), (ii) the top 10 producers and distributors of the input materials allegedly provided for less than adequate remuneration (chromium ore and iron ore) to the two Indian exporting producers, for the production of the product under investigation.
- (44) The questionnaire to the GOID included a specific questionnaire for the Lembaga Pembiayaan Ekspor Indonesia ('Indonesia Eximbank'). This financial institution had been specifically referred to in the complaint as a public body or body entrusted or directed by the GOID to grant subsidies. In addition, for administrative convenience, the GOID was asked to forward specific questionnaires to (i) any other financial institution that provided loans or export credits to the sampled companies or to the buyers of the sampled companies (in the context of export buyer credits) ⁽¹¹⁾, (ii) the top 10 producers and distributors of the main input materials for the product under investigation, as well as to any other input producers and distributors of the materials in question, which have provided inputs to the two sampled companies, and (iii) PT. Asuransi Asei Indonesia ('ASEI'), specifically referred to in the complaint as a provider of export credit insurance on concessional basis, potentially also to the producers of the product under investigation.
- (45) Furthermore, the questionnaire to the GOID included a specific questionnaire for PT. Indonesia Morowali Industrial Park ('IMIP'), the company operating the industrial park where IRNC, one of the sampled exporting producers, is located. Since IMIP is a company related to IRNC, IRNC was also requested to forward the same questionnaire to IMIP.
- (46) The GOID was asked to gather any responses provided by these entities and to send them directly to the Commission.
- (47) The Commission received questionnaire replies from the GOI, which did not include however replies to the specific questionnaires referred to in recital (43), as well as from the GOID, which included replies from the Indonesia Eximbank, three other financial institutions, eleven input suppliers: four coal miners (PT. Sungai Danau Jaya, PT. Tanah Bumbu Resources, PT. Wahana Baratama Mining, and PT. Bukit Asam Tbk), three nickel ore miners (PT. GAG Nikel, PT. Ceria Nugraha Indotama and PT. Tiran Indonesia), four traders of nickel ore and coal (PT. Ekasa Yad Resources, PT. Batu Bara Global Energy, PT. Rwood Resources Indonesia, and PT. Bumi Nusantara Jaya), ASEI and IMIP. The Commission received the same IMIP's questionnaire replies also from IRNC.

⁽¹⁰⁾ https://trade.ec.europa.eu/tdi/case_details.cfm?id=2513

⁽¹¹⁾ A list of the financial institutions providing loans or export credits to the sampled companies was attached to the questionnaire.

1.9. Verification visits

- (48) In view of the outbreak of COVID-19 and the confinement measures put in place by various Member States as well as by various third countries, the Commission could not carry out verification visits pursuant to Article 16 of the basic Regulation at provisional stage. The Commission instead cross-checked remotely all the information deemed necessary for its provisional determinations in line with its Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations ⁽¹²⁾.
- (49) Without prejudice to the application of Article 28 of the basic Regulation, the Commission cross-checked remotely via videoconference the GOI and the GOID's replies to the questionnaires. Officials from relevant ministries participated during the remote cross-checking ('RCC'). The RCC of the GOID included also the RCC of the information provided by Indonesia Eximbank and by two input suppliers, namely PT. Gag Nikel and PT. Sungai Danau Jaya.
- (50) Furthermore, the Commission carried out RCCs of the following companies/parties:
- (a) The Union association, representing the three sampled Union producers:
 - European Steel Association ('EUROFER'), Brussels, Belgium.
 - (b) Exporting producers in India:
 - Chromeni Steels Private Limited ('Chromeni'), Ahmedabad,
 - Jindal Stainless Limited ('JSL'), New Delhi and Jindal Stainless Hisar Limited ('JSHL'), New Delhi, and their related companies, notably related traders: Jindal Stainless Steelway Limited ('JSS'), Gurugram and Jindal Steelitalia Limited ('JSI'), Gurgaon, service provider: Jindal United Steel Limited ('JUSL'), New Delhi and raw-material supplier: Jindal Coke Limited ('JCL'), New Delhi, jointly referred to as 'the Jindal Group'.
 - (c) Exporting producers in Indonesia:
 - PT. Indonesia Ruipu Nickel and Chrome Alloy ('IRNC'), Jakarta and its related companies, notably its four main related Indonesian input suppliers PT. Indonesia Guang Ching Nickel and Stainless Steel Industry ('GCNS'), Jakarta, PT. Indonesia Tsingshan Stainless Steel ('ITSS'), Jakarta, PT. Sulawesi Mining Investment ('SMI'), Jakarta and PT. Tsingshan Steel Indonesia ('TSI'), Jakarta (together with IRNC, jointly referred to as 'the IRNC Group'), and the related industrial park where the IRNC Group is located, PT. Indonesia Morowali Industrial Park ('MIP'), Jakarta,
 - PT. Jindal Stainless Indonesia ('Jindal Indonesia'), Gresik.

1.10. Non-imposition of provisional measures and subsequent procedure

- (51) On 20 October 2021, pursuant to Article 29(a)(2) of the basic Regulation, the Commission informed interested parties that it intended not to impose provisional measures and to continue with the investigation.
- (52) The Commission continued seeking and verifying all information it deemed necessary for its definitive findings.

1.11. Final disclosure

- (53) On 17 December 2021 the Commission informed all parties of the essential facts and considerations on the basis of which it intended to impose a definitive anti-subsidy duty on imports of the product concerned ('final disclosure'). All parties were granted a period within which they could make comments thereon. Interested parties had an opportunity to comment on the initiation of the investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.
- (54) Subsequently, on 21 January 2022 interested parties received an additional final disclosure ('additional final disclosure') and they were granted a period within which they could make comments thereon. Interested parties had an opportunity to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

⁽¹²⁾ Notice on the consequences of the COVID-19 outbreak on anti-dumping and anti-subsidy investigations (2020/C 86/06) (OJ C 86 of 16.3.2020 p. 6).

- (55) Comments were received from the complainant, the GOI, the GOID, the GOC, the sampled exporting producers, the unrelated importer LSI, and the consortium of importers and distributors Euranimi.
- (56) Parties who so requested were also granted an opportunity to be heard. Hearings took place with IRNC Group and Euranimi.
- (57) The comments submitted by the interested parties were considered and taken into account where appropriate in this Regulation.
- (58) IRNC Group claimed that its rights of defence were violated because it had not been given enough time to prepare the comments on final disclosure. In response, the Commission highlighted that the IRNC Group was initially given an 18-day deadline to comment, which is well above the legal time period of 10 days which the Commission is required to provide to interested parties upon final disclosure. In addition, the Commission granted a three day extension to the company upon its request. Therefore, the Commission considered that the IRNC Group was given sufficient time to submit its comments on final disclosure, and the claim was rejected.
- (59) Jindal Group and Jindal Indonesia requested the Commission to ensure that the proposed countervailing duties and the steel safeguard measures were not cumulated, as done in the anti-dumping Regulation.
- (60) This was addressed in recitals (1083) and (1084).
- (61) For the sake of legal certainty, Jindal Group and Jindal Indonesia also requested the Commission to include the proposed regulation imposing anti-subsidy duties in Regulation (EU) 2019/1382 ⁽¹³⁾.
- (62) The Commission noted that Article 3 already addresses the issue of interaction between duties levied according to this Regulation and duties levied according to Regulation (EU) 2019/159 ⁽¹⁴⁾. In the last amendment of Regulation (EU) 2019/1382, the Commission already announced that in the future each Regulation imposing anti-dumping and/or anti-subsidy concerning steel products also subject to the safeguard measure would include specific provisions preventing their concurrent application with the above-quota safeguard tariff duty ⁽¹⁵⁾.
- (63) After final disclosure, Euranimi and LSI argued that the Commission should suspend the measures pursuant to Article 24(4) of the basic Regulation.
- (64) The Commission acknowledged receipt of the information provided by these parties and reminded them that, should the Commission consider it appropriate, the Commission may decide to suspend measures where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and when it is in the Union interest to do so.

2. PRODUCT CONCERNED AND LIKE PRODUCT

2.1. Product concerned

- (65) The product concerned by this investigation is flat-rolled products of stainless steel, not further worked than cold-rolled (cold-reduced), currently falling under CN codes 7219 31 00, 7219 32 10, 7219 32 90, 7219 33 10, 7219 33 90, 7219 34 10, 7219 34 90, 7219 35 10, 7219 35 90, 7219 90 20, 7219 90 80, 7220 20 21, 7220 20 29, 7220 20 41, 7220 20 49, 7220 20 81, 7220 20 89, 7220 90 20 and 7220 90 80 and originating in India and Indonesia. The CN codes are given for information only.

⁽¹³⁾ Commission Implementing Regulation (EU) 2019/1382 of 2 September 2019 amending certain Regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures (OJ L 227, 3.9.2019, p. 1).

⁽¹⁴⁾ Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (OJ L 31, 1.2.2019, p. 27).

⁽¹⁵⁾ Commission Implementing Regulation (EU) 2021/1754 of 4 October 2021 amending Implementing Regulation (EU) 2019/1382 amending certain Regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to a safeguard measure (OJ L 352, 5.10.2021, p. 1, recital (6)).

2.2. Like product

- (66) The investigation showed that the following products have the same basic physical, chemical and technical characteristics as well as the same basic uses:
- the product concerned;
 - the product produced and sold on the domestic markets of the countries concerned; and
 - the product produced and sold in the Union by the Union industry.
- (67) The Commission concluded that those products are therefore like products within the meaning of Article 2(c) of the basic Regulation.

2.3. Claims regarding product scope

- (68) One Union producer, who also acted as an importer and end user, requested the exclusion of stainless steel cold rolled products with steel grade 200 and 201 from the product scope. The investigation has established that such products are interchangeable as far as characteristics are concerned. Also, the Commission came to the conclusion that granting this exclusion request would indeed pose an unreasonable burden for customs authorities, which would need to carry out a laboratory test and check the end use for each shipment. Furthermore, the data that the company provided with regard to its purchases of products with steel grade 200 and 201 and other products from the countries concerned showed that it did buy other products falling within the product scope of the current investigation from those countries, which inherently bears the risk of cross-compensation. Furthermore, although the company claims that these steel grades have only one end-use, it cannot be excluded that these steel grades might have other uses.
- (69) Therefore, the Commission concluded that granting this product exclusion request would not be appropriate and it was thus rejected.

3. SUBSIDISATION: INDIA

3.1. Subsidies and subsidy programmes within the scope of the investigations

- (70) On the basis of the information contained in the complaint, the Notice of initiation and the replies to the Commission's questionnaires, the alleged subsidisation through the following subsidies by the GOI were investigated:
- i. Direct and potential direct transfer of funds:
 - Pre-shipment and post-shipment credit financing
 - Interest equalization scheme for export financing
 - Incentives provided by Export Credit Agencies
 - Preferential loans of State Bank of India ('SBI') and Steel Development Fund ('SDF')
 - Research and Development ('R&D') Grants of SDF and Ministry of Steel
 - ii. Government revenue foregone or not collected that is otherwise due:
 - Duty Exemptions and Remissions Schemes
 - (a) Advanced Authorization Scheme ('AAS')
 - (b) Duty Free Import Authorization Scheme ('DFIA')
 - (c) Duty Drawback Scheme ('DDS')
 - (d) Export Promotion of Capital Goods Scheme ('EPCGS')
 - (e) Merchandise Export from India Scheme ('MEIS')
 - (f) Export promotion through duty and tax exemptions – Deemed Export.
 - Incentives for Export Oriented Units ('EOU') and Special Economic Zones ('SEZ')
 - Income tax incentives

- iii. Provision of goods or services for less than adequate remuneration ('LTAR'):
 - The provision of chromium ore for less than adequate remuneration
 - The provision of iron ore for less than adequate remuneration
- iv. Purchases of goods through Government procurement policies
- v. Incentives provided by Exim Bank in the form of Buyers Credits
- vi. Incentives provided by the local subsidy schemes of the State of Gujarat.

3.2. Schemes for which evidence of subsidisation was not found

– Pre-shipment and post-shipment credit financing

- (71) The complainant claimed that Indian banks provide pre-shipment export financing to exporters who require payment for sold goods before the shipment of those goods. Similarly, post-shipment export financing is a loan that financial institutions provide to exporters. This scheme is managed by the Reserve Bank of India (RBI), India's central bank. It was further claimed that GOI, through its central bank, entrusts or directs private Indian banks to provide a financial contribution in the form of a direct transfer of funds (Article 3(1)(a)(i) and Article 3(1)(a)(iv) of the basic Regulation). To benefit from these schemes the exporter merely needs to show proof of export without any risk assessment being required. The benefit to the exporter is therefore the difference between preferential rate thus received and the market rate for similar loans in India.
- (72) One of the Indian exporting producers was using, to a limited extent, pre-shipment credits in the IP.
- (73) The company was using pre-shipment credits under working capital facilities (credit lines) opened by public and private banks. The interest rate applied were established in line with market conditions and at the level charged by other public and private banks (including international banks), with which the company had open credit lines. The interest rate was based on Benchmark Prime Lending Rate ('BPLR') – in case of export credits in INR or on LIBOR – in case of export credits in USD. In both cases, a spread was added, based on the credit rating assessment of the company. The same credit lines were used also for the domestic short-term financing.
- (74) The two Indian exporting producers did not use post-shipment export credits during the IP.
- (75) As a consequence, the Commission did not need to further investigate these schemes.

– Interest equalization scheme for export financing

- (76) The complainant claimed that the interest equalization scheme ('IES') provides exporters with a financial contribution in the form of a direct transfer of funds by providing compensation to the lenders of those exporters equivalent to 3 % to 5 % of the value of the interest that would otherwise have been due on certain loans.
- (77) The two Indian exporting producers did not use IES during the IP.
- (78) As a consequence, the Commission did not need to further investigate this scheme.

– Incentives provided by Export Credit Agencies

- (79) The GOI fully owns two Export Credit Agencies: Export Credit Guarantee Corporation of India Ltd (ECGC) and Exim Bank of India. The principal goal of both agencies is the promotion of Indian exports. The complainant claimed that incentives provided by these Agencies confer a benefit to the exporters because they provide insurance, credit guarantees, credit lines and export credits under conditions less strict than those on the market.
- (80) The two Indian exporting producers did not use credit guarantees, export credits or credit lines provided by ECGC or Exim Bank.

(81) Two producers of Jindal Group were covered however by insurance policies of ECGC. However, the Commission did not find these insurance agreements deviating from the normal market conditions. The premium fees depended on maximum loss coverage, countries and buyers covered by the policy and the previous 'claim history', i.e. the risk profile of the companies. The Commission verified that all the premium fees and charge fees were paid.

(82) As a consequence, the Commission did not need to further investigate this scheme.

– Preferential loans of State Bank of India ('SBI') and Steel Development Fund ('SDF')

(83) The complainant claimed that GOI provides sector specific preferential loans via State Bank of India (SBI) and Steel Development Fund (SDF) to the stainless steel producers.

(84) SBI was one of the banks granting to Jindal Group long-terms loans but the Commission did not find them sector specific or preferential. The interest rate was established based on BLPR + spread. In fact, the interest rate charged by SBI was slightly higher than interest rates charged by private banks granting long-term loans to Jindal Group with similar duration.

(85) The two Indian exporting producers did not receive loans from the Steel Development Fund during the IP.

(86) As a consequence, the Commission did not need to further investigate this scheme.

– Research and Development Grants of SDF and Ministry of Steel

(87) The complainant claimed that GOI provides steel producers with R&D grants via SDF. The R&D grants can also be obtained directly from the Ministry of Steel.

(88) The two Indian exporting producers did not receive R&D grants in IP or grants that could be allocated to the IP.

(89) As a consequence, the Commission did not need to further investigate this scheme.

– Duty Exemptions and Remissions Schemes

(90) The complainant claimed that the producers of the product under investigation benefit from several pre-export and post-export duty drawback schemes under which the imported raw materials or capital goods can be exempted from custom duties and import taxes. These schemes confer a benefit in the sense of Article 3(1)(a)(ii) and 3(2) of the basic Regulation to exporting manufacturers, equal to the amount of revenue foregone by the government and therefore to the amount of duties and taxes not collected.

(91) As explained in recitals (117) to (205) below, one or both Indian exporting producers benefited from some of the duty exemptions and remission schemes, namely: AAS, DDS, EPCGS and MEIS.

(92) However, none of the two exporting producers benefited in the IP from the DFIA scheme, nor had domestic sales transactions that were classified as Deemed Export. Therefore, the Commission did not need to further investigate those latter two schemes.

– Incentives for Export Oriented Units ('EOU') and Special Economic Zones ('SEZ')

(93) The complainant claimed that the producers of the product under investigation benefit from several tax incentives being registered as EOU or being located in SEZ.

(94) However, neither of the two Indian exporting producers was registered as EOU during the IP, nor benefited from any past capital goods subsidies as an EOU that could be allocated to the IP. None of the two exporting Indian producers is also located in a SEZ.

(95) As a consequence, the Commission did not need to further investigate these schemes.

– Income tax incentives

- (96) The complainant claimed that producers of the product under investigation benefit from income tax deductions and exemptions resulting from several programs, including:
- Reduced income tax rate for newly established companies
 - Income tax deductions of R&D costs
 - Income tax deductions of profits resulting from large industrial projects (ITES)
 - Income tax deductions of profits of special category enterprises
 - Income tax deductions of investments into new plants and machineries.
- (97) The two Indian exporting producers did not enjoy any income tax exemptions, deductions or reduced tax rates during the IP.
- (98) As a consequence, the Commission did not need to further investigate this scheme.

– The provision of iron ore for less than adequate remuneration

- (99) The complainant claimed that the GOI has implemented a policy involving the setting of high export taxes on iron ore. The government thus ensured an increase in the domestic supply of these products and guaranteed that iron prices remain well below international levels. These export duties, together with other elements, amounted to the GOI entrusting or directing raw material producers to provide inputs to the Indian producers for less than adequate remuneration.
- (100) However, none of the two Indian exporting producers is using iron ore in its production process. Therefore, the Commission did not need to further investigate this scheme.

– Purchases of goods through Government procurement policies

- (101) The complainant claimed that the GOI has supported the Indian cold-rolled stainless steel industry through government procurements. It was claimed that government agencies are obliged to use a minimum percentage of Indian steel and iron in its procurement (between 15 % and 50 %). Furthermore, when a foreign bidder offers the lowest price, they can only obtain up to half of the order quantity. The other part must be awarded to a local supplier that is able to price within a 20 % range above the foreign bidder's price. Only if not a single local supplier can price within 20 % of the lowest price (an unlikely event, given the broad margin), can the more efficient, foreign bidder obtain the rest of the contract.
- (102) One of the Indian exporting producers was successfully bidding in the IP in the government procurement procedures.
- (103) The Commission verified all the procurement procedures and tenders related to the Indian company in question in the IP. However, no elements of concrete subsidization were found.
- (104) Tenders are published online, on the websites of the Indian respective administration units, institutions or public companies (for example Indian Railways) and the companies are free to send their offers. It is a standard practice that procurement volume is divided between two companies. The company, which offered the lowest price, is granted 60 % of the procurement and the company, which offered the second lowest price, is granted the remaining 40 % of the contract, under the condition that it will adjust its price to the level offered by the winner of the bid. This rule applies also if one or both companies in question are foreign bidders.
- (105) Admittedly, some procurements are open only for domestic companies. However, if the procedure is open for the foreign bidders there is no price discrimination as alleged by the complainant. The price preference (20 %) for the domestic suppliers exists only in case of procurements related to capital goods ⁽¹⁶⁾.

⁽¹⁶⁾ POLICY FOR PROVIDING PREFERENCE TO DOMESTICALLY MANUFACTURED IRON & STEEL PRODUCTS IN GOVERNMENT PROCUREMENT- REVISED, 2019, art 2.11 and Annex B (Gazette of India No 324 of 29 May 2019).

- (106) The Commission verified that in all the procurement procedures awarded to the Indian SSCR producer in the IP, whether open to foreign bidders or not, the company selected had offered the lowest price or, as a company with the second best offer, had to adjust its price to the lowest price offered.
- (107) Following final disclosure, the complainant claimed that the exclusion of the foreign bidders from some of the procurement procedures led to reduced competition and therefore resulted in higher overall prices, which equated to a financial contribution through the purchase of goods at more than adequate remuneration.
- (108) Moreover, the complainant observed that by excluding imports from certain tenders, the Indian procurement rules guarantee certain volumes of the purchases for the Indian producers, which confers in itself a benefit to them.
- (109) The Commission agrees that the exclusion of foreign bidders potentially reduces competition and may lead to the creation of a market only for domestic bidders. However, the volumes sold by the Jindal Group through the award of public tenders were negligible against the background of the total domestic sales of the company in the IP. In addition, in the analysis of procurement procedures awarded to the Indian SSCR producer in the IP, the Commission did not notice substantial differences in the price levels between winning offers in tenders opened for the foreign companies and those where they did not participate. As a result, in this particular case the Commission has not found any material benefit within the meaning of the Article 3(1)(b) of the basic Regulation.

– Incentives provided by Exim Bank in the form of Buyers Credits

- (110) The complainant claimed that Exim Bank offers Lines of Credit and Buyer's Credit. Those incentives are provided not to exporters but to foreign governments, foreign development banks and overseas financial institutions, commercial banks abroad or other entities. The funding enables them to buy from Indian exporters on deferred credit terms.
- (111) None of the export sales of the exporting producers under investigation during the IP were covered by Exim Bank lines of credit or buyer's credit.
- (112) As a consequence, the Commission did not need to further investigate these schemes.

– Incentives provided by the local subsidy schemes of the State of Gujarat

- (113) The complainant claimed that, apart from subsidies granted by the GOI, some of the SSCR producers may benefit from state-level subsidy schemes provided by the Government of Gujarat (GOG). The complaint lists four local schemes:
- Scheme for Incentive to Industries 2016-2021, which provides a tax incentive for new companies setting up in Gujarat.
 - Gujarat's VAT remission scheme: a Gujarati enterprise can recoup the VAT paid on its purchased inputs in the form of an input tax credit.
 - Special Economic Zone Act: Tax exemptions for stamp duty and registration fee.
 - Tax exemption for Sales and Other State Taxes on Purchases of Inputs for the SEZ or a unit within the SEZ.
- (114) Only one of the Indian exporting producers under investigation is located in the State of Gujarat and could potentially use the local subsidy schemes listed above. However, the company was not found to benefit from any of these schemes in the IP.
- (115) As a consequence, the Commission did not need to further investigate these schemes.

– Electricity stamp deduction (Government of Gujarat)

- (116) The Commission found that one exporting producer availed itself of this measure during the IP. However, since it appeared that the benefit conferred to this company was negligible (0,02 %), the Commission decided not to investigate this measure further.

3.3. Schemes for which evidence of subsidisation was found

3.3.1. *Duty exemption and remission schemes*

- (117) The AAS, EPCGS and MEIS schemes are based on the Foreign Trade (Development and Regulation) Act 1992 (No. 22 of 1992) which entered into force on 7 August 1992 ('Foreign Trade Act'). The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in 'Foreign Trade Policy' documents, which are normally issued by the Ministry of Commerce every five years and updated regularly.
- (118) The Foreign Trade Policy document relevant for the IP is Foreign Trade Policy 2015-20 ('FTP 2015-20'). The GOI also sets out the procedures governing FTP 2015-20 in a 'Handbook of Procedures, 2015-20' ('HOP 2015-20').
- (119) The DDS scheme is based on section 75 of the Customs Act of 1962, on section 37 of the Central Excise Act of 1944, on sections 93A and 94 of the Financial Act of 1994, and on the Customs, Central Excise Duties and Service Tax Drawback Rules of 1995. The drawback rates are published on a regular basis.
- (120) As a general remark, it is noted that the Commission was not able to finalize within a reasonable time the remote cross checking of certain documents related to export/import transactions within a framework of the duty drawback schemes described in this sub-section, as requested and agreed during the RCC. In this regard, the Commission used best facts available in case of discrepancies found between the figures reported by the companies and the GOI, on the basis of Article 28(3) of the basic Regulation.
- (121) Following final disclosure, one of the Indian exporting producers claimed that the purpose of the AAS, DDS and MEIS schemes is to neutralize the customs duties that the company pays on imports of raw materials used in the exported products and therefore these three schemes do not confer a benefit to the company.
- (122) However, contrary to this statement, benefits received by the companies under DDS and MEIS schemes do not have any direct link with duties due on imports of raw materials used by the company in the exported products.
- (123) In the case of the DDS scheme, an exporting company receives cash payments, which are linked only with the FOB value of its exports. The company in question is not required to import any raw materials at all.
- (124) In the case of the MEIS scheme, an exporting producer receives scripts which might be sold on the market or used to offset future import duties due, but this offset is not limited to the raw materials used in the production of the exported products for which MEIS scripts were received. Thus, MEIS scripts can be used to offset any import duties due, including import duties concerning capital goods. They can also be cashed even if the company is not importing anything at all.
- (125) Only in the case of the AAS scheme there is a direct link between import duties exemption on raw materials imported by the company and exported products. Thus, the Commission does not treat the duty exemption as a benefit to the company, provided that the latter can show actual consumption of raw materials imported under AAS in the production of the exported final products.

– Advanced Authorisation Scheme ('AAS')

- (126) The Commission established that one Indian exporting producer used AAS during the IP.

(a) Legal basis

- (127) The detailed description of the scheme is contained in paragraphs 4.03 to 4.24 of the FTP 2015-20 and chapters 4.04 to 4.52 of the HOP 2015-20 and the updated HOP 2015-20.

(b) Eligibility

- (128) AAS consists of six sub-schemes, as described in more detail in the following section. Those sub-schemes differ, *inter alia*, in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the AAS physical exports and for the AAS annual requirement sub-schemes. Manufacturer-exporters supplying the ultimate exporter are eligible for AAS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 7.02 of the FTP 2015-20, such as suppliers of an export oriented unit ('EOU'), are eligible for the AAS deemed export sub-scheme. Eventually, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the sub-schemes Advance Release Order and Back to back inland letter of credit.

(c) Practical implementation

- (129) The AAS can be issued in the situations described below.
- (130) Physical exports: This is the main sub-scheme. It allows for duty-free import of input materials for the production of a specific exported end product. 'Physical' in this context means that the export product has to leave the Indian territory. An import allowance and export obligation, including the type of exported product are specified in the licence.
- (131) Annual requirement: Such an authorisation is not linked to a specific exported product, but to a wider product group (e.g. chemical and allied products). The licence holder can – up to a certain value threshold set by its past export performance – import duty-free any input to be used in manufacturing any of the items falling under such a product group. It can choose to export any resulting product falling under the product group using such duty-exempt material.
- (132) Intermediate supplies: This sub-scheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter who produces the intermediate product can import duty-free input materials and can obtain for this purpose an AAS for intermediate supplies. The ultimate exporter finalises the production and is obliged to export the finished product.
- (133) Deemed exports: This sub-scheme allows a main contractor to import inputs free of duty which are required in manufacturing goods to be sold as 'deemed exports'. According to the GOI, deemed exports refer to those transactions in which the goods supplied do not leave the country. A number of categories of supply is regarded as deemed exports provided the goods are manufactured in India, e.g. supply of goods to an EOU or to a company situated in a special economic zone ('SEZ').
- (134) Advance Release Order ('ARO'): The AAS holder intending to source the inputs from domestic sources, in lieu of direct import, has the option to source them against AROs. In such cases the Advance Authorisations are validated as AROs and are endorsed to the domestic supplier upon delivery of the items specified therein. The endorsement of the ARO entitles the domestic supplier to the benefits of deemed exports as set out in paragraph 7.03 of the FTP 2015-20 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty). The ARO mechanism refunds taxes and duties to the supplier instead of refunding the same to the ultimate exporter in the form of drawback/refund of duties. The refund of taxes/duties is available both for domestic inputs as well as imported inputs.
- (135) Back to back inland letter of credit: This sub-scheme again covers indigenous supplies to an Advance Authorisation holder. The holder of an Advance Authorisation can approach a bank for opening an inland letter of credit in favour of a domestic supplier. The authorisation will be validated by the bank for direct import only in respect of the value and volume of items being sourced domestically instead of importation. The domestic supplier will be entitled to deemed export benefits as set out in paragraph 7.03 of the FTP 2015-20 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).
- (136) The Commission found that one exporting producer using the scheme obtained concessions under the first sub-scheme i.e. AAS physical exports during the IP. It is therefore not necessary to establish the countervailability of the remaining unused sub-schemes.

- (137) For verification purposes by the Indian authorities, an Advance Authorisation holder is legally obliged to maintain 'a true and proper account of consumption and utilisation of duty-free imported/domestically procured goods' in a specified format (chapter 4.51 and Appendix 4H HOP 2015-20), i.e. an actual consumption register. This register has to be verified by an external chartered accountant/cost and works accountant who issues a certificate stating that the prescribed registers and relevant records have been examined and the information furnished under Appendix 4H is true and correct in all respects.
- (138) With regard to the sub-scheme used during the IP by the company concerned, i.e. physical exports, the import allowance and the export obligation are fixed in volume and value by the GOI and are documented on the Authorisation. In addition, at the time of import and of export, the corresponding transactions are to be documented by Government officials on the Authorisation. The volume of imports allowed under the AAS is determined by the GOI on the basis of Standard Input Output Norms ('SIONs') which exist for most products including the product under investigation.
- (139) The imported input materials are not transferable and have to be used to produce the resulting export product. The export obligation must be fulfilled within a prescribed time frame after issuance of the licence (18 months with two possible extensions of 6 months each).
- (140) There is no close nexus between the imported inputs and the exported finished products. The eligible input materials can also be imported and used for products other than the product under investigation. Moreover, licences for various products can be clubbed. This means that exports under AAS licence of one product may give right to duty-free imports of inputs under an AAS licence for another product.
- (141) The investigation showed that none of the AAS licenses used by the exporting producer had been closed. Therefore, the exporting producer was unable to show any appendixes 4H for their AAS licences. Moreover, the exporting producer admitted that its consumption register does not allow to establish actual consumption of imported raw-materials and linking it with produced and exported final products. It should be noted that the producer in question is vertically integrated on multiple level:
- stage 1: production of coke and ferrochromium
- stage 2: production of liquid stainless steel
- stage 3: production of slabs
- stage 4: production of hot rolled coils
- stage 5: production of cold rolled flat products (product concerned)
- and imported raw-materials are used at stage 2 where they are mixed with raw-materials produced at stage 1 or purchased domestically.
- (d) Conclusion on the AAS
- (142) The exemption from import duties is a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation, namely it constitutes a financial contribution of the GOI since it foregoes duty revenue which would otherwise be due and it confers a benefit upon the investigated exporter since it improves its liquidity.
- (143) In addition, AAS physical exports are contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation. Without an export commitment, a company cannot obtain benefits under this scheme.
- (144) The sub-scheme used in the present case cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 3(1)(a)(ii) of the basic Regulation. It does not conform to the rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) of the basic Regulation. The GOI did not effectively apply a verification system or a procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation). It is also considered that the SIONs for the product under investigation were not sufficiently precise and that, in themselves, those SIONs cannot constitute a verification system of actual consumption because the design of those standard norms does not enable the GOI to verify with sufficient precision what amounts of

inputs were consumed in the export production. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would need to be carried out in the absence of an effectively applied verification system (Annex II(5) and Annex III(II)(3) to the basic Regulation).

(145) The sub-scheme is therefore countervailable.

(e) Calculation of the subsidy amount

(146) In the absence of permitted duty drawback systems and lack of the possibility of verification of the actual consumption rate of the relevant inputs, the total amount of custom duties forgone (basic custom duty and custom cess) is considered an excess remission that would constitute a countervailable subsidy in accordance with Article 3(1)(a)(ii) of the basic Regulation.

(147) The exporting producer was informed of the Commission intentions to apply Article 28 of the basic Regulation and best facts available in this regard by the Letter of 22 November 2021.

(148) Contrary to further claims of the company that such methodology of calculation of benefit under AAS is a departure from previous Commission practice and is based on mere assumptions and inferences, it is reiterated that the company did not provide any data, which would allow calculation of the actual excess remission.

(149) In accordance with Article 7(1)(a) of the basic Regulation, fees incurred by the company to obtain the subsidy were deducted from the total subsidy amount where claimed.

(150) In accordance with Article 7(2) of the basic Regulation, the excess remission should be allocated over the total export turnover as appropriate denominator, because the subsidy is contingent upon export performance.

(151) The subsidy rate established with regard to this scheme during the IP amounted to 0,05 %.

(152) Following final disclosure, the Indian exporting producer in question reiterated its claims with regard to the unwarranted application of Article 28 of the basic Regulation and the methodology of calculation of the company benefit under this scheme used by the Commission.

(153) However, no new arguments were presented. It is recalled that the Commission had no other option than to refer to best facts available, as the company did not provide any data which would allow standard calculation of the excess remission under this scheme. In any event, taking into account the subsidy rate established, as indicated in recital (151) above, the Commission decided not to countervail the negligible benefit conferred to Jindal Group under the AAS.

– Duty Drawback Scheme ('DDS')

(154) The Commission established that one Indian exporting producer used the DDS during the IP.

(a) Legal basis

(155) The legal basis applicable during the review investigation period was the Custom & Central Excise Duties Drawback Rules 1995 ('the 1995 DDS Rules'), as amended in 2006 ⁽¹⁷⁾ and then replaced by Customs and Central Excise Duties Drawback Rules, 2017 ⁽¹⁸⁾ ('the 2017 Rules') which entered into force on 1 October 2017. Rule 3(2) of the 1995 DDS Rules governs the method of calculation of this duty drawback scheme. Rule 12(1)(a)(ii) of the said DDS Rules governs the Declaration that the exporting producers need to file in order to benefit from the scheme. These Rules have remained identical in the 2017 DDS Rules and correspond to Rule 3(2) and Rule 13(1)(a)(ii) respectively.

⁽¹⁷⁾ <http://www.cbic.gov.in/htdocs-cbec/customs/cs-act/formatted-htmls/cs-rulee>

⁽¹⁸⁾ Notification No. 88/ 2017-CUSTOMS (N.T.) New Delhi, the 21st September, 2017.

<http://www.cbic.gov.in/resources/htdocs-cbec/customs/cs-act/notifications/notfns-2017/cs-nt2017/csnt88-2017.pdf>

(156) In addition, Circular No. 24/2001⁽¹⁹⁾ contains specific instructions how to implement the Rule 3(2) and the Declaration that exporters need to produce under the Rule 12(1)(a)(ii).

(157) The Rule 4 of the 1995 DDS Rules stipulates that the Central Government may revise amount or rates determined under the rule 3. The Government has made a number of modifications, the last ones revising the rates being Notification No. 95/2018 – CUSTOMS and Notification No. 07/2020 – CUSTOMS. As a result, for the product under investigation, the DDS rates were 1,8 % and 1,6 % of the FOB value of the exported products, for the first and second part⁽²⁰⁾ of the IP respectively. The same DDS rates are applied to stainless steel hot-rolled products exported by the Indian company in question.

(b) Eligibility

(158) Any manufacturer-exporter or merchant-exporter is eligible for this scheme.

(c) Practical implementation

(159) Under this scheme, any company exporting eligible products is entitled to receive an amount corresponding to a percentage of the declared FOB value of the exported product. Rule 3(2) of Custom & Central Excise Duties Drawback Rules specifies how the amount of the subsidy is to be calculated:

‘(2) In determining the amount or rate of drawback under this rule, the Central Government shall have regard to:

- (a) the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;
- (b) the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods;
- (c) the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;
- (d) the average amount of duties paid on materials wasted in the process of manufacture and catalytic agents: Provided that if any such waste or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted;
- (e) the average amount of duties paid on imported materials or excisable materials used for containing or, packing the export goods;
- (f) any other information which the Central Government may consider relevant or useful for the purpose.’

(160) In other words, the GOI based the refundable amount on industry-wide average values of relevant customs duties paid on imported raw materials and an average industry consumption ratio collected from what the GOI considers as being representative manufacturers of the eligible export products. The GOI then expresses the amount to be refunded as a percentage of the average export value of the eligible exported products.

(161) The GOI uses this percentage to calculate the amount of the duty drawback all eligible exporters are entitled to receive. The rate for this scheme is determined by the GOI on a product-by-product basis.

⁽¹⁹⁾ Cus. 20th April, 2001F.NO.605/47/2001-DBK, Government of India, Ministry of Finance, Department of Revenue, Declaration under Rule 12(1)(a)(ii) of Drawback Rule for availing AIR of Drawback. See in particular Sections 2 and 3 of the Declaration under Rule 12(1)(a)(ii) of Drawback Rule for availing AIR of Drawback; available at: <http://www.cbic.gov.in/htdocs-cbec/customs/cs-circulars/cs-circulars-2001/24-2001-cus>

⁽²⁰⁾ The level of DDS rate changed as of 28 January 2020.

- (162) In order to be eligible to benefit from this scheme, a company must export. At the moment when shipment details are entered in the Customs server, it is indicated that the export is taking place under the DDS and the DDS amount is fixed irrevocably. After the shipping company has filed the Export General Manifest and the customs office has satisfactorily compared that document with the shipping bill data, all conditions are fulfilled to authorise the payment of the drawback amount by either direct payment on the exporter's bank account or by draft.
- (163) The exporter also has to produce evidence of realisation of export proceeds by means of a Bank Realisation Certificate ('BRC'). This document can be provided after the drawback amount has been paid but the GOI will recover the paid amount if the exporter fails to submit the BRC within a given deadline.
- (164) The drawback amount can be used for any purpose and, in accordance with Indian accounting standards, the amount can be booked on an accrual basis as income in the commercial accounts, upon fulfilment of the export obligation.
- (165) The relevant legislation and administrative instructions stipulate that the Indian customs administration should require no evidence that the exporter requesting the duty drawback must have incurred or will incur a customs duty liability for imports of the raw materials needed for the manufacture of the exported product. In addition, during the RCC, the GOI confirmed that companies that would source domestically all the raw materials would still benefit from the full rate calculated under Rule 3(2) mentioned above.

(d) Conclusion on the DDS

- (166) The DDS provides subsidies within the meaning of Article 3(1)(a)(i) and Article 3(2) of the basic Regulation. The so-called duty drawback amount is a financial contribution by the GOI as it takes form of a direct transfer of funds by the GOI. There are no restrictions as to the use of these funds. In addition, the duty drawback amount confers a benefit upon the exporter, because it improves its liquidity.
- (167) The rate of duty drawback for exports is determined by the GOI on a product-by-product basis. However, although the subsidy is referred to as a duty drawback, the scheme does not have all the characteristics of a permissible duty drawback system or substitution drawback system within the meaning of Article 3(1)(a)(ii) of the basic Regulation; nor does the scheme conform to the rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) of the basic Regulation. The cash payment to the exporter is not necessarily linked to actual payments of import duties on raw materials, and is not a duty credit to offset import duties on past or future imports of raw materials. In addition, there is no system or procedure in place to confirm which inputs are consumed in the production of the exported products and in what amounts. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would need to be carried out in the absence of an effectively applied verification system (Annex II(5) and Annex III(II)(3) to the basic Regulation).
- (168) The payment by the GOI subsequent to exports made by exporters is contingent upon export performance and therefore this scheme is deemed to be specific and countervailable under Article 4(4)(a) of the basic Regulation.
- (169) In view of the above, it is concluded that the DDS is countervailable.

(e) Calculation of the subsidy amount

- (170) In accordance with Article 3(2) and Article 5 of the basic Regulation, the Commission calculated the amount of countervailable subsidies in terms of the benefit conferred on the recipient, which was found to exist during the IP. In this regard, the Commission established that the benefit is conferred on the recipient at the time when an export transaction is made under this scheme. At this moment, the GOI is liable to the payment of the drawback amount, which constitutes a financial contribution within the meaning of Article 3(1)(a)(i) of the basic Regulation. Once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of drawback which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy.

- (171) In the light of the above, the Commission considered appropriate to assess the benefit under the DDS as being the sum of the drawback amounts earned on export transactions made under this scheme during the IP. The Commission took into account duty drawback amounts earned on all the export transactions of the Indian exporting producer as the company exports only the product under investigation and hot-rolled stainless steel products, which are semi-products for the production of the product under investigation covered by the same DDS rates.
- (172) In accordance with Article 7(2) of the basic Regulation, the Commission allocated these subsidy amounts over the total export turnover of the company during IP as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.
- (173) The subsidy rate established with regard to this scheme during the IP for Jindal Group amounted to 1,65 %.

– Export Promotion of Capital Goods Scheme

- (174) The Commission established that two Indian exporting producers received concessions under the EPCGS which could be allocated to the product concerned during the IP.

(a) Legal basis

- (175) The detailed description of the EPCGS is contained in chapter 5 of the FTP 2015-20 as well as in chapter 5 of HOP 2015-20.

(b) Eligibility

- (176) Manufacturer-exporters, merchant-exporters 'tied to' supporting manufacturers and service providers are eligible for this measure.

(c) Practical implementation

- (177) Under the condition of an export obligation, a company is allowed to import capital goods (new and second-hand capital goods up to 10 years old) at a reduced duty rate. To this end, the GOI issues, upon application and payment of a fee, an EPCGS licence. The scheme provides for a reduced import duty rate applicable to all capital goods imported under the scheme. In order to meet the export obligation, the imported capital goods must be used to produce a certain amount of goods deemed for export during a certain period. Under the FTP 2015-20 and updated FTP 2015-20 the capital goods can be imported with a 0 % duty rate under the EPCGS. However, in case of capital goods imported before 2015, 3 % duty rate was also an alternative – in that case, the time for realization of the export obligation was longer. The export obligation, which amounts to six times the duty saved, must be fulfilled within a period of maximum six years.

- (178) The EPCGS licence holder can also source the capital goods indigenously. In such case, the indigenous manufacturer of capital goods may avail itself of the benefit for duty free import of components required to manufacture such capital goods. Alternatively, the indigenous manufacturer can claim the benefit of deemed export in respect of supply of capital goods to an EPCGS licence holder.

(d) Conclusion on the EPCGS

- (179) The EPCGS provides subsidies within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation. The duty reduction constitutes a financial contribution by the GOI, since this concession decreases the GOI's duty revenue which would be otherwise due. In addition, the duty reduction confers a benefit upon the exporter, because the duties saved upon importation improve the company's liquidity.
- (180) Furthermore, the EPCGS is contingent in law upon export performance, since such licences cannot be obtained without a commitment to export. Therefore, it is deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation.

(181) The EPCGS cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 3(1)(a)(ii) of the basic Regulation. Capital goods are not covered by the scope of such permissible systems, as set out in Annex I point (I), of the basic Regulation, because they are not consumed in the production of the exported products.

(e) Calculation of the subsidy amount

(182) The amount of countervailable subsidies was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the unpaid customs duty on imported capital goods spread across a period which reflects the normal depreciation period of such capital goods in the industry concerned. The amount so calculated, which is attributable to the IP, has been adjusted by adding interest during this period in order to reflect the full time value of the money. The commercial interest rate during the investigation period in India was considered appropriate for this purpose.

(183) In accordance with Article 7(1)(a) of the basic Regulation, fees incurred by the companies to obtain the subsidy were deducted from the total subsidy amount where claimed.

(184) In accordance with Article 7(2) and 7(3) of the basic Regulation, this subsidy amount has been allocated over the appropriate export turnover during the IP as the appropriate denominator because the subsidy is contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported. In case of one of the Indian companies, the export turnover of the product under investigation was used as denominator, as the company uses machines purchased under the EPCGS only for the production of the product concerned.

(185) One of the Indian exporting producers claimed an adjustment for the export turnover used as denominator in the calculations. The company argued that they have just started production in the IP and reached only 15 % of their capacity. Therefore, the company requested extrapolation of their export turnover to consider full utilization of their capacity.

(186) However, the calculation of the subsidy rates is always based on actual turnovers. It cannot be assumed that after start-up phase the company will use its capacity fully. Also, the ratio of future split between domestic and export turnover would be just a speculation. Therefore, this claim was rejected.

(187) Following final disclosure, the company reiterated this claim, emphasizing the fact that the EPCGS is a non-recurring subsidy and therefore a calculation without adjustment of the denominator does not reflect correctly the benefit granted to the company, which is in the start-up phase of the operations.

(188) The EPCGS is indeed a non-recurring subsidy and it was treated by the Commission as such: the amount of benefit under the scheme was allocated to the IP taking into account the depreciation period of the capital goods in question. However, the Commission cannot adjust the denominator, making assumptions with regard to the potential export turnover of the company, as already highlighted in recital (186) above. Therefore, the calculation methodology is upheld.

(189) The subsidy rate established with regard to this scheme amounted to 5,69 % for Chromeni and 0,36 % for Jindal Group as allocated for the IP.

– Merchandise Export from India Scheme ('MEIS')

(190) The Commission established that two Indian exporting producers used the MEIS during the IP.

(a) Legal basis

(191) The detailed description of the MEIS is contained in chapter 3 of FTP 2015-20 and updated FTP 2015-20 and in chapter 3 of HOP 2015-20 and updated HOP 2015-20.

(b) Eligibility

(192) Any manufacturer-exporter or merchant-exporter is eligible for this scheme.

(c) Practical implementation

- (193) Eligible companies can benefit from the MEIS by exporting specific products to specific countries which are categorised into Group A ('Traditional Markets' including all EU Member States), Group B ('Emerging and Focus Markets') and Group C ('Other Markets'). The countries falling under each group and the list of products with corresponding reward rates are listed in Appendix 3B of the updated HOP.
- (194) The benefit takes the form of a duty credit equivalent to a percentage of the FOB value of the export. The MEIS rate in the IP amounted to 2 % ⁽²¹⁾.
- (195) Pursuant to para 3.06 of the FTP 2015-20 certain types of exports are excluded from the scheme, e.g. exports of imported goods or transhipped goods, deemed exports, service exports and export turnover of units operating under special economic zones/export operating units.
- (196) The duty credits under the MEIS are freely transferable and valid for a period of 18 months from the date of issue while the duty credit scripts issued on or after 1 January 2016 shall be valid for a period of 24 months from the date of issue as per paragraph 3.13 of the updated HOP 2015-20.
- (197) They can be used for: (i) payment of custom duties on imports of inputs or goods including capital goods, (ii) payment of excise duties on domestic procurement of inputs or goods including capital goods and payment, (iii) payment of service tax on procurement of services.
- (198) An application for claiming benefits under the MEIS must be filed online on the Directorate-General of Foreign Trade website. Relevant documentation (shipping bills, bank realisation certificate and proof of landing) must be linked with the online application. The relevant Regional Authority ('RA') of the GOI issues the duty credit after scrutiny of the documents. As long as the exporter provides the relevant documentation, the RA has no discretion over the granting of the duty credits.

(d) Conclusion on MEIS

- (199) The MEIS provides subsidies within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation. MEIS duty credit is a financial contribution by the GOI, since the credit will eventually be used to offset import duties paid on capital goods, thus decreasing the GOI's duty revenue which would be otherwise due. In addition, MEIS duty credit confers a benefit upon the exporter who is not subject to the payment of those import duties.
- (200) Furthermore, the MEIS is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation.
- (201) It is noted that the MEIS expired after the IP, as of 1 January 2021. However, until the end of 2021, the companies may still apply for the MEIS scripts for the export transactions made in 2020. Furthermore, the companies are still able to use the MEIS script obtained in 2021 to balance import duties due, until 15 September 2023. Thus benefits under this scheme were received during the IP and will continue even after the imposition of measures.

(e) Calculation of the subsidy amount

- (202) In accordance with Article 3(2) and Article 5 of the basic Regulation, the Commission calculated the amount of countervailable subsidies in terms of the benefit conferred on the recipient, which was found to exist during the IP. In this regard, the Commission established that the benefit is conferred on the recipient at the time when an export transaction is made under this scheme. At this moment, the GOI issues a duty credit which is booked by the exporting producer as an account receivable which can be offset by the exporting producer at any moment. This constitutes a financial contribution within the meaning of Article 3(1)(a)(ii) of the basic Regulation. Once the customs authorities issue an export shipping bill, the GOI has no discretion as to whether or not to grant the subsidy. In the light of the above, the Commission considered appropriate to assess the benefit under the MEIS as being the sum of the amounts earned on export transactions made under this scheme during the IP. The Commission took into account MEIS amounts earned on all the export transactions of the Indian exporting producers, as the companies export only product under investigation and hot-rolled stainless steel products, which are semi-products for the production of product under investigation covered by the same MEIS rates.
- (203) In accordance with Article 7(1)(a) of the basic Regulation, fees incurred by the companies to obtain the subsidy were deducted from the total subsidy amount where claimed.

⁽²¹⁾ The Government of India's Public Notice No 32/2015-2020 of 22 September 2016, available at https://content.dgft.gov.in/Website/PN3216_0.pdf

- (204) In accordance with Article 7(2) and (3) of the basic Regulation, the Commission allocated this subsidy amount over the export turnover of the companies during the IP as appropriate denominator, because the subsidy is contingent upon export performance, and it was not granted by reference to the quantities manufactured, produced, exported or transported.
- (205) The subsidy rate established with regard to this scheme amounted to 1,87 % for Chromeni and 1,92 % for Jindal Group in the IP.

3.3.2. *Provision of chromium ore for less than adequate remuneration*

3.3.2.1. The complaint and the subsidy scheme

- (206) The complainant claimed that the GOI ensures an artificial reduction of costs of key inputs of the local industry by inducing chromium ore mining companies in India through a number of regulatory measures including export restrictions (such as export tax, export licences and involvement of State Trading Enterprises in exports) to provide the chromium ore to the downstream Indian SSCR industry for less than adequate remuneration.
- (207) The complainant further claimed that the GOI fully controls the mining sector as regards chromium ore in India. Through its laws and regulations, the GOI sets who extracts the chromium (mining companies subject to a licence). There is also State-ownership and/or presence of the State among the mining companies. Thus, the mining companies are vested with authority by the GOI to pursue the GOI's policy objectives.
- (208) As chromium ore is mainly used for the production of ferrochromium, which is essentially used in the production of stainless steel, that benefit was conferred to the Indian producers of SSCR which produce both ferrochromium and stainless steel.

3.3.2.2. Legal basis

- (209) Mining policy covering chromium ore is administered through the Ministry of Mines. Mineral exports are also administered by the Ministry of Commerce and Industry.
- (210) Both the central and regional governments play vital roles in the mining industry including chromium ore mining, by setting national mining policies, standards, guidelines, and criteria, as well as deciding on mining authorisation procedures.
- (211) The legal basis of the relevant rules and regulations are the following:
- Mines and Minerals (Development and Regulation) Act, 1957 ⁽²²⁾
 - The Minerals (Evidence of Mineral Contents) Rules, 2015 ⁽²³⁾
 - The Mineral (Auction) Rules, 2015 ⁽²⁴⁾
 - The Mineral (Non- exclusive Reconnaissance Permits) Rules, 2015 ⁽²⁵⁾
 - The National Mineral Exploration Trust Rules, 2015 ⁽²⁶⁾

⁽²²⁾ Available at <https://indiankanoon.org/doc/25127/>, last accessed 27 January 2022.

⁽²³⁾ Notification no 246 of 17 April 2015.

⁽²⁴⁾ Notification no 322 of 20 May 2015.

⁽²⁵⁾ Notification no 516 of 29 June 2015.

⁽²⁶⁾ Notification no 632 of 14 August 2015.

- The Mineral (Mining by Government Company) Rules, 2015 ⁽²⁷⁾
- The Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 ⁽²⁸⁾
- The Atomic Minerals Concession Rules, 2016 ⁽²⁹⁾
- The Mineral Concession (other than Atomic and Hydrocarbon Energy Minerals) Rules, 2016 ⁽³⁰⁾
- The Mineral Conservation & Development Rules, 2017 ⁽³¹⁾
- National Mineral Policy, 2019 ⁽³²⁾.

3.3.2.3. Findings of the investigation

- (212) The Commission established that one vertically integrated Indian exporting producer of SSCR purchased chromium ore domestically for the production of ferrochromium, which that producer used for the production of slabs, subsequently for hot-rolled coils, and ultimately for cold-rolled flat products.
- (213) The vast majority of the company's chromium ore purchases in the IP originated from the State-owned Enterprise ('SOE') Odisha Mining Corporation ('OMC'). There were also minor purchases reported from two allegedly private mining companies and one trading company.
- (a) The application of the provisions of Article 28(1) of the basic Regulation
- (214) The Commission informed the GOI that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged subsidies granted to the SSCR industry including through the provision of chromium ore for less than adequate remuneration.
- (215) The Commission requested the GOI in its questionnaire, in the deficiency letter, and during the RCC to provide certain information relating to the suppliers and the functioning of the domestic market of chromium ore in India. These information requests included, among others, questions on the legal and institutional framework, the organization of the chromium ore market, the producers of chromium ore in India, price-setting mechanisms and prices, as well as shareholding of companies.
- (216) At initiation, the Commission requested the GOI to forward Appendix B attached to the anti-subsidy questionnaire (questionnaire for chromium ore suppliers) to the top 10 producers and distributors of chromium ore, as well as to any other producers and distributors of chromium ore, which have provided chromium ore to the exporting producers. Appendix B consisted of a word document ('Appendix B_Input supplier') and an excel file ('Appendix B - Input suppliers tables'). No replies to Appendix B were received.
- (217) The Commission, in its deficiency letter to the GOI of 25 August 2021, took note of the fact that it had not received any reply to Appendix B of the questionnaire.
- (218) During and after the RCC, the Commission informed the GOI that it was still missing information related to the overall production and consumption of chromium ore on the Indian market. The GOI also indicated that it was not able to provide price statistics on Indian domestic prices of the raw material in question. Furthermore, there were remaining open questions on the structure and the players on the market, and whether they were State-owned or private parties. Finally, the Commission was still missing the correct legal basis concerning export taxes on chromium ore.

⁽²⁷⁾ Notification no 749 of 3 December 2015.

⁽²⁸⁾ Notification no 645 of 20 October 2015.

⁽²⁹⁾ Notification no 471 of 11 July 2016.

⁽³⁰⁾ Notification no (number not provided) of 4 March 2016.

⁽³¹⁾ Notification no 137 of 27 February 2017.

⁽³²⁾ Available at <https://mines.gov.in/writereaddata/Content/NMP12032019.pdf>, last accessed 27 January 2022.

- (219) Therefore, the Commission informed the GOI on 8 December 2021 that it intended to have to resort to the use of facts available under Article 28(1) of the basic Regulation. After this letter, the GOI first provided a very minor part of the missing information, mainly on the structure of the market, the ownership of some of the mining companies and the legal basis for the export tax. The submission of this information consisted of only a few pages, lacking supporting evidence. Then the GOI sent an additional letter objecting to the application of Article 28(1) of the basic Regulation in general, and argued that the Commission should take into account the additional information provided and thus refrain from using facts available.
- (220) In reply, the Commission first noted that the GOI had repeatedly failed to provide this information when requested in the course of the investigation and that the additional information was received at a very late stage of the investigation, so that it could not be taken into account. In the meantime, the Commission obtained the relevant missing information on ownership of the mining companies and on export taxes on chromium ore from public sources. Therefore, the Commission found that the GOI failed to provide the necessary information as provided by Article 28(1), first sentence of the basic Regulation and that the information provided by the GOI so late in the investigation could not be used as per the conditions in Article 28(3) of the basic Regulation. In any event, the Commission still had to complement the very little information provided by the GOI with other facts available for the parts that were missing, mainly with respect to price setting as well as the role of the GOI and its influence on suppliers (including private players) on the chromium ore market. Therefore, the Commission maintained that it had to rely on Article 28(1) and resort to the use of facts available.
- (221) Following final disclosure, the GOI reiterated its position that the application of Article 28 of the basic Regulation was unwarranted, as all the information requested by the Commission had been provided.
- (222) However, as explained in details in recital (220), that information reached the Commission at a very late stage of the investigation or was incomplete. This concerned especially such crucial elements as the structure of the chromium ore market, the methodology for price setting or captive consumption of chromium ore. Therefore, although the Commission used the information provided by the GOI to the extent possible, it also had to revert to additional sources and best facts available.
- (b) Analysis
- (223) In order to establish the existence of a countervailable subsidy three elements must be present under Article 3 and 4 of the basic Regulation: (i) a financial contribution (ii) a benefit and (iii) specificity (Article 3 of the basic Regulation).

(i) Financial contribution

Mining companies acting as public body

- (224) The investigation first assessed whether the GOI provided chromium ore to stainless steel producers through mining companies acting as a 'public body'. The relevant legal standard and interpretation for this assessment under Article 3(1)(a) and 2(b) of the basic Regulation stem from the WTO jurisprudence on 'public body'.
- (225) According to the relevant WTO case-law⁽³³⁾, a public body is an entity that 'possesses, exercises or is vested with governmental authority'. 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

⁽³³⁾ WT/DS379/AB/R (US – Anti-dumping and Countervailing Duties on Certain Products from China), Appellate Body Report of 11 March 2011, DS 379, paragraph 318. See also WT/DS436/AB/R (US — Carbon Steel (India)), Appellate Body Report of 8 December 2014, paragraphs 4.9 - 4.10, 4.17 - 4.20 and WT/DS437/AB/R (US – Countervailing Duty Measures on Certain Products from China) Appellate Body Report of 18 December 2014, paragraph 4.92.

entity operates'; and (iii) evidence that a government exercises 'meaningful control over an entity and its conduct'. When conducting a public body inquiry, an investigating authority must 'evaluate and give due consideration to all relevant characteristics of the entity' and examine all types of evidence that may be pertinent to that evaluation; in doing so, it should avoid 'focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant'.

- (226) In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider 'whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member', and the classification and functions of entities within WTO Members generally. Thus, whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body.
- (227) There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice.
- (228) Evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. Indeed, government ownership of an entity, while not a decisive criterion, may serve, in conjunction with other elements, as evidence. However, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity in itself does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, 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 exercising governmental authority.
- (229) 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'. In this respect, the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue. 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.
- (230) The nature of an entity's conduct or practice may certainly constitute evidence relevant to a public body inquiry. Indeed, the conduct of an entity – particularly when it points to a 'sustained and systematic practice' – 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. However, the assessment of such evidence is aimed at answering the central question of whether the entity itself possesses the core characteristics and functions that would qualify it as a public body. For instance, relevant for the assessment as to whether an entity is a public body in the context of Chinese State-owned commercial banks ('SOCBs') in DS379 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'. This evidence 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. Thus, the AB in DS379 noted that, 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. These SOCBs exercised governmental functions on behalf of the Chinese Government.

- (231) Moreover, the AB has also given importance to the fact that the government in question failed to cooperate during the investigation. Indeed, in DS379, the AB confirmed the USDOC's determination that the SOCBs in the CFS Paper investigation constituted 'public bodies' on the following considerations: (i) near complete state-ownership of the banking sector in China; (ii) Article 34 of the Commercial Banking Law, which states that banks are required to 'carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies'; (iii) record evidence indicating that SOCBs still lack adequate risk management and analytical skills; and (iv) the fact that 'during [that] investigation the [USDOC] did not receive the evidence necessary to document in a comprehensive manner the process by which loans were requested, granted and evaluated to the paper industry' ⁽³⁴⁾.
- (232) Finally, in order to be considered public bodies, the SOEs at issue would not necessarily have to be controlled by the GOC in every sale of input to downstream producers.
- (233) In sum, whether the mining companies in India engaged in supplying chromium ore are 'public bodies' should be examined by looking into the core characteristics and functions of those companies, and their relationship with the GOI. Evidence of State-ownership, direct control by the State, GOI's intervention in the market to achieve certain policy objectives may show, also in a context where there is no cooperation by the government in question, that the mining companies exercise governmental functions on behalf of the GOI.

Core characteristics of the mining companies and their relationship with the GOI

- (234) At first, the Commission sought information about State ownership as well as other formal indicia of government control in the State-owned chromium ore miners. For this purpose, the Commission could rely only on the information provided by OMC – the only mining company which was cooperating in the investigation at least at the stage of the RCC verification, and which was the almost exclusive supplier of the Indian exporting producer of SSCR that purchased chromium ore domestically during the IP, as mentioned in recital (212).
- (235) The GOI stated that in the IP there were two active State-owned producers of the chromium ore, OMC and Industrial Development Corporation of Orissa Ltd., which accounted for 21 % of the total production, The second public chromium ore mining company only had a minimal output in the IP.
- (236) The data of the GOI also referred to six private mining companies, namely Misrilal Mines Ltd., B.C. Mohanty & Sons Ltd, Ferro Alloys Corporation Ltd, Indian Metals and Ferro Alloys Ltd., Balasore Alloys Ltd., and Tata Steel Mining. However, according to publicly available information, four of them are producing chromium ore for their captive use of ferro-chromium, and are thus not active on the free market. Furthermore, the mining lease of the two remaining mining companies lapsed during the IP. Their lease was purchased by Tata Steel Mining to complement the expansion of its own ferrochrome production. The first of these companies still had limited production in the IP (9 % of total production).
- (237) As a result the non-captive chromium ore market in India is limited to two SOE mining companies, one of them being a marginal player (0,1 % of total production), which in fact makes OMC the sole supplier of the chromium ore in the free market.
- (238) The investigation revealed that OMC is 100 % State-owned. Furthermore, according to the Articles of Association, the Chairman of the Board, Managing Director and one of the Directors are members of the Indian Administrative Service (Government Public Enterprises Department) and one director represents the Government Finance Department. Moreover, according to the Articles of Association of the company, all directors are appointed and paid by the Governor of the Odisha State.
- (239) Finally, according to Article 54A of OMC's Articles of Association, 'the Governor may from time to time issue such directives and instructions, as he may think fit, in regard to the finances and conduct of the business and affairs of the Company and the Directors shall duly comply with and give effect to such directives or instruction'.

⁽³⁴⁾ WT/DS379/AB/R (US – Anti-dumping and Countervailing Duties on Certain Products from China), Appellate Body Report of 11 March 2011, DS 379, paragraph 349.

- (240) Based on the above, the Commission concluded that the non-captive chromium ore market is dominated by one company, OMC, which is fully State-owned, and also managed and controlled by the State. Indeed, through its ownership, presence in the management of the company as well as the direction of its business decisions, the GOI exercises meaningful control over OMC and its conduct.

Functions of the mining companies in India

- (241) The Commission assessed whether the mining companies, and in particular OMC, possess governmental authority and whether they exercise this authority in the performance of governmental functions.
- (242) The strong influence of the GOI and the government's meaningful control over OMC is also reflected in the highly regulated environment with respect to chromium ore that the GOI created in the past years which included export restrictions, combined with mining licensing requirements favouring captive mining, and the exercise of control over the supply and sales prices on the domestic market via State-owned operators. The evidence showed that the mining companies, including OMC as regards chromium ore, abide to the GOI's policy objectives and thus perform governmental functions.
- (243) Already back in 2005, an expert group constituted by the Ministry of steel for formulating guidelines for preferential grant of mining lease, issued a report (the 'Dang Report')⁽³⁵⁾ with a number of relevant findings and recommendations.
- (244) At that time it was noted that:

'Iron ore, manganese ore and **chrome ore** are critical raw material inputs for the steel industry. Their timely and assured availability in adequate quantity and quality on long term basis is a sine qua non for the rapid and orderly growth of the steel and ferrous industry which is a core sector of the national economy'.⁽³⁶⁾

'A comparison of the cost of mining with the net realizations from exports at these prices reveals windfall profits by a handful of India chrome exporters, at the cost of conservation of a scarce non-renewable mineral resource. Though, India has less than 1 % of the world known reserves of chrome ore, its share of the global chrome ore trade is highly disproportionate 35 %. In India five principal producers-M/s. TISCO, M/s. Orissa Mining Corporation Ltd., Balasore Alloys Ltd., Ferro Alloys Corporation Ltd. Jindal Strips Ltd. account for over 90 % of production.... In view of the very limited reserves of high grade chrome ore, it appears essential to restrict exports of such natural ore which is much in demand by domestic steel and alloy makers ...'⁽³⁷⁾

(emphasis added).

'With only 1 % of the 122 world reserves, Indian Chrome Ore exports are presently a highly disproportionate 35 % of world trade. This is clearly an aberration caused by large profit margins between cost of mining and net export realization. Exports of natural chrome ore need to be stopped altogether.'⁽³⁸⁾

(emphasis added).

'In view of the large spread between mining costs and export prices, Government should consider levy of graded export duties on all exports of chrome including concentrates, if at all permitted.'⁽³⁹⁾

'In keeping with the purposes of MMDR Act, and as in the case of iron ore, domestic plants requiring chrome ore for production of value added ferro alloys/chromium steels must be given absolute preference in grant of chromium leases.'⁽⁴⁰⁾

⁽³⁵⁾ Available at https://steel.gov.in/sites/default/files/GRANT%20OF%20MINING%20LEASES_0.pdf, and last accessed on 27 January 2022.

⁽³⁶⁾ Page 4 of the Dang Report.

⁽³⁷⁾ Pages 119-120 of the Dang Report.

⁽³⁸⁾ Pages 121-122 of the Dang Report.

⁽³⁹⁾ Page 157 of the Dang Report.

⁽⁴⁰⁾ Page 121 of the Dang Report.

'After providing the 1st Preference to producers of Steel, by way of captive/semi-captive mines, it is essential to implement policy measures for encouraging a globally competitive mining industry per se, working to world benchmarks of scientific mining, optimum utilization of all mined material, beneficiation, systematic and time bound prospecting and environmental and bio-diversity preservation. Such professional mining enterprises, whether in the public or private sector, must in the first instance allocate a certain minimum proportion of production (say 70 %) to cater to the needs of domestic users.' ⁽⁴¹⁾

(emphasis added).

- (245) The Dang Report thus shows that chromium ore was considered to be a vital resource for the domestic steel industry, that export prices were considered to be too high in comparison with domestic prices, and that in view of keeping reasonable domestic prices, a combination of export restraints and preferential mining leases for captive production was warranted. The Dang Report further shows the GOI's intention to heavily regulate the chromium ore sector as a 'core sector of the national economy'.

- (246) Furthermore, the report of the Working Group on Steel Industry for the twelfth five year plan, issued in November 2011 ⁽⁴²⁾ states explicitly that:

'Chromite is used mainly in metallurgical industry in the production of Ferro-alloys, e.g., Ferro-chrome, charge-chrome and silico-chrome which are used as additives in making stainless steel and special alloy steel'. ⁽⁴³⁾

'The steel industry has sought restrictions on exports of chromite ores. The government has put in place a fiscal framework to discourage excessive export of chromite ores'. ⁽⁴⁴⁾

(emphasis added).

'Following are the major recommendations for development of the Chromite sector in India: v) Chromite resources in the country are not abundant. The country possesses only 1,8 % of the total chromite ore reserves of the world but exports constitute 30-35 % of the world trade. Therefore, there is an urgent need to conserve this critical input for the use of domestic industry and bring in fiscal measures against exports'. ⁽⁴⁵⁾

- (247) Finally, the GOI's National Mineral Policy of 2019 also states that endeavours shall be made to promote the domestic industry, and that efforts shall be made with respect to mining leases to ensure uninterrupted supply ore to the downstream industry.

- (248) The Commission then assessed how this policy intent was carried out in legislative and regulatory terms. First, concerning export restrictions, the GOI took several measures to discourage exports of chromium ore, which can be verified on the Ministry of Steel website ⁽⁴⁶⁾ and in the OECD Database of Export Restriction on Industrial Raw Materials ('OECD Database') ⁽⁴⁷⁾.

- (249) The main measure is an export tax imposed originally in 2008 in the form of a specific duty of 2 000 INR per tonne ⁽⁴⁸⁾. The form of this tax was changed into an *ad valorem* duty of 30 % per tonne in 2012 at the start of the 12th Five-Year plan, and remains at this level still now ⁽⁴⁹⁾. According to the OECD database declared purposed of this measure is 'Safeguard domestic supply; Promote further processing/value added'.

⁽⁴¹⁾ Page 144 of the Dang Report.

⁽⁴²⁾ Available at http://mme.iitm.ac.in/shukla/wg_steel2212%281%29.pdf, and last accessed on 27 January 2022.

⁽⁴³⁾ Page 77 of the Working Group Report.

⁽⁴⁴⁾ Page 79 of the Working Group Report.

⁽⁴⁵⁾ Page 81-82 of the Working Group Report.

⁽⁴⁶⁾ <https://steel.gov.in/policies/exportimport-policy-iron-ore> (second table refers to chromium ore).

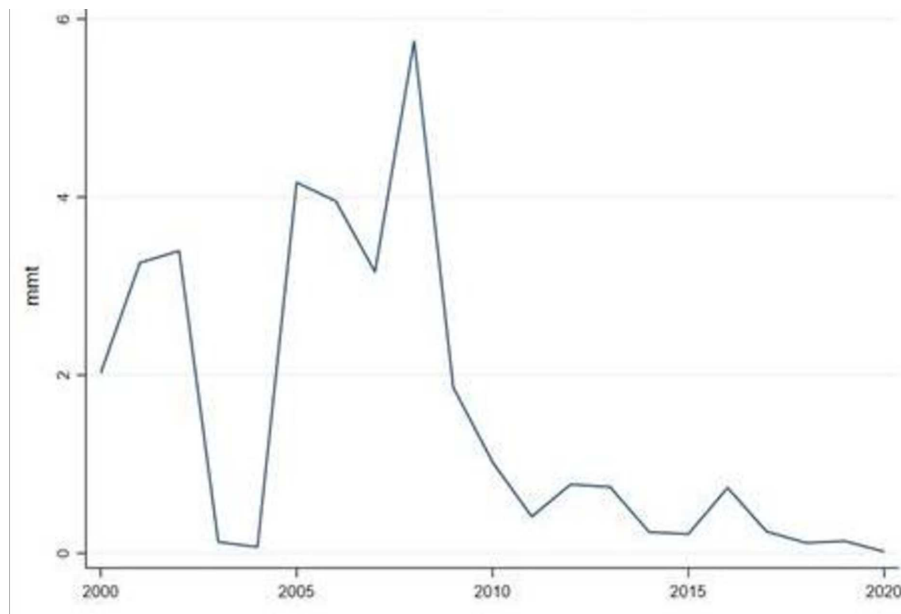
⁽⁴⁷⁾ https://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials last accessed on 27 January 2022.

⁽⁴⁸⁾ The rate increased to 3 000 INR/tonne in 2009.

⁽⁴⁹⁾ Recent legal basis – Notification no 35/2016-Customes dated 26.5.2016.

- (250) Other export restrictions include licencing requirements and a qualified exporters list (in practice limited to the state trading enterprise Metal and Mineral Trading Corporation) for certain grades of the chromium ore, as well as a congestion surcharge levied on the Base Freight Rates of the Indian Railways in the rail transport of chromium ore to Bangladesh and Pakistan (being the only countries with rail connection with India).
- (251) The most visible effect of the policy was the impressive reduction of the volume of export of chromium ore following the introduction of the targeted export restraints in 2008 and then again following their expansion in 2012. The development of chromium ore export is illustrated by the below graph:

IND, Chromium exports (HS 261000)



- (252) Hence, the targeted export restraints achieved the goal pursued by the GOI of discouraging exports and keeping chromium ore available for the domestic downstream industry.
- (253) These export volumes have to be seen against the background of the domestic consumption of the chromium ore. The GOI provided in its reply only limited data concerning export of the chromium ore (Financial Year ('FY') 18/19⁽⁵⁰⁾ to FY20/21), while figures with regard to domestic production and consumption were provided for FY16/17 to FY19/20. Both sets of those data are provided as confidential. Nevertheless, it is possible to make on this basis a comparison of export volumes and domestic consumption for the FY19/20 (covering 9 months of the IP) and the preceding FY18/19. In both financial years, export volumes did not exceed 1,5 % of domestic consumption. It should be noted that share of imports in the domestic market was also insignificant.
- (254) The Indian market also showed a constant and irrational overcapacity of production compared to the sum of domestic consumption and exports minus imports. This overcapacity could not be explained by the GOI. Such overcapacity can thus only be explained by the fact that the mining companies, including OMC in the chromium ore sector, exercised governmental functions (in particular, ensuring the adequate supply of chromium ore in line with the GOI's policy objectives to support the downstream industry and add value to the supply chain).
- (255) Second, the Commission found that according to the GOI Minerals Concession Rules of 2016, captive mines have a right of first refusal when their mining lease expires. Article 8a of the Mines and Mineral Development Act of 1957 (as amended in 2015), also provides for extended periods of mining leases for captive users and reiterates the right of first refusal in auctions of mining leases for captive users. This allows mining leases to remain predominantly in the hands of captive downstream ferrochrome producers, in line with the statements in recital (244) above. *De facto*, the Commission also found, as mentioned in recital (236) above, that all the private chromium ore mining owners were

⁽⁵⁰⁾ 'FYx/x+1' covers period from 1 April of the year x to 31 March of the year x+1.

actually using the ore for captive production. Thus, as a result of the closing of the external borders and the preferential allocation of mining leases for captive use, there is only one predominant State-owned player remaining on the market, OMC, which thus has control over the quantities and prices of chromium ore available on the non-captive domestic market. As the predominant suppliers of chromium ore in the Indian market, OMC has to comply with the GOI's policy objectives to support the downstream industry via low prices, as further explained in the following section, and thus exercises governmental functions.

Provision of chromium ore by the mining companies for less than adequate remuneration.

- (256) In the next step, the Commission verified whether the chromium ore was in practice provided for less than adequate remuneration, in particular by OMC.
- (257) As explained in recital (213), the GOI was not able to provide information about price setting or price statistics on Indian domestic prices of chromium ore. The vast majority of sales of chromium ore on the Indian non-captive market is made by OMC, and this is also the case for the vast majority of Jindal Group purchases. These sales were thus considered to be representative for the entire Indian free market.
- (258) This chromium ore is sold by OMC via e-auction. However, the investigation established that OMC restricted access to these e-auctions: 70 % of the monthly production is guaranteed for so-called 'long-term buyers' located in the State of Odisha. Only downstream ferrochrome producers are eligible as long-term buyers, and the guaranteed quotas cannot exceed the company specific production capacity of ferrochrome. This shows that OMC, in the exercise of governmental functions, is in practice applying in another format the preferential allocation of chromium ore quantities to downstream ferrochrome producers, as is already done at the level of the allocation of mining leases as well. The remaining 30 % is also reserved for domestic downstream producers outside the State of Odisha (excluding traders).
- (259) Thus, supply over chromium ore in the free market is controlled by OMC and is channelled predominantly to the downstream industry by OMC in line with the GOI's overall intention and legislative framework, as highlighted in recitals (242) to (255) above.
- (260) Yet, there was evidence showing that the pricing for the small quantities offered via e-auction is not based on free bidding offers from the companies. The auction starts with a base price, which is decided arbitrarily by the Board of OMC. The GOI explained that in the period post-IP, this base price was set as a fraction (corresponding to 13,5 %) of the international price of the downstream product, i.e. ferrochrome. However, the GOI could not explain how this fraction/correction factor was determined. After further analysis, the Commission found that the correction factor for the post-IP prices, was actually based on the historical average of prices for chromium ore set by Decision of the Board of OMC. The Commission did not receive access to the past Decisions of the Board and the GOI could not explain the principles behind these decisions. The Commission also could not find any objective link between the correction factor and the conversion cost of chromium ore into ferrochrome. Therefore, the Commission needed to use facts available as regards the price of chromium ore on the basis of Article 28(1) of the basic Regulation.
- (261) In this respect, the Commission noted that, as admitted by the GOI, the base price was arbitrarily low compared to international prices for no reason. Such artificially low prices appear to accord with the GOI's policy to provide cheap domestic chromium ore to the downstream industry. In addition, the Commission looked at empirical evidence. When looking at the purchase prices of the raw material in question provided by OMC to the Jindal Group, the Commission found that those prices, depending on the type of chromium ore, were 15 – 40 % lower than corresponding export prices of chromium ore of Turkish origin (bearing the greatest resemblance to the Indian chromium ore) to its main export market - China. On this basis, the Commission concluded that the base price of the chromium ore sold in the e-auction was set at an artificially low level with respect to market prices for chromium ore. Chromium ore prices were also too low in comparison with the downstream product (ferrochrome). Thus, the GOI's and OMC's allegations that prices for ferrochrome were relevant for the prices of chromium ore were dismissed.

- (262) Therefore, the evidence indicated that OMC, the predominant supplier of chromium ore in the free market and from which the Indian exporter producer purchased this raw material for its further used in the SSCR production process, did not behave as a market operator; rather, when providing chromium ore OMC was exercising governmental functions on behalf of the GOI and in line with the GOI's policy objectives to favour the downstream industry.

Conclusion

- (263) The legal and economic environment in India shows that the mining companies supplying chromium ore, and in particular the SOE OMC, possess, exercise or are vested with governmental authority. Chromium ore, like other minerals in India, is a natural resource managed by the GOI as a core sector of its national economy. In particular, the GOI put in place a set of measures (namely, imposing export restrictions resulting in oversupply and low domestic prices, and setting the base prices of the ore auctions at artificially low levels for these producers) showing that the suppliers of chromium ore, and in particular OMC, are meaningfully controlled by the GOI in the exercise of governmental functions. Thus, on the basis of the evidence available, the Commission concluded that the GOI provided chromium ore to the stainless steel industry for less than adequate remuneration within the meaning of Article 3(1)(a)(iii) of the basic Regulation, as interpreted and applied in line with the relevant WTO standard under Article 1.1(a)(iii) of the SCM Agreement.
- (264) Following final disclosure, the Jindal Group observed that the objective of the auction system is not to provide chromium ore at a low price but to maximize the Government's income by selling chromium ore at the highest price possible. Furthermore, the company indicated that the GOI does not direct the price of the chromium ore but only sets the floor price of the auction.
- (265) Finally, the company referred to the fact that Indian export prices of ferrochrome were higher than export prices of ferrochrome from South Africa, Kazakhstan and Turkey, which according to the company means that the Jindal Group is not benefiting from subsidized chromium ore used for the production of ferrochrome.
- (266) However, the first two arguments raised by the company do not invalidate the main conclusion of the Commission with regard to chromium ore auctions, as described in recitals (258) to (261), namely that access to the auction and sales volumes are restricted, the floor price is decided arbitrarily by the OMC Board, and its level is artificially low. All the above results in a final auction price, which is indeed above the floor price, but is still not market-based as notably a comparison with Turkish prices shows (recital (261)).
- (267) It is also noted that the chromium ore provided for less than adequate remuneration to the Jindal Group is affecting the cost of manufacturing of ferrochrome, which is later captively used by the company in the production of stainless steel. In any event, the financial contribution by the GOI is provided at the level of the chromium ore, not at the level of the downstream product, ferrochrome. Therefore, comparison of export prices of Indian ferrochrome with export prices of ferrochrome originating in other countries is irrelevant.
- (268) Taking into account the above, the conclusion of recital (263) is upheld.

(ii) Benefit and calculation of the subsidy amount

- (269) In accordance with Article 3(2) and Article 5 of the basic Regulation, the Commission determined the existence of benefit and calculated the amount of countervailable subsidies in terms of the benefit conferred on the recipient, which was found to exist during the investigation period.
- (270) Only one of the Indian exporting producers under investigation (Jindal Group) purchased chromium ore for the production of ferrochromium and, ultimately, SSCR.

- (271) As a first step, the Commission established volumes and weighted average prices of all the Jindal Group purchases of chromium ore in the IP, split according to type of ore which was defined by the company according to form (for example friable or concentrate) and chromium oxide content. These two parameters affect price differences of different types of chromium ore.
- (272) As a second step, the Commission replaced actual prices of each type of purchased chromium ore with the appropriate benchmark price.
- (273) The Commission noted that the prevailing market terms and conditions in India are all affected by the structure of the market. In addition, as explained in recital (257), one predominant player – with essentially 100 % market share in the free market – acting as a public body is imposing its price. Hence, it was impossible to establish an undistorted price of chromium ore for an Indian SSCR producer or elsewhere in the Indian market. Accordingly, there were no domestic prices in India, which could be used as appropriate benchmark.
- (274) Therefore, and in line with Article 6(d) second subparagraph of the basic Regulation, the Commission reverted to another country as an outside benchmark, duly adjusted to the prevailing market conditions in India.
- (275) The Commission tried to identify an undistorted price of chromium ore produced in the mine of a representative other country and to simulate that such mine would actually be located in India. The majority of chromium ore worldwide is exported from South Africa to China. Thus, the Commission considered the export price from South Africa to China as a possible benchmark price. However, it was established that chromium ore originating in South Africa is very different from the chromium ore originating in India in terms of the two most important parameters: chromium oxide content and chromium-iron ratio ('Cr:Fe ratio') ⁽⁵¹⁾.
- (276) The alternative benchmark proposed by the complainant was the export price of chromium ore from Turkey (being also one of the biggest world producers) to China. The Commission noted that the two parameters indicated in recital (275) are much closer in comparison of Turkish-Indian chromium ore than in South African-Indian chromium ore ⁽⁵²⁾.
- (277) Following final disclosure, the Jindal Group contested the Commission's findings that such parameters as chromium oxide content and Cr:Fe ratio make the Indian chromium ore more alike to Turkish than to South African chromium ore. The company indicated that it is important to compare the Cr:Fe ratio of chrome ores with similar chromium oxide contents. According to the company, the Turkish chromium ore with 40-42 % content has a Cr:Fe ratio of 2,6-2,8, which is much higher than in case of the Indian or South African ore of the same content.
- (278) As explained in recital (281), the Commission did not use the 40-42 % content chromium ore the Jindal Group referred to in order to establish the basic benchmark. The basic benchmark selected by the Commission has a 46-48 % chromium ore content with Cr:Fe ratio of 2,5 ⁽⁵³⁾. It is therefore very similar to the Indian ore of a comparable chromium oxide content, as confirmed by the Jindal Group itself in its submission:

'Indian chrome ore will have a Cr:Fe ratio of 2.4 only at a Cr₂O₃ level of 46 %' ⁽⁵⁴⁾

'For Indian chrome ore to have a Cr:Fe ration of 2.6 to 2.8, the Indian ore would need to have a much higher Cr₂O₃ of 48-50 % or higher' ⁽⁵⁵⁾.

The above confirms that Indian ore is much more akin to Turkish ore than to South African ore with its Cr:Fe ratio of 1,3 to 1,5 ⁽⁵⁶⁾.

⁽⁵¹⁾ Heinz H. Pariser analysis - Sherlock document no t21.007982 of 25 November 2021.

⁽⁵²⁾ *Idem*.

⁽⁵³⁾ DDC Mining Export Limited, Izmir, Turkey, <http://www.ddcmining.com/chrome-ore.html>

⁽⁵⁴⁾ Jindal, Comments on Eurofer benchmark submission, 29 July 2021, para 13, page 5.

⁽⁵⁵⁾ Jindal, Comments on Eurofer benchmark submission, 29 July 2021, para 8, page 4.

⁽⁵⁶⁾ *Idem*.

- (279) Furthermore, according to the Bureau of Indian Standards IS:10818-1984 specification of chromite for Metallurgical Industries ⁽⁵⁷⁾, the normal Cr:Fe ratio for the production of high carbon ferrochromium used in the production of stainless steel is around 2,8. This means that the benchmark selected by the Commission is also more representative than the South African alternative from the point of view of the end-use of chromium ore by the Jindal Group. That is, the transformation into high carbon ferrochromium for the production of stainless steel.
- (280) Furthermore, the Commission took note of the claims of the Indian exporting producer with regard to the differences still existing between Turkish and Indian chromium ore in their physical form and chromium oxide content. However, those differences were addressed by the adjustments described in recital (289).
- (281) The Commission subsequently used the weighted average Turkish export price to China in the IP as a basic benchmark ⁽⁵⁸⁾. The basic benchmark of 209 USD per tonne referred to chromium ore of chromium oxide content 46-48 %, in the form of concentrate, delivered on CIF basis.
- (282) The Commission was also mindful of the Appellate Body's ruling that adjustments for delivery charges must reflect the generally applicable delivery charges for the good in question in the country of provision ⁽⁵⁹⁾. Purchase prices of chromium ore reported by Jindal Group were in 99,96 % on ex-works mine delivery terms.
- (283) The Commission hence adjusted the basic benchmark price to the ex-works level. The CIF price was reduced by the sea freight and insurance costs ⁽⁶⁰⁾ and domestic transport cost in Turkey ⁽⁶¹⁾.
- (284) Following final disclosure, the GOI indicated that the OECD data used by the Commission to adjust the Turkey-China export CIF price to the ex-works level were available only until 2016. The GOI further claimed that extrapolation of the relevant indicator to the IP cannot be considered as an objective examination of prices.
- (285) However, the Commission did not merely extrapolate CIF-FOB ratio as provided by the OECD for 2016. The adjustment to the IP was based on the actual freight and insurance costs differences between 2016 and the IP as quoted by Baltic Exchange Dry Index ('BDI') for the twenty main sea routes. A detailed calculation of the ex-works basic benchmark price was provided to the Jindal Group in the specific disclosure.
- (286) The calculation of freight and insurance adjustments made by the Commission was also contested in the post disclosure submission of the Jindal Group. The company proposed an alternative source of data to adjust Turkey-China export CIF price to FOB ⁽⁶²⁾. According to the Jindal Group, this data source better showed actual freight cost between Turkey and China in the IP than OECD and BDI data which are 'a weighted average of all shipping routes'.
- (287) However, the quotation provided by the Jindal Group refers to only one month of the IP, to transport between Turkey and 'north-east Asia' generally, and to transport of soda ash, not of chromium ore. The basic OECD CIF-FOB ratio used by the Commission takes into account the whole year, the specific sea route (Turkey-China) and the specific product (chromium ore and concentrates). It is only the BDI cost adjustment between 2016 and IP which refers to an average of several sea routes.
- (288) Taking into account the above, the methodology used for the basic benchmark price adjustment to ex-works is upheld.

⁽⁵⁷⁾ <https://archive.org/details/gov.in.is.10818.1984/page/n7/mode/2up> page 4.

⁽⁵⁸⁾ Source: 2020 CRU International Ltd. ©.

⁽⁵⁹⁾ Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted on 19 December 2014, para. 4.317.

⁽⁶⁰⁾ On the basis of the OECD Dataset: International Transport and Insurance Costs of Merchandise Trade (ITIC) Turkey-China. https://stats.oecd.org/Index.aspx?DataSetCode=CIF_FOB_ITIC adjusted to IP on the basis of BDI Baltic Exchange Dry Index https://en.wikipedia.org/wiki/Baltic_Dry_Index

⁽⁶¹⁾ On the basis of quotation for Istanbul – Derince port deliveries as provided by World Bank <https://www.doingbusiness.org/content/dam/doingBusiness/country/t/turkey/TUR.pdf>, p. 51.

⁽⁶²⁾ IHS Mark it.

- (289) The Commission further adjusted the basic ex-work benchmark price for physical form of the ore and chromium oxide content in order to find specific benchmark prices for each type of the ore purchased by the Jindal Group in the IP. The physical form adjustment was based on the briquetting costs (friable ore) and pelletizing plus sintering costs (concentrate ore) as provided by the Jindal Group. Chromium oxide content adjustment was based on the melting cost of the chrome indicator as provided by the complainant ⁽⁶³⁾. No adjustment was done for the differences in Cr:Fe ratio, as this parameter is very close in comparison to Turkish and India ore. It was conservative approach as in fact the Cr:Fe ratio of Indian ore is slightly higher, which normally would result in higher price for the ore in the same form and the same chromium oxide content.
- (290) As the Turkish chromium ore is unaffected by the government measures distorting the Indian market and as the prevailing market conditions in the two countries, including quality, availability, marketability, transportation and other conditions of purchase or sale, are comparable, the Commission considered that the price of chromium ore in Turkey is comparable to the one that would prevail in India in the absence of the GOI's distortive measures.
- (291) Finally, the Commission compared the actual cost of purchase of the domestic chromium ore by the Jindal Group in the IP with the cost, which would have been paid if the prices per type of the ore had been replaced by the respective benchmark prices.
- (292) The total amount of the difference represents the 'savings' obtained by the Indian producer which purchased chromium ore in the Indian distorted market compared to the price, which it would have paid in the absence of distortions. Ultimately, this total amount represents the benefit conferred on the Indian producer by the GOI during the IP.
- (293) Detailed calculations of the benchmarks and benefit conferred were provided to the Indian exporting producer in question in the specific disclosure.
- (294) In accordance with Article 7(2) of the basic Regulation, the Commission allocated this subsidy amount over the total turnover of the company during the IP as appropriate denominator, because the subsidy granted a benefit to the entire production of the product concerned and its upstream product (hot-rolled coils), and not only to the production destined for export.

(iii) Specificity

- (295) The GOI's intervention as regards the provision of chromium ore for less than adequate remuneration is directed to benefit certain industries, in particular the stainless steel industry including producers of SSCR. The subsidy is therefore specific under Article 4(2)(a) of the basic Regulation. The inherent characteristics of chromium 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 ⁽⁶⁴⁾.
- (296) In light of the foregoing, the Commission considered that the GOI interventions are specific to the SSCR producers within the meaning of Article 4(2)(a) of the basic Regulation.

(c) Conclusions on the provision of chromium ore for less than adequate remuneration

- (297) In light of all the elements mentioned above, the Commission found that the provision of chromium ore by the GOI should be considered a specific subsidy within the meaning of Article 3(1)(a)(iii) and Article 3(2) of the basic Regulation in the form of provision of goods which confers a benefit upon the recipient companies.
- (298) The subsidy amount established for the Jindal Group amounted to 0,45 %.

⁽⁶³⁾ Sherlock document no t21.007982 of 25 November 2021.

⁽⁶⁴⁾ 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, para 4.398.

3.3.3. *Pass-through of the upstream subsidies*

- (299) Following final disclosure, the complainant noted that the Commission's findings revealed that a large majority of the subsidies identified for the integrated exporting producers affect the upstream stages of the production process of SSCR. According to the complainant, this means that the non-integrated Indian producer of SSCR – Chromeni – might also have benefited from subsidies conferred to Indian and/or Indonesian upstream producers. This could happen in case of domestic sales of upstream products from the Jindal Group (India) to Chromeni or in case of Chromeni's purchases of subsidized upstream products of Indonesian origin.
- (300) On the basis of the analysis of Chromeni's production process and the company's raw material purchases in the IP, the Commission concluded that the company could not have benefited from the purchases of subsidized upstream products of Indian origin.
- (301) Chromeni purchased however upstream products, namely hot rolled coils, from a related company in Indonesia, which may have benefited from the GOID provision of nickel ore for less than adequate remuneration (see Section 4.3). In this regard, the Commission could not make any findings since there were no elements in the file to make this assessment on this matter.

3.4. **Amount of countervailable subsidies**

- (302) The countervailable subsidy amounts established were as follows:

Company	DDS	EPCGS	MEIS	Total export subsidies	Chromium ore LTAR	TOTAL
Chromeni	-	5,69 %	1,87 %	7,56 %	-	7,56 %
Jindal Group	1,65 %	0,36 %	1,92 %	3,93 %	0,45 %	4,37 %

- (303) Taking into account high level (100 %) of cooperation of the Indian producers, the Commission considered it appropriate to set the residual subsidy amount for India at the level of the highest individual subsidy amount, that is 7,56 %.

4. **SUBSIDISATION: INDONESIA**

4.1. **Subsidies and subsidy programmes within the scope of the investigations**

- (304) On the basis of the information contained in the complaint, the Notice of initiation and the replies to the Commission's questionnaires, the alleged subsidisation through the following subsidies by the GOID were investigated:
- i. Direct transfer of funds
 - Provision of preferential loans
 - ii. Provision of goods or services for less than adequate remuneration ('LTAR')
 - The provision of nickel ore and stainless steel scraps for less than adequate remuneration
 - The provision of coal for less than adequate remuneration
 - The provision of land for less than adequate remuneration
 - The provision of natural gas for less than adequate remuneration
 - The provision of electricity for less than adequate remuneration
 - iii. Government revenue foregone or not collected that is otherwise due
 - Income tax incentives
 - Import duty exemption
 - VAT exemption on inputs and machinery

- Land and building tax ('PBB') on mining industry
- Exemption of (import) income tax

iv. Subsidies linked to the development of Indonesian industry through Chinese investment.

4.2. Pass-through ratios

- (305) In their comments following final disclosure, the IRNC Group claimed that incorrect sales data were used for the calculation of the pass-through ratios for two related companies.
- (306) This claim was found to be justified and therefore the Commission revised the respective pass-through ratios accordingly.

4.3. Background on the preferential policies for the domestic stainless steel industry

- (307) Indonesia has significant resources of nickel. As of 2020, its resources were estimated to 21 million tonnes of nickel ⁽⁶⁵⁾ (1,1 billion tonnes of nickel ore), around 20 % of the world's known nickel ore reserves.
- (308) Historically, Indonesia was one of the largest producers of nickel ore. However, as Indonesia had limited capacity domestically for processing the nickel ore (only two smelters as explained in recital (315)), it traditionally exported most of its nickel ore, mostly to China.
- (309) The nickel ore extraction rate increased significantly in Indonesia, from about 5 million tonnes in 1996 to around 10 million tonnes in 2007, and further to 70 million tonnes in 2013. This acceleration was driven by the demand from the Chinese plants/smelters producing nickel pig iron (NPI). NPI is an alloy of iron and nickel with low nickel content. The Indonesian nickel ore is particularly suitable for the Chinese technology to manufacture NPI.

Table 1

Indonesia exports of nickel ore (tonnes)

	2005	2006	2007	2008	2009
China	73 353	660 206	5 432 401	6 594 319	7 604 354
Total Exports	3 703 515	4 394 125	9 026 850	10 592 151	10 437 126

Source: Global Trade Atlas ('GTA')

- (310) Thus, the GOID progressively realised that exporting the overwhelming majority of its nickel ore reserves limited the potential benefits for the country from this scarce raw material. The benefits could be much greater for the country if the GOID managed to increase the domestic added value generated by the nickel ore reserves. To achieve this objective, the GOID focused on the domestic development of the whole industrial value chain using nickel ore up to the downstream industries, namely the smelters and the stainless steel industry as the ultimate user of this raw material. This would allow Indonesia to reap much greater domestic benefits rather than simply exporting nickel ore.
- (311) However, achieving this objective was not easy for Indonesia alone. The main issues faced by the GOID were the substantial financing requirements for setting up smelters and the downstream industries (i.e. several billions euros of upfront investments), and the relative lack of know-how and technology to produce stainless steel from NPI that matched the nickel ore quality extracted in Indonesia. Therefore, the GOID approached potential partner countries that could help it achieve this objective ⁽⁶⁶⁾. The natural choice fell on China because of the historical ties and

⁽⁶⁵⁾ <https://www.statista.com/statistics/273634/nickel-reserves-worldwide-by-country/>

⁽⁶⁶⁾ See, for example, the GOID's efforts to attract Japan: <https://kemenperin.go.id/artikel/3594/Let-Japan-Process-Nickel-in-Indonesia:-Industri-minister>

geographical proximity, and more importantly the fact that Chinese stainless steel producers were already using Indonesian nickel ore. Furthermore, China was a perfect candidate for the GOID to entice into a preferential bilateral framework to maximise the domestic added value stemming from Indonesia's nickel ore reserves as China had substantial financing available and specific preferential policies encouraging the stainless steel industry, including for investments abroad under the long-standing 'going out' policy, as well as the required technology and know-how to efficiently use Indonesian nickel ore. This resulted in a long-standing cooperation framework up to today. The main milestones and relevant official documents are summarised in the following recitals.

- (312) The GOID's attempts to attract Chinese investment towards Indonesian nickel industry go back to at least 2005, when Indonesia undertook to build 'a conducive investment climate' ⁽⁶⁷⁾ for investors from China. In June 2005, during a visit to Beijing, the Indonesian Coordinating Minister of Economy proposed to the Chinese Vice Premier investment prospects in four sectors of the Indonesian economy, including natural resources and '[h]e also hoped more Chinese businesses could go to Indonesia for investment, saying that the Indonesian government would create a favorable environment to facilitate Chinese investors' ⁽⁶⁸⁾. In response to this offer, the Chinese Vice Premier asked Indonesia to guarantee that Chinese investments in Indonesia would be profitable ⁽⁶⁹⁾. In addition, Indonesian officials also extended gratitude to China for providing 'gratis and preferential loans to Indonesia.' ⁽⁷⁰⁾
- (313) As a result, the GOID and GOC signed a Joint Declaration in 2005 which started their cooperation in the mining and the metallurgical sectors. Based on this Joint Declaration, in 2010 GOID and GOC signed a Plan of Action, which contains a plan to encourage Chinese investment in resource-based industries in Indonesia, including mining, as further explained in recitals (563) and (584). These early agreements already show the main terms of the specific cooperation framework between the two governments, and how the governments planned to implement their strategy by relying on private investors that would benefit from a number of preferential policies and support closely watched by the governments.
- (314) In 2007, the GOID introduced Law No. 27 on Long-Term National Development Plan ('RPJPN') for the period 2005–2025. RPJPN placed the industrial sector as the engine of growth for strengthening the economic structure. This was to be supported by, among others, the mining sector. Improving value addition in the primary sector, including mining, was highlighted as the main target to promote local and international competitiveness, and strengthen the national industrial base.
- (315) In the nickel sector, increasing the value added meant building smelters in Indonesia. At that time (and until 2016), there were only two smelters in Indonesia: a nickel matter smelter belonging to PT Vale with a capacity of approximately 80 000 tonnes of nickel and a ferronickel smelter belonging to the State-owned PT. Aneka Tambang ('Antam') with a production capacity of 26 000 tonnes of nickel.
- (316) The cost of building a smelter alone can reach EUR 1 billion depending on the technology and the production capacity. As mentioned above, Indonesia did not have either the financial resources or the right technology to build the smelters, whereas China had both and it also needed the Indonesian nickel ore for the production of stainless steel products.
- (317) One of the major measures to seal this cooperation framework between the GOID and the GOC and to allow the GOID to achieve its objective was the introduction of Law No. 4 of 2009 on Mineral and Coal Mining ('the 2009 Mining Law') in 2009 which superseded the Law No 11 of 1967 on Mining ⁽⁷¹⁾. Traditionally, the GOID heavily controlled the mining sector. Article 1 of Law No 11 of 1967 on Mining already granted a predominant role to the GOID and powers to regulate this sector, stating that '[a]ll minerals found within the Indonesian mining jurisdiction in the form of natural resources as blessing of God Almighty are national wealth of the Indonesian people and shall, therefore, be controlled and utilized by the State for maximum welfare of the people'. The Preamble of the 2009

⁽⁶⁷⁾ <https://koran.tempo.co/read/ekonomi-dan-bisnis/44119/cina-minta-indonesia-jamin-investor>

⁽⁶⁸⁾ http://en.people.cn/200506/28/eng20050628_192888.html

⁽⁶⁹⁾ <https://koran.tempo.co/read/ekonomi-dan-bisnis/44119/cina-minta-indonesia-jamin-investor>

⁽⁷⁰⁾ <https://koran.tempo.co/read/ekonomi-dan-bisnis/44119/cina-minta-indonesia-jamin-investor>

⁽⁷¹⁾ Article 1 of Law No 11 of 1967 on Mining already granted a predominant role to the GOID and powers to regulate this sector, stating that '[a]ll minerals found within the Indonesian mining jurisdiction in the form of natural resources as blessing of God Almighty are national wealth of the Indonesian people and shall, therefore, be controlled and utilized by the State for maximum welfare of the people'.

Mining Law further states that 'minerals and coal that buried in the mining jurisdiction of Indonesia represents non-renewable natural wealth which is a gift from the almighty god and which possesses an important role in the fulfilling the needs of life of many people, therefore the management of these resources must be under the control of the State in order to provide real value-add to the national economy in an effort to achieve prosperity and wealth for the community in a fair manner'. In particular, Article 4 of the 2009 Mining Law stipulates that '(1) Mineral and coal as non-renewable natural resources constitute national wealth controlled by the state for the greatest benefit of the people's welfare' and '(2) The control of mineral and coal by the state as referred to in paragraph (1) shall be realised by the Government and/or regional governments'. Importantly, through Article 103 of the 2009 Mining Law the mineral processing as an added value of mineral was required to be done in Indonesia. The Elucidation of this Article 103 paragraph (1) mentions that the obligation to conduct processing and refining domestically is intended to, among other things, (a) increase the value of mining through its commodities, (b) provide raw materials for industry, (c) provide employment, and (d) increase the State's income. In other words, these provisions imposed an obligation on all nickel ore mining companies either to build their own nickel processing/purification facility or to sell their nickel ore to such a domestic facility, so as to achieve the overarching objective to increase the domestic added value of the nickel ore via preferential policies targeting the downstream stainless steel industry. Furthermore, Article 170 of the 2009 Mining Law provided for a five-year 'grace period'. The objective of the 'grace period' was to prepare the mining industry for the domestic processing obligation and enable the companies to build the purification facilities necessary to absorb the nickel ore supply.

- (318) Against the backdrop of the 2009 Mining Law, and in particular its domestic processing requirement, the Indonesian exports of nickel ore skyrocketed, with China absorbing almost the totality of exports, as shown in the table below.

Table 2

Indonesia exports of nickel ore (tonnes)

	2010	2011	2012	2013	2014	2015
China	14 346 464	36 142 281	43 095 682	58 604 652	3 989 894	0
Total Exports	17 566 047	40 792 165	48 449 392	64 802 857	4 160 121	0

Source: GTA

- (319) Since the GOID's objective to create processing capacities in Indonesia was not achieved, on 11 January 2014, through several regulations, the GOID banned the exports of nickel ore from Indonesia (for more details on the export restrictions and export ban on nickel ore, see recitals (405) – (413)).
- (320) In 2017 the GOID slightly relaxed the export ban by allowing export of nickel ore with less than 1,7 % nickel content in certain quantities. These exports were subject to 10 % export duty while the exporters also needed to prove that the construction of their processing facility was going according to schedule. The reason for this was that at that time Indonesia did not have the technology to process nickel ore with less than 1,7 % nickel content into value added products, which was more suitable for batteries for electrical vehicles than for steel (see further below in Section 4.4). However, in 2020 the GOID banned completely the export of all nickel ore. The reason for the reintroduction of the ban of the low content ore was that the Chinese companies have plans to build smelters for this type of nickel ore that could be used to manufacture batteries for electric vehicles.
- (321) Over the years, and thanks to the domestic processing requirement and export restrictions imposed on exports of nickel ore by the GOID, several nickel ore smelters were built. The domestic need of nickel ore also increased thanks to the GOID's actions to induce the smelting capacity previously established in China to move to Indonesia. Indeed, through the RKABs, as explained in recital (414), the GOID is controlling the production of nickel ore. The GOID also keeps the domestic price significantly below international prices to benefit the smelters and stainless steel producers.

Table 3

Indonesia nickel ore (million tonnes)

	2014	2015	2016	2017	2018	2019	2020
Production	7,81	7,84	20,92	26,0	32,0	61,0	48,0
Exports	4,16	0	0	4,88	19,7	32,3	0

Source: GOID's questionnaire reply and <https://www.statista.com/statistics/707267/production-of-nickel-ore-in-indonesia/>

- (322) The bilateral cooperation instigated by the GOID with the GOC on the preferential treatment to set up and favour the creation and development of the Indonesian domestic stainless steel industry goes back to the early years in 2000. It consists of a number of bilateral documents setting up the legal and policy framework leading to the adoption of several specific support policies and preferential programmes constituting countervailable subsidies covered by this investigation (see the main bilateral documents at recital (548)).
- (323) The bilateral cooperation took place specifically in the Indonesian Morowali Industrial Park ('the Morowali Park'). This is an industrial park in the Sulawesi area where Indonesia and China decided to develop the stainless steel industry.
- (324) The managing company in charge of implementing the bilateral cooperation in the Morowali Park is a Sino-Indonesian company, IMIP. This company formally started its operations in October 2013.

4.4. Provision of nickel ore for less than adequate remuneration

4.4.1. The complaint and the subsidy scheme

- (325) 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. According to the complainant, 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.

4.4.2. Legal basis

- (326) Mining policy covering nickel ore is administered through the Ministry of Energy and Mineral Resources ('MEMR'), represented by the Director General of Mineral and Coal ('DGoMC'). Mineral exports are also administered by the Ministry of Trade, represented by the Director General of Foreign Trade.
- (327) Both the central and regional governments play vital roles in the mining industry, by setting national mining policies, standards, guidelines, and criteria, as well as deciding on mining authorisation procedures. Furthermore, the GOID is actively involved in development, control, evaluation, and conflict resolution in the sector.
- (328) The mining industry is heavily regulated in Indonesia. A large number of regulations, that are continuously being changed, issued by different governmental bodies monitor and supervise each aspect of the mining sector as shown below. The legal basis of the relevant rules and regulations are the following:
- Law No. 27 on Long-Term National Development Plan ('RPJPN') for the period 2005–2025;
 - Law No 4 of 2009 on Mineral and Coal Mining ('2009 Mining Law') as amended by Law 3 of 2020 ('2020 Mining Law');
 - Government Regulation 55 of 2010 ('GR 55/2010') on the guidance and supervision on the implementation of the management of mineral and coal mining business;

- Government Regulation 23 of 2010 ('GR 23/2010') as amended by Government Regulation 24 of 2012 ('GR 24/2012') regarding the Implementation of Mineral and Coal Mining Business Activities;
- MEMR Regulation No. 27 of 2013 on Procedures and Determination of Share Divestment Pricing and Changes of Capital Investment in Coal and Mining Sectors ('MEMR 27/2013');
- Government Regulation No. 1 of 2014 ('GR 1/2014') concerning the second amendment to GR 23/2010 as further amended by GR 24/2012 concerning the implementation of the business activities on mineral and coal mining;
- MEMR Regulation No. 1/2014 ('MEMR 1/2014') regarding the upgrading of added value of minerals through mineral processing and refinery in the country;
- Government Regulation No. 77 of 2014 ('GR 77/2014'), the third amendment of GR 23/2010;
- Government Regulation No 1 of 2017 ('GR 1/2017'), the fourth amendment of GR 23/2010 about the Operation of mineral and coal;
- Ministry of Trade (MOT) Regulation No 01/M-DAG/PER/1/2017 concerning export provisions for processed and purified mining products;
- MEMR Regulation No 5 of 2017 ('MEMR 5/2017') concerning mineral value-adding improvements through in-country mineral processing and refining activities;
- MEMR Regulation No 7 of 2017 ('MEMR 7/2017') concerning the procedure for determining the reference price for sales of minerals and coals;
- MEMR Regulation No 9 of 2017 regarding the divestment procedures and divestment share price fixing mechanism on mineral and coal mining business ('MEMR 9/2017') as amended by MEMR 43/2018;
- Government Regulation 48 of 2017 ('GR 48/2017');
- MoF Regulation PMK No. 13/PMK.010/2017 and MoF Regulation PMK No. 164/PMK.010/2018 setting out the rates of export duty for the various forms of processed metal minerals;
- MEMR Decree 2946 K/ 30/ MEM/ 2017 concerning the calculation formula for the determination of metal and mineral reference price;
- MEMR Regulation No 25 of 2018 ('MEMR 25/2018') regarding the minerals and coal mining businesses (which revoked MEMR 5/2017);
- MEMR Regulation No. 26 of 2018 ('MEMR 26/2018') concerning the implementation of good mining practices and the supervision of mineral and coal mining;
- MEMR Regulation No 11 of 2018 ('MEMR 11/2018') regarding the Procedure for granting of area, licensing and reporting in the business activity of mineral and coal mining superseded by MEMR Regulation No 7 of 2020 ('MEMR 7/2020') regarding the Procedure for giving the region (allocating the mining area), licensing and reporting on the mineral and coal mining business activities;
- MEMR Regulation No 22 of 2018 (MEMR 22/2018) regarding amendment to MEMR 11/2018 regarding procedure for the granting of area, licensing and reporting in the business activity of mineral and coal mining;
- MEMR Regulation No 11 of 2019 ('MEMR 11/2019'), the second amendment to MEMR 25/2018 concerning mineral and coal mining business;
- MEMR Regulation No 7 of 2020 concerning the procedures for giving the region (allocating the mining area), licensing, and reporting on the mineral and coal mining business activities ('MEMR 7/2020');
- MEMR Regulation No 11 of 2020 ('MEMR 11/2020') concerning the third amendment of MEMR Regulation 7/2017 concerning procedure for determining the reference prices fixing of mineral metal and coal sales; and
- Decision of MEMR Number 84 K/32/MEM/2020 on the guideline for conducting offering, evaluation and calculation of divestment share prices in mineral and coal mining.

4.4.3. Findings of the investigation

- (329) At the outset, the Commission observed that one exporting producer of SSCR purchased the nickel ore domestically from either related or unrelated companies to melt it and use it to manufacture SSCR products.
- (330) The provision of nickel ore for less than adequate remuneration is one of the key measures implemented by the GOID in the context of the cooperation with the GOC in order to ensure the development of the entire industrial value chain of the stainless steel industry in Indonesia.
- (331) In 2007, the GOID introduced Law No. 27 on Long-Term National Development Plan ('RPJPN') ⁽⁷²⁾ for the period 2005–2025. RPJPN placed the industrial sector as the engine of growth for strengthening the economic structure. This was to be supported by, among others, the mining sector, including nickel ore. Improving value addition in the primary sector, including mining, was highlighted as the main target to promote local and international competitiveness, and strengthen the national industrial base. Value chain development through product processing and diversification (downstream development), structural deepening (upstream development), and vertical integration (upstream and downstream development) was expressly mentioned in the RPJPN. The development of the manufacturing industry would be focused on subsectors that met several criteria, among others, process domestic natural resources and have export development potential.
- (332) As described at recitals (317) et seq., in line with its objective to increase the value added of the minerals in Indonesia, in 2009 the GOID introduced the 2009 Mining Law. Several implementing regulations, including a number of amendments, have been issued by the GOID in pursuing the goals of the 2009 Mining Law. The 2009 Mining Law introduced a number of significant regulatory changes to the licensing system, royalties, foreign ownership and raw material exports. In 2020, the 2009 Mining Law was amended via the 2020 Mining Law, enacted on 10 June 2020. This new law, which is of limited relevance to this investigation as it was effective at the very end of the IP, confirmed or further extended certain requirements on mining companies.
- (333) 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.
- (334) The 2009 Mining Law introduced a new licencing system that replaced the old Contracts of Work ('CoW') scheme and the local Kuasa Pertambangan ('KP') or Mining Right system. Under the new system there are two types of commercially important mining permits:
- a. Mining Business License ('IUP') is a mining business permit required to conduct mining activities within a designated IUP area, which is divided into: (i) Exploration IUP which is valid for a maximum term of 8 years for metal minerals mines; (ii) Operation Production IUP (IUP-OP) which is valid for a maximum term of 20 years for metal minerals mines, specified non-metal minerals mines and coal mines, which may be extended for two additional 10 year terms. The 2009 Mining Law thus provides assurance that holders of exploration permits will be granted production permits.
 - b. Special Mining Business License ('IUPK'), is a special mining business permit issued by the MEMR for areas which have been deemed as State Reserve Areas, which is divided into: (i) Exploration IUPK which is valid for a maximum term of 8 years for metal minerals mines and (ii) Operation Production IUPK (IUPK-OP) which is valid for a maximum 20 years for metal minerals mines. Under the 2009 Mining Law, an IUPK must first be offered through a tender to State or region owned companies. If there is no interest from these parties then the IUPK can be tendered to the private sector. IUPKs are issued for one specific mineral type only, and separate IUPs are required if another mineral type is to be extracted from the same permit area.

⁽⁷²⁾ https://perpustakaan.bappenas.go.id/e-library/file_upload/koleksi/migrasi-data-publikasi/file/RP_RKP/RPJPN%202005-2025-english.pdf

- (335) The 2009 Mining Law did 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. All Operation Production IUPs were granted for a maximum term of 20 years, which could be extended for two additional terms of 10 years each.
- (336) Under the industrial regulations, the 'Industry Business License ("IUI")', was generally accepted as the main license for industrial businesses with the production of any type of products. The IUI is issued and administered by the Ministry of Industry. In 2013, the Central Government introduced a new type of license; an IUP Operation Production for Processing and Refining (Smelter), by way of ministerial regulations (most recently, by MEMR Regulation 7/2020). This license provides for the development and operation of smelter facilities and is issued under the authority of MEMR. Thus, processing companies are operating based on two licenses.
- (337) The 2009 Mining Law also provides for administrative sanctions on the holders of an IUP, IPR, or an IUPK for breaches of the provisions as stated, *inter alia*, in Articles 102 and 103. Such administrative sanctions are in the form of: 'a. written warnings; b. temporary suspension of part or all exploration activities or production operations; and/or c. cancellation of the IUP, IPR, or IUPK' (Article 151 of the law). Finally, the Mining Law puts in place criminal sanctions on companies, which do not comply with its various provisions of up to 10 (ten) years imprisonment and a maximum fine of IDR 10 000 000 000 (ten billion Rupiah) for false reporting of mining and sales activities (see Article 159) and the sales or processing of minerals from the entities, which do not have a valid licence (see Article 161).

4.4.3.1. The application of the provisions of Article 28(1) of the basic Regulation

- (338) The Commission informed the GOID that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged support granted to the steel industry including through the provision of nickel ore for less than adequate remuneration.
- (339) The Commission requested the GOID in its questionnaire, in the deficiency letter, and during the remote cross-check to provide certain information relating to the suppliers (namely, the mining companies) and the functioning of the domestic market of nickel ore in Indonesia. These information requests included, among others, questions on the legal and institutional framework, the organization of the nickel ore market, the producers of nickel ore in Indonesia, domestic and export price-setting mechanisms and prices, as well as shareholding of companies.
- (340) At initiation, the Commission requested the GOID to forward Appendix B attached to the anti-subsidy questionnaire (questionnaire for nickel ore suppliers) to the top 10 producers and distributors of the nickel ore, as well as to any other producers and distributors of nickel ore, which have provided nickel ore to the exporting producers. Appendix B consisted of a word document ('Appendix B_Input supplier') and an excel file ('Appendix B - Input suppliers tables'). The GOID did not forward the specific questionnaire intended for suppliers of input materials to known suppliers in Indonesia.
- (341) The Commission, in its deficiency letter to the GOID of 4 October 2021, took note of the fact that it had not received any reply to Appendix B of the questionnaire from neither of the Indonesian largest nickel ore suppliers. The related suppliers of nickel ore did not provide a reply either.
- (342) As a result, despite the fact that there are more than 290 nickel ore miners in Indonesia, as stated in recital (378), the Commission received a reply only from a related trader of nickel ore (PT. Ekasa Yad Resources) which anyway submitted its reply as a related company to IRNC Group, and only one unrelated nickel ore producer (PT GAG Nikel). In reply to the deficiency letter, the GOID provided only two additional replies for nickel ore producers (PT Tiran Indonesia and PT Ceria Nugraha Indotama).
- (343) The replies of the three nickel ore miners were significantly deficient. PT GAG Nikel refused to provide a copy of its license and , minutes of the shareholder's and board of directors meeting during the IP claiming that they were confidential.

- (344) PT Ceria Hugraha provided the Articles of Association and business certificate only in Bahasa. Although several version of the Articles of Association were provided, they were all in Bahasa and in a picture format that could not be translated by a computer and therefore the Commission was not able to read them.
- (345) PT Tiran Indonesia did not even submit a reply to the word document Appendix B_Input supplier. It only submitted a company presentation in Indonesian, a draft of the financial statement for 2019 and 2020 and the excel file Appendix B - Input suppliers tables. The company neither submitted its Articles of Association nor the license.
- (346) Concerning the company that was cross-checked, PT. GAG Nikel, the GOID failed to provide its RKABs (mandatory annual working plan and budget) for 2019 and 2020 and quarterly, biannual and yearly production and sales reports submitted to the MEMR for 2019 and 2020. After the RCC of GAG Nikel the GOID submitted the Deed of Establishment of GAG Nikel but only in Bahasa and in a format that could not be translated by a computer and, therefore, the Commission could not use it.
- (347) Finally, the GOID claimed that the volume of production stipulated in the RKAB as explained in recitals (414) to (424), were set in line with the volumes stipulated in the feasibility studies. However, it provided only a few pages from the feasibility studies and the environmental impact analysis of the companies for which it submitted the RKAB with some numbers, while the text related to these numbers was covered in black without any explanations, which indicates that the GOID was deliberately impeding the Commission to assess the way the miners were setting up their annual production volumes.
- (348) 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. The GOID also failed to provide statistics on Indonesian domestic prices of nickel ore although according to the legislation in force it collects such information.
- (349) After having received the letter regarding the possible application of Article 28 of the basic Regulation ('Article 28 letter'), the GOID interpreted the Article 28 letter as a deficiency letter and submitted several additional documents of GAG Nikel such as the RKAB for 2019 and 2020 of GAG Nikel, the application/report for obtaining the RKAB for 2019 and 2020 and the quarterly production and sales reports of nickel whole for 2019 and 2020. All these documents were only in Bahasa. The GOID also submitted a reply to Appendix B for Antam.
- (350) Considering the very late submission of these documents and the fact that they were not submitted in English, and the fact that the legal context was the Article 28 procedure and not a deficiency process, as well as the fact that in any event the Commission would not be in a position to verify this information and ask clarifications on these documents, they could not be used in the investigation. Thus, the Commission decided to disregard such information, as provided by Article 28(3) of the basic Regulation, and use facts available instead.
- (351) 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.
- (352) Furthermore, in contradiction with GOID's statement that it did not have records of prices of nickel ore in Indonesia, the quarterly reports submitted by the GAG Nikel and the RKAB application indicate otherwise. In these documents GAG Nikel reported to the GOID all the sales of nickel ore on a transaction by transaction basis disclosing thus to the GOID the sale volume, selling prices of the nickel ore as well as the name of its customers.

- (353) The absence of sufficient cooperation did not allow the Commission to collect all the information it considered relevant for its findings in this investigation. Due to the non-cooperation of the nickel miners, the Commission was also prevented from collecting additional documents and asking additional information, namely on licensing agreements between the miners and the GOID, including the underlying conditions, royalties, and references to the legislative context regulating to them. Consequently, 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.
- (354) Therefore, in the absence of information to the contrary received from the GOID, the Commission partially relied on facts available for its findings regarding those aspects of the investigation in accordance with Article 28 of the basic Regulation.
- (355) In the comments on final disclosure, the GOID explained that it submitted GAG Nickel's articles of association as part of the deed of establishment, which was provided by letter of 19 November 2021. The Commission confirmed that the articles of association are part of the deed of establishment. However, the Commission noted that this submission occurred very late in the investigation, and more importantly that the articles were submitted only in Bahasa. Therefore the Commission was not able to use them.
- (356) Moreover, the GOID stated that the translation of the articles of association of PT. Ceria Hugraha required time. In any event, the GOID claimed that the Commission did not require the translation of all the documents into English and, as such, the lack of translation should not impede the investigation. As for the file format, the GOID asserted that this was not specified.
- (357) The Commission noted that in the instructions for the anti-subsidy questionnaire, to which the annex for inputs supplier was attached, it is clearly stated 'Please provide an English translation for all documents and source material that you submit in response to this questionnaire'. Moreover, the anti-subsidy questionnaire was sent to the GOID on 18 May 2021, therefore the GOID had more than sufficient time at its disposal for the translation of the articles of association of PT. Ceria Hugraha. As for the file format, the Commission made the remark on the format of the document in recital (344) because it did not allow a computer-based translation, therefore the document could not be used. This claim was therefore rejected.
- (358) With regard to the RKABs, the GOID recalled that it submitted them as attachments to the letter of 8 December 2021. The Commission recalled that in the letter of 19 November 2021 (which was the deadline for the GOID to submit the RCC exhibits), the GOID had informed the Commission that, based on an internal decision, GAG Nickel had decided not to provide the RKABs. The letter of 8 December 2021 was sent in response to the Article 28 letter. The Commission noted that this date was way too late in the investigation for the Commission to take into account new documents. More importantly, the Article 28 process and the comments that interested parties may submit relate to the failure to submit information and cannot be used by the parties as an opportunity to submit new information that should have been submitted in the earlier stage of the investigation, or as part of the deficiency process. The Commission therefore rejected this argument.
- (359) The GOID explained also that it blackened the text not related to the volume of production data to simplify the reading of the text.
- (360) The Commission noted that the GOID was requested to submit complete documents and not to blacken any part of the text. The Commission would have needed to have access to all the text to properly assess the complete information contained in the RKABs for its findings. This argument was therefore rejected.
- (361) With regard to the statistical data on consumption, the GOID claimed that, since the Commission employed sampling, it could not reconcile the national consumption data with nickel ore purchased by IRNC. The Commission highlighted and clarified that the quantity of nickel ore purchased by IRNC was significantly higher compared to the national consumption data reported by the GOID. Therefore, the data submitted by GOID seem to significantly underestimate the national production of nickel ore. The GOID did not provide any facts to rebut these findings. This claim was therefore rejected.

- (362) The GOID further explained that, at the time of the expiration of the deadline, it was still trying to provide information and data, since the Commission stated in the Article 28 letter that it would have considered the use of Article 28. The GOID submitted that itself and GAG Nikel did not have sufficient time to translate the documents and that during the RCC the Commission did not indicate the need to translate the documents into English. Concerning the translation, the Commission referred to the instructions in the questionnaire and recalled that it does not need to repeat each time a request for a document is made that that document has to be translated. The failure to provide information in English may lead to the application of facts available due to the impossibility of using the documents submitted. The Commission recalls that the GOID did not submit any request for extension of the deadline or indication that work was ongoing for the documents which were later submitted through the answer to the Article 28 letter. Furthermore, the Commission recalled that the GOID was involved in a number of countervailing duty investigations, and thus it was well aware that documents must be submitted in English in such investigations. Therefore, this claim was rejected.
- (363) The GOID reiterated the content of its letter of 8 December 2021 in relation to the issue of Indonesian nickel ore consumption data, stating that it submitted nickel ore consumption data for the stainless steel sector. As explained above at recital (361), the Commission recalled again 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 sector.
- (364) The GOID also claimed that itself and the miners never refused to provide evidence of State shareholdings, control and decision-making processes. The GOID admitted that Antam acquired GAG Nikel's shareholder, but recalled that GAG Nikel is still listed as a foreign entity, as explained during the RCC.
- (365) The Commission considered that, in the reply to the questionnaire, there was no evidence of the State ownership of the majority owner of GAG Nikel, which was only mentioned during the RCC. Moreover, the fact that GAG Nikel is listed as a foreign entity has no relevance with regard to its State ownership. This claim was therefore rejected.
- (366) GOID further explained that PT. Vale was not on the list of the top 10 input producers because it forwarded the questionnaire for input suppliers only to the input suppliers of the cooperating exporting producers. The list of the top 10 input producers provided therefore did not include PT. Vale.
- (367) The Commission recalls that instructions in the questionnaire concerning the list of the top 10 input producers clearly requested the GOID to 'provide a list containing the following information on the largest 10 producers of each of these input materials'. In the instructions, there was no reference to the supply of input materials to the exporting producers, and thus the list should have included the top 10 input producers overall in Indonesia.
- (368) In conclusion, all of the claims were rejected. In any event, the Commission noted that none of these comments, taken alone or together, would have been capable of reversing the findings of non-cooperation or any other aspects of the investigation, which were thus confirmed.

4.4.3.2. Analysis

- (369) In order to establish the existence of a countervailable subsidy, three elements must be present under Article 3 and 4 of the basic Regulation: (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.

4.4.3.2.1. Financial contribution

- (370) For the first element, the Commission analysed if the set of measures adopted by the GOID led to a financial contribution in the form of government's provision of nickel ore for less than adequate remuneration to the Indonesian SSCR exporting producers via a public body or by entrusting or directing private bodies within the meaning of Article 3(1)(a) of the basic Regulation.

(i) Mining companies acting as public body

- (371) The investigation first assessed whether the GOID provided nickel ore to stainless steel producers through mining companies acting as a 'public body'. The relevant legal standard and interpretation for this assessment under Article 3(1)(a) of the basic Regulation stem from the WTO jurisprudence on 'public body' which has been explained in recitals (225) to (232).
- (372) In sum, whether mining companies in Indonesia are 'public bodies' should be examined by looking into the core characteristics and functions of those companies, and their relationship with the GOID.

Core characteristics and functions of the mining companies in Indonesia

- (373) The GOID has set up a regulatory mechanism which bestows nickel ore mining companies with authority to exercise governmental functions.
- (374) The extraction and management of minerals in Indonesia are of a kind that are classified as governmental in Indonesia. In this respect, Article 33(3) of the 1945 Constitution affirms that the earth, the water, and natural resource wealth that are buried within the earth are to be under the control of the state and utilized for the greatest prosperity of the community. As stated in the preamble of the 2009 Mining Law, 'the management of these resources must be under the control of the State in order to provide real value-add to the national economy in an effort to achieve prosperity and wealth for the community in a fair manner'. Thus, all minerals in Indonesian are public natural resources, which are controlled and utilized by the State.
- (375) Through several laws and regulations, the GOID decides which company is allowed to extract nickel ore and from where (namely, mining areas). Mining companies are required to have a license in order to extract nickel ore. The GOID also determines the amount of nickel ore mining companies can extract. Pursuant to Article 5(3) of the 2009 Mining Law, the GOID 'possesses the authority to determine the amount of production of every commodity per year in every province'. Similarly, under Articles 5(1) and 5(5) of the 2009 Mining Law, the GOID may control the production and export of minerals in the domestic interest. The GOID also requires the mining companies to increase the added-value of the minerals by requiring the further processing and purification of the nickel ore, and determines to whom the mining companies can sell the nickel ore for such further processing (Articles 102-104 of the 2009 Mining Law). Article 119 of the 2009 Mining Law further stipulates that the license 'can be cancelled by the Minister, the Governor, the Regent/the Mayor pursuant to their authorities, when: a. the holder of the [license] does not fulfil their obligations that are already stipulated in the [licence] and the laws and regulations'.
- (376) Thus, the 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 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.

Relationship with the GOID: ownership and formal indicia of control by the GOID

- (377) At first, the Commission sought information about State ownership as well as other formal indicia of government control in the State-owned nickel ore miners. For this purpose, the Commission had to rely almost entirely on facts available according to Article 28 of the basic Regulation 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, as set out in recitals (338) to (354).
- (378) The GOID stated that during the investigation period there were more than 290 nickel ore producers in Indonesia. The GOID provided a list with the ten largest nickel ore producers and specified that only one of them was State-owned i.e. Antam. The GOID also claimed that it had no ownership, control or relation upon the companies that are classified as private. Furthermore, the GOID claimed that no government official is a member of the Board of Director in PT Aneka Tambang. It should be noted that Antam failed to provide a reply to Appendix B stated in recital (340) within the deadline. The GOID submitted a reply to Appendix B for Antam after it was inform of the application of Article 28, as stated in recital (349), and therefore it could not be cross-checked anymore.

- (379) Furthermore, the GOID stated that 6 % and 4 % of the nickel domestic production in 2019 and 2020 respectively was generated by State-owned companies.
- (380) In the deficiency letter, the Commission asked the GOID to provide the market share for each of the ten largest nickel ore producers or, if not available, their respective turnovers. In reply to this question, the GOID actually provided another list of the 10 largest nickel ore companies based on their volume of nickel ore production in 2019 and 2020. In total, these companies represented 37 % and 42 % respectively of the total domestic production. There was an overlap of only two producers in the two lists of the top 10 largest nickel ore producers.
- (381) In the deficiency letter, the Commission also asked the GOID to provide the shareholders' structure of the top 10 largest nickel ore producers submitted in the questionnaire reply. The Commission also asked the GOID to provide the shareholders' structure of 10 producers of nickel ore that it identified as large suppliers of IRNC.
- (382) The GOID replied that apart from Antam which was a listed company, the other companies were not listed on the Indonesian Stock Exchange and therefore it could not obtain the information regarding their shareholders' structure. In addition, the GOID provided the shareholder's structure of two companies from the second list of the 10 largest producers of nickel ore, which showed that these two companies were privately owned. Also for the list of companies provided by the Commission, the GOID provided the shareholders' structure of six companies, indicated as being private companies. Finally, the GOID stated that the sole exporting producer that was purchasing nickel ore in Indonesia was supplying nickel ore from private suppliers only.
- (383) The investigation revealed that the GOID's statement that it did not have information concerning the shareholders' structure of the nickel mining companies was factually incorrect. On the contrary, the Commission found that the GOID is closely monitoring the ownership of mining companies. Firstly, when a company applies to obtain a mining license (such as IUP or IUPK), it needs to provide the shareholders' structure to the respective Indonesian authorities as there are certain restriction to the foreign ownership. Under GR 77/2014 ⁽⁷³⁾, exploration IUPs and IUPKs can have up to 75 % foreign ownership. Foreign ownership percentages of IUPs/IUPKs start at 49 % and then progressively increase to 60 % if the operation has processing/or refining activities, and again to 70 % if the operation is underground. Secondly, the shareholders' structure is also necessary for the GOID to be able to implement the divestment requirement pursuant to the 2009 Mining Law as applied by GR 1/2017 and MEMR 9/2017 (as amended by MEMR 43/2018) as explained in recitals (425) to (433). Finally, since the enactment of 2009 Mining Law, the GOID has issued several regulations that require approval from central or regional government for changing shareholders and board members in mining companies. MEMR 27/2013 was the first regulation to introduce approval requirements for changing shareholders and board members for IUP holders. Essentially, this regulation required approval from the MEMR or the heads of regional governments (depending on their respective authority) for changing shareholders and board members in IUP holding mining companies. The latest regulation in this regard is GR 48/2017 ⁽⁷⁴⁾. Furthermore, the shareholders structure of GAG Nickel was included in the application/report for obtaining the RKAB for GAG Nickel submitted by GOID in reply to the application of Article 28 as stated in recital (349). Therefore, each year when a mining company is applying for the mandatory RKAB, as part of the information package submitted in this regard, it has to submit its shareholder structure to MEMR. Therefore, the Commission had to resort to facts available on the basis of Article 28 of the basic Regulation to fill the gaps due to the lack of cooperation by the GOID on ownership and control of the mining companies.
- (384) First, the Commission investigated the very limited information on ownership and control of mining companies submitted in the investigation. In the reply to Annex B of PT GAG Nickel, it was stated that Antam was a minority shareholder and the majority of shares were owned by another company. The GOID provided no specific information on the public nature of the shareholders of this company in its questionnaire reply. However, according to public sources found by the Commission ⁽⁷⁵⁾, it turned out that the actual shareholder of this company was in fact the GOID, which had full ownership. This was subsequently confirmed during the RCC of PT GAG Nickel. As a result, it was clear that the GOID had failed to give full and accurate information on the actual ultimate ownership of this company.

⁽⁷³⁾ http://www.gbgindonesia.com/en/main/legal_updates/government_changes_divestment_requirements_for_mining_companies_in_indonesia.php

⁽⁷⁴⁾ <https://jdih.esdm.go.id/peraturan/Permen%20ESDM%20Nomor%2048%20Tahun%202017.pdf>

⁽⁷⁵⁾ Antam's 2020 Annual Report, p. 296, available at: <https://www.antam.com/en/reports/annual-reports>.

- (385) Furthermore, it is noted that PT Vale was not included by the GOID in the list of the largest nickel ore miners in Indonesia. However, based on publicly available information, PT Vale extracted in 2019 around 4,2 million ⁽⁷⁶⁾ tonnes of nickel ore, which is more than what the top largest nickel ore miner reported by GOID extracted in 2019. Furthermore, through PT Indonesia Asahan Aluminium (Inalum) ⁽⁷⁷⁾ the State also owns 20 % stake in PT Vale Indonesia ⁽⁷⁸⁾. The GOID became a shareholder in PT Vale in 2020 as part of the GOID's requirement of the divestment of stakes by foreign-owned companies. Furthermore, in reply to Art. 28 letter, the GOID stated that PT Vale was not a State-owned company (but it remained silent about the 20 % stake the Indonesian State holds in PT Vale) and that it did not produce and sale nickel ore but nickel matte. While indeed PT Vale is a manufacturer of nickel matte, PT Vale also has a nickel ore mine in Indonesia ⁽⁷⁹⁾ and extracts nickel ore for its captive use.
- (386) This shows that the GOID provided inaccurate information regarding the largest nickel miners suppliers, the GOID also contradicted itself between what it declared in the questionnaire reply and deficiency letter reply and what it explained at the RCC. Furthermore, the GOID not only submitted unreliable data for the consumption of nickel ore as explained in recital (351), also the production volume of nickel ore is unreliable as the GOID did not include the production of nickel ore for captive consumption. These blatant inconsistencies cast doubt on the accuracy and reliability of the GOID in these aspects of the investigation.
- (387) In order to fill all the substantial gaps regarding State ownership and the exercise of control in the nickel ore mining companies given the limited and inconsistent information provided by the GOID, the Commission carried out research based on publicly available sources. Unfortunately, little information was publicly available on ownership and control of the mining companies, including the large ones. Nevertheless, this research revealed that in addition to Antam ⁽⁸⁰⁾, the State also owns shares in PT GAG Nickel and PT WEDA Bay Nickel ⁽⁸¹⁾ through Antam, although the GOID claimed that it did not have information about the shareholders' structure of PT WEDA Bay Nickel.
- (388) In addition, the Commission research showed that another State-owned company, that is PT Timah Tbk, conducts its nickel mining business through subsidiary PT Tim Nikel Sejahtera in Southeast Sulawesi ⁽⁸²⁾. The shareholder of PT Tonia Mitra Sejahtera, one of the companies mentioned by the GOID, is the Indonesian Ministry of Trade.
- (389) The Commission then calculated the share of State-owned companies based on the percentages of domestic production submitted by the GOID in the investigation. 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 % ⁽⁸³⁾ (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. On the basis of Article 28, the Commission could thus infer that a larger share of mining companies producing nickel ore was actually State-owned. This percentage can only increase in view of the divestment obligation explained in recitals (425) to (434).
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- ⁽⁷⁶⁾ <http://www.vale.com/indonesia/EN/investors/information-market-id/annual-reports/doc/2020-Annual-Report-PT-Vale-Indonesia-Tbk.pdf>
- ⁽⁷⁷⁾ A 100 % Indonesian State-owned company.
- ⁽⁷⁸⁾ <http://www.vale.com/indonesia/EN/investors/information-market-id/shareholder-profile/Pages/default.aspx>
- ⁽⁷⁹⁾ <http://www.vale.com/indonesia/en/business/mining/nickel/nickel-indonesia/pages/default.aspx>
- ⁽⁸⁰⁾ The GOID is the controlling shareholder in Antam via Inalum who has 65 % stake in Antam.
- ⁽⁸¹⁾ Antam owns 10 % stake in PT Weda Bay Nickel. Antam has the option to increase its shares in PT WBN to 25 %. The remaining 90 % is owned by Strand Minerals Pte. Ltd who is currently 57 % owned by the Tsingshan group and 43 % owned by Eramet S.A (see Annual report of Antam of 2020, page 421).
- ⁽⁸²⁾ <https://timah.com/userfiles/post/2103166050097BA4F96.pdf> (Annual report 2020 of PT Timah).
- ⁽⁸³⁾ PT Vale was included based on publicly available information (PT Vale annual report).

- (390) The Commission had to rely on its own research also with regard to management and control of the mining companies due to the lack of cooperation of GOID. Once again, limited information was publicly available. As concerns Antam, the Commission found that according to its annual reports, the Board of Commissioners is composed of five members and the Board of Directors is composed of four members. It appears that the GOID holds directly in Antam only Series A share with 'Dwiwarna Ownership'. All other shareholders hold Series B shares. The Dwiwarna Shareholders/proxies have the exclusive rights to appoint Directors and the Board of Commissioners. In 2018, two out of five members of the Board of Commissioners and three out of four members of the Board of Directors were dismissed and replaced, on proposal by the GOID and its 'proxy'. Similarly, in 2019 the President Commissioner, the President Director and other two directors were dismissed and replaced, on proposal by the GOID and its 'proxy'. Moreover, the current President Commissioner is a former member of the Armed Forces, another Commissioner is a current member of the State Intelligence Agency, another one is an officer at the MEMR. Only two out of five commissioners benefit from the qualification of 'Independent Commissioners'. Finally, in the Board of Commissioner, one director is a former employee of GAG Nikel, another one a former employee of Inalum and another one also a former employee of another State-owned company. Only one director comes from the private sector.
- (391) Furthermore, GAG Nikel's Board of Commissioners is composed of two members while, the Board of Directors is composed of two members according to GAG Nikel's questionnaire reply or three members pursuant to Antam's 2020 annual report). One current member of GAG Nikel's Board of Commissioners is the former Director of Mineral and Coal Revenue of the MEMR while the former (not as of 20 June 2020) President Commissioner was an employee of Antam. The current GAG Nikel's President Director and another director are employees of Antam, the third director is an employee of Inalum.
- (392) PT Vale's Board of Directors is composed of five members and the Board of Commissioners is composed of 10 members. The current Vice-President of the Board of Commissioners, is the current Director of Strategic Services of Inalum ⁽⁸⁴⁾. Another member of the Board of Commissioners is the former Minister of Communication and Information of Indonesia and Deputy CEO of the Indonesian State-owned electricity company PT. PLN. Another member of the Board of Commissioners is the former Director General of the MEMR and former President Commissioner of Antam and the current assistant to the Minister of Industry for Metal, Natural Gas and Natural Resources Affairs.
- (393) 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.

Government authority and the exercise of meaningful control by the GOID

- (394) In addition to the State ownership and formal links between the State and the mining companies, the Commission assessed whether the mining companies possess governmental authority and whether they exercise this authority in the performance of governmental functions.
- (395) 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. These obligations clearly show that the mining companies are performing governmental functions.
- (396) As relevant background to all these measures, the Commission recalls that according to Article 4 of the 2009 Mining Law, the minerals are controlled by the State. Furthermore, the key objective of 2009 Mining Law is to maximise the added value from the nickel ore reserves to the Indonesian economy. To do so, the legislation provides for State control of minerals and coal mining activities. Article 2(2) provides that 'The control of mineral and coal by the state as referred to in paragraph (1) shall be realised by the Government and/or regional governments'. Furthermore, the GOID can set a mineral policy that gives priority to domestic interests, notably through the control of production and exports. Article 5(2) stipulates that 'The national interests as referred to in paragraph (1) can be realized through the control of production and exports'. The GOID has the authority to set the annual production of each commodity for each province. Article 5(3) stipulates that 'In conducting the control as referred

⁽⁸⁴⁾ <http://www.vale.com/indonesia/EN/aboutvale/local-leadership/boc/Pages/default.aspx>

to in paragraph (2), the Government has the authority to set the annual production of each commodity for each province.' Pursuant to Article 144, the GOID is closely supervising the management of the mining business. As an implementation of this article, the GOID enacted GR 55/2010 regarding the guidance and supervision of the implementation of the management of mining activities. Article 22 stipulates that the GOID's supervision refers, among others to 'the realization of production and sales including the quality and quantity and the price of mineral and coal'.

- (397) Furthermore, as an implementation of 2009 Mining Law, the GOID enacted GR 23/2010 as amended by GR 24/2012. Based on Article 89(1) 'The Minister shall control the production of minerals and coal made by mineral and coal Production Operation Mining Permit holders and mineral and coal Production Operation Special Mining permit holders' and Article 89(2), 'Control of mineral and coal production as intended by section (1) shall aim to: a. meet the environmental requirements; b. conserve mineral and coal resources; c. control mineral and coal prices.' In addition, according to Article 90(1) 'The Minister shall determine the national quantity of mineral and coal production at the provincial level' and according to Article 90(2) 'The Minister may delegate authority to the governors to determine the quantity of mineral and coal production for the respective districts/cities.' Furthermore, Article 84 stipulates that '(1) Production Operation Mining Permit holders and Production Operation Special Mining Permit holders must give preference to the domestic needs of minerals and/or coal. (2) The Minister shall determine the domestic needs of minerals and coal as intended by section (1) that include the needs for processing industries and domestic direct use.'
- (398) The control of production is further accompanied by the control of domestic sales and prices of minerals. Article 92(1) of this regulation authorizes the Minister to 'control mineral and coal sales undertaken by mineral and coal Production Operation Mining Permit holders and mineral and coal Production Operation Special Mining holders'. Furthermore, Article 92(2) stipulates that 'Control of mineral or coal sales as intended by section (1) shall aim to: a. give preference to the supply of the domestic needs of minerals and coal; and b. stabilize mineral and coal prices.'
- (399) In addition to the production volume, the GOID is strictly supervising all the sales transactions on the domestic market. Article 10 of MEMR 7/2017 reads 'Holders of Metal Minerals Production Operation IUP, Coal Production Operation IUP, Metal Minerals Production Operations IUPK, and the Coal Production Operation IUPK must submit any Metal Minerals or Coal sales contract to the Minister through the Director General or the governor in accordance with their authority.' Furthermore, Article 11 reads as follows: '(1) Holders of Metal Minerals Production Operation IUP, Coal Production Operation IUP, Metal Minerals Production Operation IUPK, and Coal Production Operation IUPK are required to submit reports on the implementation of Metal Minerals or Coal sales activities every month no later than 5 (five) calendar days after the end of each month to the Minister through the Director General or governor in accordance with his authority. (2) Report on the sales of Metal Minerals or Coal referred to in paragraph (1) shall at least contain the selling price, sales volume, quality of Metal Minerals or Coal sold, point of sales, and the country or region of sales.'
- (400) These measures already show the strong interference and central government control in the mining sector including the nickel ore, *inter alia* with regard to production and sales target, price controls, and a bias in favour of domestic needs for minerals extracted in Indonesia. This is not a mere regulatory framework for the mining business, but the 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. The following measures specific to the nickel ore sector further show how the GOID exercise its authority and control over mining companies.

Domestic processing obligation

- (401) 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'.

- (402) The obligation to conduct processing and refining domestically is intended to, among other things, (a) increase the value of mining through its commodities, (b) provide raw materials for industry, (c) provides employment, and (d) increase the state's income. In other words, these provisions imposed an obligation on all nickel ore mining companies either to build their own nickel processing/purification facility or to sell their product to such a domestic facility.
- (403) Furthermore, Article 170 of the 2009 Mining Law provided for a five year 'grace period': 'The holder of a work contract [...] which has already commenced production is required to begin purification as stated in Article 103 paragraph (1) no later than 5 (five) years from the enactment of this Law'. Article 112(4) of GR 23/2010 as amended by GR 24/2012 confirmed that holders of mining business license must conduct processing and refining domestically no later than five years after the enactment of 2009 Mining Law 'Mining authorizations, regional mining permits and small-scale mining permits granted under laws and regulations prior to the issuance of this Regulation of the Government shall remain valid until their expiration and must: [...] (c) undertake domestic processing and/or refining/smeltering at the latest 5 (five) years of Law Number 4 of 2009 concerning Mineral and Coal Mining coming into effect'.
- (404) These 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. They are therefore vested with government authority and perform government-mandated activities as a result.

Export restrictions

- (405) On 11 January 2014, the GOID issued GR 1/2014 which amended Article 112 of GR 24/2012 and added a new Article 112C. The key amendment to Article 112 was the removal of Article 112 (4) (c) in GR 23/2010 which required the holder of a mining business licence (IUP) or small scale mining licence (IPR) to conduct domestic processing and refining of minerals within five years after the enactment of 2009 Mining Law given that the deadline had passed. The key terms in this additional Article 112C were as follows: (1) Holders of Contracts of Work as referred to in Article 170 of 2009 Mining Law must refine their mining products domestically and (2) Holders of operational and production mining business licences (IUPOP) as referred to in Article 112 (4) (a) of this regulation must process and refine their mining products domestically ⁽⁸⁵⁾.
- (406) On the same day MEMR 1/2014 ⁽⁸⁶⁾ was issued as an implementing regulation of GR 1/2014. MEMR 1/2014 provided guidance on the level of processing or refining which must be met prior to export. MEMR 1/2014 defined the 11 metal minerals that were banned from export as of January 2014. Six metals, including nickel, could only be exported in a processed form.
- (407) 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 GR 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, subject to conditions set out in implementing regulations. Article 4 of MOT 01/M-DAG/PER/1/2017 stipulated as follows: 'Mining Products attached in Appendix III as intended in Article 3 paragraph (1) can only be exported with provisions: a. company owning IUP of nickel Production Operation or IUPK of nickel Production Operation: 1. has used nickel with content <1.7 % (less than one point seven percent) at least 30 % (thirty percent) of total input capacity of the possessed nickel processing and purifying facility; and 2. has built or is building purifying facility, independently or cooperate with other parties'.
- (408) Based on MEMR 25/2018 there were specific rules that were applicable to metal minerals with particular criteria (i.e. nickel with a content of < 1,7 %). Article 46(1) stipulates that 'The holders of Mining Business License (IUP) for Production Operation or Special Mining Business License (IUPK) for Production Operation can conduct the Sales of nickel with a level of <1,7 % (less than one point seven percent) or washed bauxite with a level of Al₂O₃ >= 42 % (more than or equal to forty two percent) abroad in the specific quantities by using the Tariff Post/ HS (Harmonized System) in accordance with the provisions of the laws and regulations at the latest of the date of January 11, 2022.'

⁽⁸⁵⁾ <https://www.pwc.com/id/en/publications/assets/eumpublications/newsflash/2014/eumnewsflash-50.pdf>

⁽⁸⁶⁾ <http://extwprlegs1.fao.org/docs/pdf/ins137694.pdf>

and Article 46(2) stipulates that 'The sales of nickel with a level of <1,7 % (less than one point seven percent) or washed bauxite with a level of $\text{Al}_2\text{O}_3 \geq 42$ % (more than or equal to forty two percent) as referred to in paragraph (1) is conducted with the provisions: a. Has or is building the facility of Purification; and b. Paying the export duty in accordance with the provisions of the laws and regulations.' The refining/smeltering facility was allowed to be built either individually or jointly with other parties.

- (409) The export of these products could only be conducted after examination process by surveyor and approval from the Directorate General of Foreign Trade ('DGoFT') was granted following a recommendation from the MEMR. The purpose of the examination was to ensure that the mining products satisfied the minimum processing and/or refining requirement.
- (410) In February 2017, the Minister of Finance ('MoF') issued PMK No. 13/PMK.010/2017 ⁽⁸⁷⁾ (as subsequently amended by MoF Regulation PMK No. 164/PMK.010/2018) setting out the rates of export duty for the various forms of processed metal minerals. For nickel ore with concentration < 1,7 % Ni the export tax was 10 %.
- (411) Pursuant to MEMR 11/2019 the ban on nickel ore export with content below 1,7 % Ni was accelerated to 31 December 2019. Any export recommendation that had been issued by the MEMR for nickel ore export with content below 1,7 % Ni prior to the issuance of MEMR 11/2019 remained valid. However, that recommendation expired on 31 December 2019. The MEMR 11/2019 became effective on 1 January 2020. The MEMR was still able to issue export recommendation for nickel ore with content below 1,7 % Ni until the 31 December 2019.
- (412) Therefore, as of 1 January 2020 all types of nickel ore are forbidden from being exported.
- (413) These export restrictions and the export ban of nickel ore significantly limit the freedom of mining companies to sell nickel ore to buyers offering the highest price worldwide. These companies can only sell in the Indonesian market for the benefit of the downstream industry, mainly the stainless steel industry, despite nickel ore resources being scarce worldwide and Indonesia being a very large producer. These restrictions lead to a very limited number of domestic customers as the user industries, and also to depressed domestic prices of nickel ore. Once again, this shows that mining companies, far from being free market players, are 'public bodies' effectively performing governmental activities.

Annual working plans and budget (RKAB)

- (414) Pursuant to Article 101 of GR 23/2010 as amended by GR 24/2012 'Mining Permit holders and Special Mining Permit holders must turn in all data obtained from explorations and production operations to the competent Minister, governors, or regents/mayors.' Furthermore, pursuant to Article 103 'Reports as intended by Article 101 shall be progressive reports on work within a specified time frame and a specified activity submitted by Exploration Mining Permit holders and Exploration Special Mining Permit holders as well as Production Operation Mining Permit holders and Production Operation Special Mining Permit holders.' Moreover 'Annual working plans and budget (RKAB) as intended by Article 101 shall be submitted to the competent Minister, governors or regents/mayors at the latest 45 (forty-five) working days prior to the conclusion of each calendar year'.
- (415) MEMR 11/2018 ⁽⁸⁸⁾ (as amended by MEMR 22/2018 and MEMR 51/2018) defines the annual RKAB as 'annual work and budget plan in the business of minerals and coal mining, covering the aspects of business, technical and environment'. MEMR 11/2018 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). In addition to providing such an obligation, 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.

⁽⁸⁷⁾ <https://jdih.kemenkeu.go.id/fulltext/2017/13~PMK.010~2017Per.pdf>

⁽⁸⁸⁾ <http://www.apbi-icma.org/uploads/files/old/2018/02/Peraturan-Menteri-ESDM-No.11-Tahun-2018-English-Version-.pdf>

- (416) The annual RKAB has to be submitted by mining business license holders and special mining business license holders at least 90 calendar days, and no later than 45 calendar days, before the end of the fiscal year, which also includes the obtaining of the consent for the annual RKAB.
- (417) On behalf of the MEMR or the Governor, the Directorate General of Minerals and Coal (DGoMC) shall perform an evaluation of the annual RKAB and provide the consent for, or a response about the annual RKAB in no more than 14 business days after the date when the annual RKAB was completely and properly received. IUP holders are required to deliver the revised version of the annual RKAB, which must accommodate the response from the DGoMC, in no more than five days after the date when the response from the DGoMC was received. The DGoMC shall give consent for the revised version of the annual RKAB in no more than 14 business days after the date when the revised annual RKAB was completely and properly received. Holders of Exploration IUPs and IUPs, IUP-OPs, IUPK-OPs, or IUP-OP specifically for processing and/or refining may apply for one amendment to the annual RKAB in the current year, should there be a change in their production capacity. The application for an amendment to the annual RKAB is to be submitted after the IUP holder has submitted its second quarterly report, and it has to be submitted, at the latest, by 31 July of the current year. Holders of IUP-OPs and IUPK-OPs must submit amendments to their reports on the feasibility study, should there be any changes to the technical, economic, or environmental variables, according to the provisions of the applicable rules and regulations. Holders of exploration IUPs and IUPs, IUP-OPs, IUPK-OPs, or IUP-OPs specifically for processing and/or refining must report any amendments to the utilisation of their mining service businesses in the current year.
- (418) MEMR 11/2018 has been revoked and replaced by MEMR 7/2020 ⁽⁸⁹⁾. MEMR 7/2020 provides similar provisions as MEMR 11/2018 regarding the requirement to have the Annual RKAB.
- (419) During the investigation, the GOID submitted four RKABs for nickel ore miners. 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).
- (420) Unfortunately, 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 afterwards with regard to production actually achieved for the period covered by the feasibility study. Due to the lack of cooperation on this important aspect, the Commission had to rely on inferences on the basis of Article 28 of the basic Regulation.
- (421) The GOID submitted the volume of production of nickel ore during the period 2017 to 2020 in Indonesia as well as the domestic consumption of nickel ore during the same period. This data showed that there was a significant discrepancy between the volume of production and volume of consumption of nickel ore. Furthermore, 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.
- (422) Furthermore, it is noted that in addition to the annual RKAB submission requirement explained in recitals (414) to (419), MEMR 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. Among the type of information required to be submitted, the IUP holders have to submit information on the production and sales activities.
- (423) During the RCC, GAG Nickel confirmed that it reported on a quarterly, semi-annual and annual basis the volume of production as well as the volume and the value of the sales of nickel ore. The Commission requested the company to provide these reports for the investigation period. The Commission granted the GOID several days after the end of the RCC to submit this information. However, the GOID submitted this data only after the Commission informed the GOID about the application of Article 28 of the basic Regulation as explained in recital (349).

⁽⁸⁹⁾ [http://www.apbi-icma.org/uploads/files/regulation/PERMEN%20ESDM%20NO.%207%20THN%202020%20\(ENG-VERSION\).pdf](http://www.apbi-icma.org/uploads/files/regulation/PERMEN%20ESDM%20NO.%207%20THN%202020%20(ENG-VERSION).pdf)

- (424) 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. 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. The degree of commonality or overlap in the essential characteristics of the mining companies with the GOID's objectives and functions in the mineral sector shows that the mining companies possess, exercise or are vested with governmental authority.

Divestment obligation

- (425) 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. The 2009 Mining Law was silent on the level of shareholding, which must be divested, leaving it to be further regulated by the Central Government in relevant implementing regulations.
- (426) The Central Government has gradually changed the minimum percentage of divestment requirement since the issuance of the 2009 Mining Law. Currently, the prevailing minimum divestment requirement is 51 %, as applied by the fourth amendment to GR 23/2010 in 2017 (GR 1/2017)⁽⁹⁰⁾ and MEMR 9/2017⁽⁹¹⁾ (as amended by MEMR 43/2018⁽⁹²⁾).
- (427) Pursuant to Article 97 'Mining Permit holders and Special Mining Permit holders in the scope of foreign investment must upon 5 (five) years of production divest their shares in stages, such that in the tenth year at least 51 % (fifty-one percent) of their shares shall be owned by the Indonesian participants.' Furthermore, 'Share divestment as intended by section (1) shall be made to Indonesian participants that include the Government, the provincial governments, or the district/city governments, State-Owned Entities, Region-Owned Entities, or national private entities'.
- (428) 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. The divestment may be conducted through the issuance of new shares and/or the transfer or sale of existing shares, either directly or indirectly. To be noted that unlike mining companies, smelter companies are not subject to any divestment obligation.
- (429) MEMR 9/2017 stipulates that the divestment share price is based on the 'fair market value', without considering the value of the mineral reserves at the time when the divestment is conducted. This provision regarding the divestment share price has been changed by MEMR 43/2018, which states that the fair market value shall not consider the mineral or coal reserves, except those which may be mined within the period for IUP-OPs or IUPK-OPs. Furthermore, the calculation of the fair market value shall be conducted by the discounted cash flow method, using the economic benefits within the divested implementation period until the end of the IUP-OP or IUPK-OP and/or market data benchmarking.
- (430) Based on MEMR 9/2017, the regulated divestment share price would become: a. The maximum price to be offered to the Central Government, Provincial Government or Regency/Municipal Government; or b. The minimum price to be offered to a State-owned company ('BUMN'), region-owned company ('BUMD'), or national private business entity.
- (431) PerMen 43/2018 amended the above provision, and stipulated that the regulated divestment share price would become: a. The maximum price to be offered to the Central Government, Provincial Government or Regency/Municipal Government, BUMN, BUMD, or a special purpose vehicle that has been established or appointed by the Government through the MEMR, together with the Provincial Government or Regency/Municipal Government, BUMN and/or BUMD; or b. The minimum price to be offered to a national private business entity by way of tender.

⁽⁹⁰⁾ <http://www.apbi-icma.org/uploads/files/old/2017/02/PP-No.1-2017-ENGLISH-Version.pdf>

⁽⁹¹⁾ <http://www.apbi-icma.org/uploads/files/old/2017/02/Permen-ESDM-No.9-2017-English-Version.pdf>

⁽⁹²⁾ https://jdih.esdm.go.id/peraturan/25_Permen%20ESDM%20No.%2043%20Tahun%202018%20tentang%20Perubahan%20atas%20Permen%20ESDM%20Nomor%209%20Tahun%202017.pdf

- (432) The Government (via the MEMR) may engage an independent evaluator to evaluate the divestment share price. If agreement cannot be reached on the divestment share price, MEMR 9/2017 stipulated that the divested shares shall be offered on the basis of the divestment share price that has been calculated in reference to the evaluation that has been performed by the Government. This provision has now been removed in MEMR 43/2018.
- (433) The 2020 Mining Law retained the foreign ownership divestment requirement and specifically provided that foreign investors must divest a number of shares necessary to ensure that at least 51 % of the total shares of the company are held by Indonesian investors. This minimum divestment requirement is consistent with the current divestment requirements applied under GR 23/2010. As regards timing and procedures for such divestment, 2020 Mining Law provides that such matters will be subject to relevant Government Regulations (currently, GR 23/2010), which requires that the divestment process starts after the 5th anniversary of the mine's production.
- (434) These provisions show that the GOID seeks to increase its meaningful control over the mining companies by increasing its presence and displacing foreign-owned mining companies. 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. There 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. On this basis, 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.

Mandatory pricing mechanism

- (435) The investigation 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. The evolution of the relevant legislation on pricing shows that GOID has been actively monitoring nickel ore prices with specific measures dating back to 2010. In the early days, the GOID claimed that the pricing mechanism mainly applied in the context of collecting royalties. Subsequently, the GOID's intervention on prices has been reinforced over the years until the formal introduction into legislation of a specific mandatory pricing mechanism that codified a pricing mechanism which already *de facto* existed. Throughout 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.
- (436) The main objective of the pricing mechanism is to ensure that nickel ore is supplied at a significant discount to the international prices for the benefit of the stainless steel industry. At the same time, the regulated price seeks to take into account also the interests of miners to ensure continuity of supply at this discounted price, and avoid bankruptcies and social unrest. Finally, it ensures a minimum level of revenue for the State, although a much lower one than if there were no discount as compared to the international price. This has been confirmed by the Acting Director General of Mineral and Coal who said, as mentioned below, that it intended to find 'justice for smelters who want the lowest possible prices. But on the other hand, [it] must ensure that nickel mining activities provide sufficient margin for mining.' ⁽⁹³⁾
- (437) On the basis of all the evidence available, the Commission concluded 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. Via this mechanism, 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.

⁽⁹³⁾ <https://www.esdm.go.id/en/media-center/news-archives/-new-regulation-on-mineral-ore-benchmark-price-issued>

Designation of mining companies as 'National vital objects'

- (438) An additional piece of evidence showing that mining companies are vested with government authority is their formal designation as 'National vital objects'.
- (439) The investigation showed that the nickel miners PT. Antam TBK UPBN Southeast Sulawesi, PT. Ceria Nugraha Indotama, PT Vale are formally recognised as National Vital Object in the Mineral and Coal sector ⁽⁹⁴⁾. It is recalled that Antam is a State-owned company and the State also holds shares in PT Vale, while PT Ceria Nugraha Indotama is a private company.
- (440) This status is based on Decree of the MEMR Number 202.K/HK.02/MEM.S/2021 concerning the second amendment to the Decree of the Minister of Energy and Mineral Resources Number 77 K/90/MEMILIKI/2019 concerning National Vital Objects in the energy and mineral resources, of October 18, 2021 ⁽⁹⁵⁾. 34 companies in the mineral and coal sectors are listed as national vital objects.
- (441) The companies entitled to this recognition are businesses vital to the economic development of the country or sources of State income of a strategic nature. For the mineral and coal sector. The National vital objects will have the first priority from the Indonesian National Police Force in terms of security assistance when there is any disruption to operations or threat. According to Regulation 63 of 2004 about security of the national vital objects, 'The National Vital Objects Maintainer is responsible for the safeguarding of the National Vital Objects each based on the principle of internal security'. Furthermore, 'The State Police of the Republic of Indonesia is obliged to provide security assistance to the National Vital Object' and 'The State Police of the Republic of Indonesia deployed the National Vital Object protection force based on the need and estimation of the threat and/or disorder that may arise.' The State intervention is also assured in case there are actions of trade unions ⁽⁹⁶⁾.
- (442) On the basis of the above, the Commission concluded 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.

Conclusion

- (443) The above 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.
- (444) 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 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.
- (445) 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.

⁽⁹⁴⁾ <https://cerindocorp.com/News/61835aaa4161220b3a25ea7d>

⁽⁹⁵⁾ <https://cerindocorp.com/News/61835aaa4161220b3a25ea7d>

⁽⁹⁶⁾ <https://industrialindah.com/tag/obyek-vital-nasional/>

(ii) Mining companies entrusted or directed by the GOID

- (446) In addition to the findings of the mining companies being a 'public body' for the purpose of Article 3(1)(a) of the basic Regulation, 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, as provided by Article 3(1)(a)(iv) of the basic Regulation.

Legal standard

- (447) Article 3(1)(a)(iv), second indent, of the basic Regulation states that a financial contribution exists if a government: 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practises normally followed by governments'. The type of functions described by Article 3(1)(a)(iii) of the basic Regulation occurs where '*a government provides goods or services other than general infrastructure, or purchases goods...*'. Those provisions 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.
- (448) The WTO panel in *US – Export Restraints* ruled that the ordinary meaning of the two words 'entrust' and 'direct' in Article 1.1(a)(1)(iv) of the SCM Agreement require that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). It rejected the US 'cause-and-effect-argument' and asked for an explicit and affirmative action of delegation or command. However, in a subsequent case (*US – Countervailing duties on DRAMS*), the Appellate Body held that the replacement of the words 'entrusts' and 'directs' by 'delegation' and 'command' is too rigid as a standard. According to the Appellate Body, '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. In both cases, the government uses a private body as proxy to effectuate the financial contribution, and 'in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement'.
- (449) At the same time, paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement does not allow Members to impose countervailing measures to products 'whenever the government is merely exercising its general regulatory powers' or where government intervention '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'. Rather, entrustment and direction implies 'a more active role of the government than mere acts of encouragement'. Moreover, the WTO did not consider that 'leaving discretion to a private body is necessarily at odds with entrusting or directing that private body [...]. While 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), this is a factual/evidentiary matter to be addressed on a case-by-case basis.' In line with those WTO rulings, not all government measures capable of conferring benefits equate to a financial contribution under Article 3 of the basic Regulation and Article 1.1 (a) of the SCM Agreement.
- (450) In a nutshell, the relevant WTO rulings provide that:
- (i) the determination of whether there is a 'financial contribution' under Article 1.1(a)(1) of the SCM Agreement should focus on the nature of the government action, rather than on the effects or the results of the government action. In other words, it is well acknowledged that governments intervene in the market as regulators and, when so doing, they cause effects on the market and its operators. In this sense, a government may legitimately impose export taxes in order to generate revenue in case of a very competitive commodity in the international markets. In contrast, there is no such legitimate imposition of export restrictions when it becomes evident that the use of such an instrument together with other mechanisms to keep commodities in the domestic market, and to force suppliers to sell below market prices, are part of a broader scheme engineered by the government to support a particular industry or set of industries to boost their competitiveness. Thus, the nature of the government action, including its context, object and purpose, is relevant in assessing the 'financial contribution' element;

- (ii) 'entrustment' or 'direction' would involve an explicit and affirmative action addressed to a particular party in relation to a particular task or duty, this being very different from the situation in which a government intervenes in the market in some way, which may or may not have a particular result given the factual circumstances and exercise of free choice by the actors in that market. Ultimately, the key question behind the concepts of entrustment or direction is whether the conduct in question, i.e. the financial contribution in the form of provision of goods for less than adequate remuneration, can be attributed to the government or still is the free choice of the private operators in view of market considerations, such as regulatory constraints;
- (iii) Article 1.1(a)(1)(iv) of the SCM Agreement is, in essence, an anti-circumvention provision and, thus, 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. 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. However, governments are likely to have other means at their disposal to exercise authority over a private body some of which may be 'more subtle' than a command or may not involve the same degree of compulsion;
- (iv) There must be 'a demonstrable link' between the government act and the conduct of the private body. There is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence (such as implicit and informal acts of delegation or command), provided that such evidence is probative and compelling. In this respect, evidence of the government's intention to support the downstream industry (for example, through publicly stated policies or government decisions, or other governmental actions), or the existence of other government measures ensuring a particular result on the market (e.g. an export restraint together with a government measure preventing operators subject to those restraints from stocking their products or a government price regulation with a view to keeping domestic prices low for the product concerned), may be relevant to determine the existence of a 'financial contribution' under Article 1.1(a)(1)(iv) of the SCM Agreement (in particular as an indirect manner for the government to provide goods, as provided in sub-paragraph (iii)). In some circumstances, 'guidance' by a government can constitute direction. Finally, depending on the circumstances, a private body may decide not to carry out a function with which it was so entrusted or directed, despite the possible negative consequences that may follow. This does not show, however, on its own, that the private body was not entrusted or directed.

- (451) In line with that case-law, the Commission examined the nature of the GOID's intervention, i.e. whether the GOID's intervention involves the entrustment or direction of nickel ore producers to provide nickel ore at less than adequate remuneration to smelters; the nature of the entrusted or directed bodies, i.e. whether the nickel ore producers are private bodies within the meaning of Article 3(1)(a)(iv) of the basic Regulation; and the action of the entrusted or directed bodies, i.e. whether the entrusted or directed nickel ore producers provide nickel ore to the Indonesian smelters for less than adequate remuneration and hence act as a proxy for the GOID. Moreover, the Commission assessed whether the function carried out would normally be vested in the government, i.e. whether the provision of nickel ore to smelters in Indonesia is a normal government activity, and whether such function does not, in real sense, differ from the practices normally followed by governments, i.e. whether the actual provision of nickel ore by producers/mining companies, in real sense, differs from what the government would have done itself.

Assessment

- (452) In view of the WTO case-law referred to in the previous section, Commission analysed first whether the GOID's support to the Indonesian steel industry in the form of provision of nickel ore for less than adequate remuneration is effectively an objective of the various government measures in question and not merely a 'side effect' of the exercise of general regulatory power. The investigation examined in particular whether the lower prices of nickel ore found were part of the government's objectives, or whether the lower prices were rather an 'inadvertent' by-product of general governmental regulation. The Commission concluded that the various interventions by the GOID had as their objective to support the stainless steel industry, and that the lower nickel ore prices were an intended objective of these measures.
- (453) The GOID took a number of measures throughout the years to achieve its policy goal. Section 4.4 has detailed the relevant background and context leading to the GOID's decision to maximise the added value from the significant nickel ore reserves by developing domestically a smelting and downstream stainless steel industry. Part of this overall policy of the GOID was to incentivize smelters to build and maintain smelting capacity in Indonesia, *inter*

alia by ensuring low prices for nickel ore for these smelters, and in particular through export restrictions in combination with additional government measures; notably domestic processing requirements and a mandatory pricing mechanism keeping prices artificially low.

- (454) In particular, the 2009 Mining Law imposed the obligation on all nickel ore mining companies either to build their own nickel processing/purification facility or to sell their product to such a domestic facility. This constituted a *de facto* export ban of unprocessed nickel ore. One of the key stated objectives of the 2009 Mining Law in this respect is: 'to support and grow the expansion of national capabilities so that there is greater competitive ability at the national, regional, and international levels' (Article 3(d)). The 2009 Mining Law confirms the GOID aim to build the downstream mineral processing industries and ensure that they have competitive advantage on an international level. As 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.
- (455) As explained in detail in the previous section on mining companies acting as public bodies, the GOID has implemented in particular the following measures concerning nickel ore which apply to all mining companies irrespective of whether they are State-owned or privately owned:
- i. Domestic processing obligation (see recitals (401) to (404));
 - ii. Export restrictions until 2019 and a full export ban as of 1 January 2020 (see recitals (405) to (413));
 - iii. Mandatory pricing mechanism (see recitals (435) to (437)).
- (456) 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.
- (457) 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.
- (458) The GOID started regulating certain aspects of nickel ore prices as early as 2010 through Article 85 of GR 23/2010. The legislation included a reference price mainly for the purposes of calculating the level of royalties due to the GOID. It did not yet regulate the transaction prices between mining companies and smelters. Also, in these early days, the reference price only applied to domestic transactions of nickel ore. The GOID wanted to ensure that, given the potentially low level of domestic prices as opposed to export prices, the government would be able to collect a fair level of royalties on domestic sales. The pricing mechanism as set out in Article 85 was subject to an important amendment in 2017 through GR 1/2017, whereby the GOID started regulating not only the nickel ore price as regards royalties but the actual transaction price. The amended version of Art. 85 as in GR 1/2017 reads as follows: '(1) Holders of IUP Production Operation, both mineral and coal, which sells mineral and coal must refer to the reference price (2) The price which mentioned in point (1) is stipulated by: a. Minister for metal and coal b. Governor or regent/mayor, depending on its role, for non-metal minerals and rocks. (3) The price, which mentioned in point (1), is stipulated by market mechanism and/or depending on the price which accepted in international market. (4) Details about price fixing of metal minerals and coal are arranged by Minister Regulation.' ⁽⁹⁷⁾

⁽⁹⁷⁾ The GOID stated that this amended version of Article 85 in GR 1/2017 was meant to apply the HPM in mineral and coal sale for the purpose of State revenue calculation. However, there does not seem to be any reference to the fact that the HPM should be used only for the purpose of State revenue calculations in this regulation.

- (459) 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. The reference price for nickel (HPM) was provided by a formula set in MEMR Decree 2946K/30/MEM/2017, as follows: $\text{HPM Nickel Ore} = \% \text{ Ni} \times \text{CF} \times \text{HMA Nickel}$. '1. HPM Nickel Ore shall be the reference price of metal mineral in form of nickel ore in USD/DMT 2. % Ni is the content of Ni in the nickel ore. 3. CF is Corrective Factor, which is the amount of percentage that accommodates discount or premium value against the quality of commodity being sold, under the provision of: a. CF for nickel ore with 1,9 % Ni = 20 %; and b. CF will fluctuate higher/lower by 1 % for each increase of Ni content by 0,1 %.' MEMR 7/2017 defines HPM as 'the price of metal minerals that are determined at a sale point, Free on Board for each mining commodity of Metal Minerals;' and HMA as 'the price obtained from the average published Mineral Metal prices in the previous month or price on the same date as the transaction according to the price quote from the published price of Metal Minerals'. The amount of HMA is determined by the Minister every month and it refers to international prices such as the London Metal Exchange (LME) price for nickel.
- (460) While 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.
- (461) The pricing regulation also specifically shows the GOID's intention to regulate prices for the benefit of the domestic stainless steel industry at a level below normal market conditions. The mechanism was intended to achieve a price at a significant discount to the international market price. This was confirmed by various GOID statements. This pricing mechanism was also instrumental to the GOID's policy objectives as it ensured that the mining companies could continue to produce and supply the downstream industry, because the GOID policy bias in favour of the smelters had endangered the subsistence of several miners.
- (462) The MEMR's Press Release No. 253.Pers/04/SJI/2020 on New Regulation on Mineral Ore Reference Price ⁽⁹⁸⁾ confirms the fact that via the regulated price mechanism the GOID intends to keep the low level of the nickel ore price to the benefit of the domestic smelting industry as its main objective, while ensuring that the price allows the continuation of nickel ore production. The Acting Director General of Mineral and Coal openly explains that 'the government set the HPM below international price to increase the economies of scale of smelters,' and that 'the lower the HPM is, the more economical the smelters are. We always set the HPM below international market price.' The Director of Mineral Fostering and Enterprise, Yunus Saefulhak, gave an illustration of the HPM setting below international price. 'For example, if international price is USD 60 (per Wet Metric Tonne), our (Indonesia) price is USD 30 (per WMT)' ⁽⁹⁹⁾.
- (463) Other commentators also report that the GOID kept a vigilant eye on smelters' interest when setting the nickel ore price. The Acting Director General of Mineral and Coal confirmed that it intended to find 'justice for smelters who want the lowest possible prices. But on the other hand, [it] must ensure that nickel mining activities provide sufficient margin for mining' ⁽¹⁰⁰⁾ and added 'Of course, please note that after calculating the average mineral price is still below the international price of 30 percent. This aims to encourage the investment climate of smelters to build processing and refining facilities in Indonesia.' ⁽¹⁰¹⁾ The regulated price for nickel ore, disconnected from market conditions, can only work with the parallel implementation of the export ban preventing miners from other selling opportunities and the possibility to circumvent the price limitations by selling their products abroad at a higher price.

⁽⁹⁸⁾ <https://www.esdm.go.id/en/media-center/news-archives/-new-regulation-on-mineral-ore-benchmark-price-issued>

⁽⁹⁹⁾ <https://www.esdm.go.id/en/media-center/news-archives/-new-regulation-on-mineral-ore-benchmark-price-issued>

⁽¹⁰⁰⁾ <http://www.ima-api.org/wp-content/uploads/2020/07/IMA-Daily-Update-Tuesday-July-21-2020-dikonversi.pdf>

⁽¹⁰¹⁾ <http://www.ima-api.org/wp-content/uploads/2020/07/IMA-Daily-Update-Tuesday-July-21-2020-dikonversi.pdf>

- (464) 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. The nickel ore miners are therefore deprived of a rational commercial choice, and are induced to comply with the GOID's policy objective to favour the stainless steel industry.
- (465) Based on the data provided by the GOID regarding the production and consumption of nickel ore in Indonesia, presuming that this data is accurate as the GOID claims (see recitals (348) and (351)), the production of nickel ore is significantly higher than the consumption of nickel ore.
- (466) In other words, these 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.
- (467) 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 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.
- (468) 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.
- (469) In the comments on final disclosure, the GOID objected firstly to the reference to the 1945 Constitution in recital (374) as completely irrelevant in the context of the establishment of the financial contribution. In this respect, the GOID recalled the principle of state sovereignty, which includes the principle of sovereignty over national resources, as recognised by the WTO Panel in *China – Raw Materials* ⁽¹⁰²⁾.
- (470) The Commission noted at the outset that the reference to the 1945 Constitution is without prejudice to the principle of state sovereignty, including the principle of sovereignty over natural resources. Indeed, the Commission did not question the possibility or the ability of the GOID to take policy and regulatory choices. The only finding that in recital (374) the Commission drew from the 1945 Constitution, together with the 2009 Mining Law, is that all minerals in Indonesia are public natural resources, which are controlled and utilized by the State. The Commission did not establish, based on the citation of the 1945 Constitution limited to Article 33, para. 2 alone, that the GOID provided a financial contribution in the context of the provision of nickel ore from LTAR. The relevance of the 1945 Constitution is justified by the fact that Article 33 is mentioned twice in the preamble of the 2009 Mining Law, which actually regulates the mining sector and provides an implementation to the principle enshrined in the 1945

⁽¹⁰²⁾ Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3 501, paras. 7.378 and 7.380.

Constitution. Furthermore, the Commission noted that the principle of state sovereignty does not exclude that certain policy and regulatory choices, freely adopted by the GOID, could be qualified, together with all the other evidence available, as providing a financial contribution for the purpose of the GOID's obligations under the WTO. Indeed, in *China – Raw Materials*, the Panel, while acknowledging that 'the ability to enter into international agreements – such as the WTO Agreement – is a quintessential example of the exercise of sovereignty' ⁽¹⁰³⁾, recalled that 'Members must exercise their sovereignty over natural resources consistently with their WTO obligations' ⁽¹⁰⁴⁾. Consequently, on the substance of the case, in *China – Raw Materials* the Panel recommended ⁽¹⁰⁵⁾ – and the Appellate Body upheld ⁽¹⁰⁶⁾ – that China had to bring its export duty and export quota on some raw materials in line with its WTO obligations. Therefore, the Commissions considered the reference to the Constitution relevant to understand the legal context and rejected this objection.

- (471) The GOID also claimed that the mining laws, regulations and policies quoted by the Commission are irrelevant in the context of the establishment of the financial contribution because they do not intervene in the commercial transactions between business operators. The GOID argued that the Commission misinterpreted the meaning of the word 'control', included in a number of provisions, which would actually refer to the activity of managing and supervising mining businesses or activities to combat illegal mining, to prevent environmental damage caused by mining activities and to ensure that the mining exploration is fully in line with good mining practices. In this respect, the GOID made reference to the definitions of direction, supervision, public protection and implementing guidance included in Chapter XIX of the 2009 Mining Law and in Article 3 of GR 55/2010, urging the Commission to take into account the whole legislation, including implementing measures, notably GR 55/2010. The GOID was of the opinion that these provisions did not prove that it intervened in private business transactions and instructed miners to provide nickel ore for LTAR.
- (472) More specifically, the GOID contested the role in the nickel ore market attributed to it by the Commission in recital (327) by referring to the preamble of MEMR 26/2018 concerning the implementation of good mining rules and the supervision of mineral and coal mining, which implements GR 55/2010 and states that the GOID's task is only to supervise and provide guidelines for the implementation of good mining principles and practices.
- (473) Also, the GOID reacted to the finding in recital (374) that all natural resources are controlled by it with the assertion that it needs to control the mining sector to prevent the negative impact of mining activities, such as environmental degradation and pollution in connection with mining areas.
- (474) The Commission considered, in the first place, that it had to take into account each relevant piece of legislation or regulation concerning the mining sector, including the implementing regulation, to reach a conclusion concerning the financial contribution in the context of the provision of nickel ore for LTAR. A legal assessment based only on partial information and evidence on file which neglected potentially relevant information and evidence would undermine the accuracy and adequacy of the Commission's findings. It was therefore the Commission's legal obligation to analyse all relevant evidence, contrary to the GOID's assertion. This argument was therefore rejected.
- (475) As for the other claims, the allegations that the Commission misunderstood the meaning of the word 'control' and partial, limited quotations of certain pieces of legislation are not as such capable of reversing the Commission's findings.
- (476) Indeed, the Commission does not dispute the fact that the GOID's control through management and supervision is exercised also in order to fight illegal mining, prevent environmental damage and ensure good mining practices. However, the GOID's control is not limited to these activities only. As the investigation and evidence have amply shown, the control of GOID was implemented also for the overarching objective of developing the domestic

⁽¹⁰³⁾ Panel Report, *China – Raw Materials*, cit., para. 7.382.

⁽¹⁰⁴⁾ Panel Report, *China – Raw Materials*, cit., para. 7.381.

⁽¹⁰⁵⁾ Panel Report, *China – Raw Materials*, cit., para. 8.8.

⁽¹⁰⁶⁾ Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295, para. 362(b).

processing industry inter alia by controlling the production and sale prices of nickel ore. The fact that the control may have other concurrent and/or ancillary objectives does not detract from this reality. This would already be sufficient to dismiss this claim.

- (477) For the sake of completeness, the Commission also analysed the definitions of direction, supervision and public protection in Chapter XIX of the 2009 Mining Law. The Commission noted that they refer to the activity of direction and supervision that the central GOID exercises over the provincial and district/city levels within their competences in the management of the mining sector. This is clear from the paragraphs introducing the definitions reported by the GOID, namely Article 139: 'The Minister shall give direction on management of mining business conducted by the provincial governments and district/city governments within his/her authority', and Article 140, para. 1: 'The Minister shall make supervision of management of mining business conducted by the provincial governments and district/city governments within their authority.' This is further confirmed by the attributions to the central GOID in Article 6, para. 1 of the 2009 Mining Law, where point (n) includes 'to direct and supervise the management of mineral and coal mining that are conducted by the regional governments'. Therefore, the activity of direction and supervision, and its definitions, concern the direction and supervision of the central GOID in respect of the local governmental levels. However, this merely constitutes one of the attributions to the central GOID. The Commission notes, for example, that the GOID did not make reference in its arguments to Chapter III of the 2009 Mining Law, expressly entitled 'Control of minerals and coals'. This control is exercised at all levels of the GOID (Article 4, para. 2: 'shall be conducted by the Government and/or the regional governments'), as opposed to the direction and supervision in Chapter XIX exercised specifically by the Minister of Energy and Mineral Resources. Moreover, Article 5 of the 2009 Mining Law further elaborates on the notion of control, stating that 'in the national interest ... the Government ... may adopt a policy on preference for domestic mineral and/or coal needs' (para. 1), that 'National interests ... may be realized by making supervision of production and export' (para. 2) and that 'In the making of supervision ... the Government shall have the authority to set the annual production quantity of any commodity for any province' (para. 3). The supervision referred to in Article 5 is very different from the supervision referred to in Chapter XIX. Indeed, no reference to production and export can be found in the definition of supervision reported by the GOID, included in Article 141 in Chapter XIX of the 2009 Mining Law. The GOID did not provide any evidence that the notion of control is defined as supervision in Article 141, nor that the supervision referred to in Article 5 is defined by Article 141. Indeed, the definition of supervision in Article 141 clearly refers to 'Supervision as intended by Article 140', i.e., to the supervision of the central GOID over the local governmental levels in the management of the mining sector.
- (478) Again, also with reference to Article 3 of GR 55/2010, the GOID makes a partial reading of the legislation. Indeed, while the Commission does not dispute the definition of guidance provided in Article 3, it notes that this is not relevant for the assessment of control. What is relevant, for example, is instead the fact that 'The minister, governor, or regent/mayor in accordance with their authority shall supervise the implementation of the management of mining businesses ...' (Article 13, para. 2), that 'The supervision as referred to in Article 13 paragraph (2) shall be implemented on the following: ... b. marketing' (Article 16, point (b)) and finally that 'The supervision on marketing as referred to in Article 16 letter b should at least encompass the following: a. the realization of production and sales including the quality and quantity and the price of mineral and coal' (Article 22). The GOID did not address any of these clear legal bases for the GOID's control and its intervention in the price setting of nickel ore.
- (479) In addition, with reference to MEMR 26/2018, the Commission did not contest that, according to its preamble the GOID's task is only to supervise and provide guidelines for the implementation of good mining principles and practices. The Commission considers that this statement alone is not sufficient to describe the role of the GOID. On the contrary, it has to be noted that the definition of good mining practices 'shall include ... b. governance of mining business' (Article 3, para. 2, point (b)), which in turn 'shall include the implementation of: a. marketing' (Article 3, para. 4, point (a)). These provisions on marketing are implemented by holders of IUP and IUPK for production operation and 'shall at least consist of: ... c. the selling price of Mineral and Coal guided by the reference price of Mineral, the reference price of Coal, or the selling price as stipulated by the Minister; d. pricing on the relevant sales contracts guided by the reference price of Mineral or the reference price of Coal' (Article 30, para. 1, points (c) and (d)). Also in this instance, the GOID relied on selective quotations and deliberately failed to address the most relevant provisions of the pieces of legislation it quoted in its submission. Therefore, these claims were rejected.

- (480) The GOID further maintained that nickel ore miners and smelters were fully free and independent from the GOID to negotiate their business transactions, including the price of nickel ore. According to the GOID, HPM was meant to ensure (i) royalty payments, and (ii) business fairness, whereby the HPM served also as the mandatory floor price for nickel ore.
- (481) The Commission noted at the outset that it is in itself contradictory for the GOID to claim on the one hand that nickel ore miners and smelters are fully free to negotiate the nickel ore price and, on the other hand, to maintain that HPM worked as a mandatory floor price. The very existence of the HPM and its role shows that nickel ore miners and smelters are not fully free to negotiate nickel ore prices. Moreover, the claim that the HPM is a floor price is contradicted by the overwhelming evidence in the file, which shows that nickel ore prices in practice corresponded to the HPM for the transactions between related and unrelated parties alike throughout the period (see recital (518)). This shows that the HPM was a regulated and mandatory price mechanism followed by all parties, and that its mechanics via the arbitrary correction factor were designed and implemented to ensure a significant discount compared to international nickel ore prices. Therefore, this claim was rejected.
- (482) In response to the finding that the Indonesian domestic price is kept significantly below international prices, the GOID asserted that no regulation intervenes in such a manner. The GOID claimed that, on the contrary, according to MEMR 7/2017, HPM was determined based on the prevailing market price and that its compulsory introduction pursuant to MEMR 11/2020 shows how the GOID upholds the international price, as the HPM includes the HMA, which embeds an international price element. In spite of this, the GOID maintained that commercial decisions in the transactions were fully dependent on the parties, without any intervention by the GOID.
- (483) The Commission firmly rejected the claim of the GOID as unfounded. Indeed, while it is true that the HPM refers to the HMA, which reflects the international price of nickel according to the LME, the HMA is then adjusted by an arbitrary corrective factor, as explained in recital (460). This corrective factor introduces a significant 'discount or premium value against the quality of commodity being sold' (Annex to the MEMR Decree No. 2946 K/30/MEM/2017), which ensures that the domestic prices of nickel ore are always kept below international levels. This argument was therefore rejected.
- (484) Concerning the role of miners acting as public body, the GOID claimed, with reference to recital (373), that it never authorised miners to carry out government functions and there is no evidence for this in the file.
- (485) The GOID also specified, in reaction to recital (375), that it never determined to whom the miners should have sold nickel ore for further processing. In particular, the GOID referred to Article 104, para. 1 of the 2009 Mining Law, where the wording '*may cooperate with*' implies that the miners are free to cooperate with other business operators.
- (486) The Commission observed that the finding that nickel ore miners act as public bodies results from the overwhelming body of evidence and the consequent findings developed in recitals (371)-(445). Concerning the instructions regarding who the miners should sell nickel ore to, the Commission acknowledged that the GOID does not force directly the miners to cooperate with other mining permit or special mining permit holders. However, the miners are under an obligation to increase the added value of their output according to Article 102 of the 2009 Mining Law. Then, if they cannot do this by themselves, they have to cooperate with other mining permit or special mining permit holders. Once they decide to cooperate, the 2009 Mining Law significantly restricts the number of potential cooperating parties, stating in Article 103 that the output must be processed domestically in Indonesia, and limiting the participation to the processing of the output to mining permit or special mining permit holders. Furthermore, mining permits or special mining permits are issued by the GOID. Therefore, this claim was rejected.
- (487) The GOID further claimed that it never determined which companies and areas were allowed to extract nickel ore. It stated that the mining permits have a control and regulatory function with a view to ensure that activities do not conflict with each other and there is no misuse of permits granted. To support this, the GOID referred to MEMR 7/2020, which states that the purpose of mining permits is to guarantee legal certainty, ensure effectiveness and efficiency in mining activities and encourage business development. Again, the GOID requested the Commission to look also at implementing regulations, such as MEMR 25/2018 concerning mineral and coal mining businesses,

which explains the planning and the administrative steps for the extraction of nickel ore. In particular, concerning the RKABs, the GOID recalled that the amount of nickel ore to extract depends on the findings of exploration and feasibility study prepared by the companies. The GOID approves RKAB as long as it is in line with the feasibility study and only requires the miners to further process the mineral into a certain level of purification. The GOID argued that this requirement is normal and it does not derive from the stainless steel industry.

- (488) The Commission noted that the various objectives of the issuance of the mining permit did not affect the finding that the GOID, through the mining permits, determines which companies are allowed to extract nickel ore. Moreover, the Commission observes that the GOID did not challenge the finding that the GOID, through planning decision at national and local level, determines which areas are allowed to extract nickel ore. In addition, the Commission confirmed that it did take MEMR 25/2018 into account in its analysis and that this did not lead to findings different from those in this regulation. Finally, regarding RKABs, the Commission noted that the GOID failed to provide full feasibility studies and avoided engaging in discussions concerning how the production targets are set for each company, and then how it monitors and acts afterwards with regard to production actually achieved for the period covered by the feasibility study. Due to the lack of cooperation on this important aspect, the Commission had to rely on inferences on the basis of Article 28 of the basic Regulation. Therefore, these claims, not further substantiated as such, were rejected.
- (489) In response to the conclusion in recital (393) that large part of the nickel ore miners are owned by the GOID, the GOID recalled that, according to Article 2 of Law No. 19 of 2003, SOEs are established with the objective of maximising profits in their business operations.
- (490) In this regard, the GOID asserted that the establishment of entrustment and direction of the miners would require written legislation, which is absent in this case. The GOID pointed to the example of the coal sector, where MEMR Decree No. 261 of 2019 introduced a ceiling price for the coal devoted to public electricity production. On the contrary, the GOID claimed that such a ceiling does not exist for the nickel ore or the stainless steel industry. The GOID reiterated that the only requirement is the extra processing of nickel ore to reach certain minimum purification, in accordance with MEMR 25/2018.
- (491) The GOID maintained that none of the three elements for the existence of entrustment and direction, as spelled out by the Panel in *US - Export Restraints* ⁽¹⁰⁷⁾, can be found in the present case. It added that entrustment and direction cannot even be found based on the economic effects of a government measure, referring to the Panel in *US - Countervailing Measures on Softwood Lumber from Canada* ⁽¹⁰⁸⁾.
- (492) The Commission observed that the fact that SOEs are established with the objective of maximising profits according to the legislation does not call into question the State ownership and all the other elements underpinning the conclusion that nickel ore miners acted as public body. The existence of the measures on mandatory domestic processing obligations, the export restrictions, and the mandatory price mechanism all indicate that these SOEs and other miners, far from aiming for profit maximisation, were forced to follow irrational economic behaviour by being obliged to process the ore domestically, being barred from exporting and thereby achieving a higher price in international markets. Even domestically they could only sell at the low government-mandated price (i.e. the HPM). Therefore, the legal environment created by the GOID is objectively incompatible with the purported legislative aim of these companies to maximise their profit.

⁽¹⁰⁷⁾ Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, para. 8.29.

⁽¹⁰⁸⁾ Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R, circulated to WTO Members 24 August 2020, paras. 7.600 and 7.606.

- (493) With regard to entrustment and direction, the Commission noted at the outset that its main findings concluded that nickel ore miners acted as public bodies. Therefore, even if this claim by the GOID were founded, *quod non*, it would not have any impact on the conclusion concerning financial contribution by a government or a public body. In substance the Commission demonstrated the existence on entrustment and direction on the part of the GOID towards the miners in recitals (446) to (499). The evidence found was deemed to fulfil the conditions and requirements as elaborated in the relevant WTO case-law. As recalled by the Commission in recital (448), the findings in *US – Export Restraints* must be read together with the findings of the Appellate Body, as was also recognised by the Panel in *US – Countervailing Measures on Softwood Lumber from Canada*. The combination of measures taken by the GOID, including the domestic processing obligations, the export restrictions, and the mandatory pricing mechanism, as well as the statements made in relation thereto, showed that the GOID deliberately implemented these measures to entrust or direct suppliers of nickel ore to supply nickel ore at LTAR. Therefore, the effects achieved by these measures were not inadvertent or a mere by-product of the economic effects of these policies. Therefore, these claims were rejected.
- (494) With reference to the export ban referred to in recitals (405) to (413), the GOID claimed that it was not designed to distort nickel ore price in Indonesia. Instead, it was meant to preserve mineral reserves and the environment. The GOID also reiterated that nickel ore transactions were made independently, without the GOID's intervention and with the HPM as a floor price, determined by the prevailing international market price and practices.
- (495) In this respect, the GOID recalled the Panel in *US - Export Restraints*, which held that the treatment of export restraints as a financial contribution based on the mere reaction to a measure was inconsistent with the SCM Agreement ⁽¹⁰⁹⁾. The Panel stated that the existence of a financial contribution should be proven by reference to the action of a government. In the case at hand, the GOID claimed that it is simply exercising its functions and that its nickel ore policy is not an action meant to provide subsidies. The GOID affirmed that the Commission's findings concern the reaction or the effect of the nickel ore policy.
- (496) The Commission referred to its arguments in recital (493) and noted that its findings on the existence of a financial contribution are not based only on the export ban introduced by Indonesia, but on a set of measures and mechanisms undertaken by the GOID, including notably the domestic processing obligation, the RKABs, the divestment obligation, the nickel ore price setting mechanism, and the designation of mining companies as 'National vital objects'. The concerted application of all these measures speaks to the deliberate action of the GOID to achieve its policy objective to benefit the nickel processing industry, mainly SSCR producers. Therefore, the claim was considered unfounded and rejected.
- (497) In response to the finding in recital (330) concerning the relationship between the GOID's nickel ore policy and the cooperation between the GOID and the GOC, the GOID claimed that the Agreement between the GOID and the GOC on Expanding and Deepening Bilateral Economic and Trade Cooperation does not have any connection with the provision of nickel ore for LTAR. Indeed, according to the GOID, the cooperation with the GOC was not limited to the stainless steel industry. In any case, the GOID recalled that the implementation of any international agreement is subject to Indonesian law, which is applicable to all market operators in Indonesia.
- (498) The Commission noted that the cooperation between the GOC and the GOID as found in this investigation showed that access to Indonesian nickel ore was one of the main objectives behind the cooperation of China in the Morowali project. The Agreement between the GOID and the GOC on Expanding and Deepening Bilateral Economic and Trade Cooperation dates back to 2011, at a time in which exports of nickel ore to China were high, as Table 2 shows, and the 2014 export ban was not yet in force. Nonetheless, the Agreement already included a reference to the 'steel industry' (Article III) as one of the fields of cooperation, since the 2009 Mining Law already provided for a domestic processing obligation subject to a 5-year grace period. In any event, the objective of the Chinese cooperation does not have any bearing on the findings of the countervailability of the provision of nickel ore for less than adequate remuneration, as it merely concerned the context in which that programme was implemented. What was relevant for the finding concerning this programme are the measures taken by the GOID. Therefore, this claim was rejected.

⁽¹⁰⁹⁾ Panel Report, *US – Exports Restraints*, cit., para. 8.34.

Conclusion

- (499) The Commission therefore concluded 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 as specified under Article 3(1)(a)(iv) and (iii) of the basic Regulation, as interpreted and applied in line with the relevant WTO standard under Article 1.1 (a)(iv) and (iii) of the SCM Agreement.

4.4.3.2.2. Benefit

- (500) The Commission concluded that nickel ore mining companies constituted a public body and/or were entrusted or directed by the GOID to provide nickel ore to the stainless steel industry.
- (501) In the next step, the Commission assessed whether the mining companies, acting as public bodies or as being entrusted or directed by the GOID, actually provided nickel ore for less than adequate remuneration. That necessitated a detailed analysis of the market developments in Indonesia against an appropriate benchmark.
- (502) In accordance with Articles 3(2), 5 and 6(d) of the basic Regulation, the Commission assessed the amount of countervailable subsidies in terms of the benefit conferred on the recipient, which was found to exist during the investigation period.
- (503) The Commission therefore first assessed whether prices set by mining companies in Indonesia could amount to an appropriate benchmark.
- (504) As noted in recitals (435) - (437), the investigation showed that the pricing of nickel ore was subject to a pricing mechanism by the government and other government interventions that prevented the normal market dynamics of supply and demand to determine the price.
- (505) As recalled in recitals (458), the GOID started regulating certain aspects of nickel ore prices as early as 2010.
- (506) With the progressive introduction of export restrictions and the other measures as of 2014 to achieve its goal to establish the downstream stainless steel industry domestically and to support this establishment *inter alia* through low nickel ore prices, the GOID progressively changed the way the price was set. These GOID policies successfully achieved their objective to create an oversupply of nickel ore in the Indonesian market to the benefit of the stainless steel industry. As a result, this industry gained considerable pricing power vis-a-vis the mining companies, and so significantly depressed nickel ore prices in Indonesia.
- (507) In this context, as explained above, the pricing mechanism as set out in Article 85 was amended in 2017 when the GOID started regulating not only the nickel ore price as regards royalties, but the actual transaction price.
- (508) It is recalled 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. The reference price for nickel (HPM) was provided by a formula set in MEMR Decree 2946K/30/MEM/2017 ('MEMR 7/2017'), as follows: HPM Nickel Ore = % Ni x CF x HMA Nickel. '1. HPM Nickel Ore shall be the price of metal mineral in form of nickel ore in USD/DMT 2. % Ni is the content of Ni in the nickel ore. 3. CF is Corrective Factor, which is the amount of percentage that accommodates discount or premium value against the quality of commodity being sold, under the provision of: a. CF for nickel ore with 1,9% Ni = 20 %; and b. CF will fluctuate higher/lower by 1 % for each increase of Ni content by 0,1 %.' MEMR 7/2017 defines HPM as 'the price of metal minerals that are determined at a sale point, Free on Board for each mining commodity of Metal Minerals;' and HMA as 'the price obtained from the average published Mineral Metal prices in the previous month or price on the same date as the transaction according to the price quote from the published price of Metal Minerals'. The amount of HMA is determined by the Minister every month and it refers to international prices such as the LME price for nickel.

- (509) Furthermore, Article 2 of MEMR 7/2017 reads as follows: '(1) Holders of Metal Minerals Production Operation IUP, Coal Production Operations IUP, Production Operations Metal Minerals IUPK, and Coal Production Operation IUPK in selling Metal Minerals or Coal products must be guided by Metal HPM or HPB.'
- (510) The GOID claimed that HPM was linked to international prices and should be taken as the floor price for the real transaction between nickel ore producers and nickel ore buyers. The Commission notes that while indeed the formula for calculating the regulated HPM for the nickel ore is linked to the 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. By its very mechanics, the actual price of transactions must ensure a significant discount in relation to international prices.
- (511) Although the HPM was not a compulsory price at that time, it was important to protect the mining and smelter business actors in buying and selling minerals. The Director General of MEMR stated that the government would implement the price in October 2017, and that it would be announced monthly. Furthermore, it was stated that the 'HPM will become a reference so that mining companies do not sell at a higher price, otherwise smelter entrepreneurs do not buy nickel at a price that is far below the market price. In this case the government does not want one party to be superior to the other in determining commodity prices' ⁽¹¹⁰⁾. This was confirmed by a publication by the Indonesian Processing and Refining Industry Companies Association (AP3I) from September 2017, which mentioned that the HPM was intended to protect smelter companies and miners in sale and purchase transactions of minerals ⁽¹¹¹⁾. In other words, the HPM – set at a level far below the international price – became the reference price for nickel ore in Indonesia.
- (512) As the GOID policy to develop the stainless steel industry had been effectively implemented and successful, the resulting depressed nickel ore prices coupled with the government-fuelled purchasing power of the stainless steel industry had exacerbated the difficult financial situation of the mining companies, most of which would risk going out of business. The miners also organised protests and social unrest due to this bias in favour of the stainless steel industry. Therefore, the GOID had to resort to the HPM as a way to favour the stainless steel industry, but at the same time to avoid that the mining companies would either go bankrupt or would further mount their social discontent against the government. This would have caused disruption in supplies and possible price increases at the expense of the stainless steel industry, jeopardising the GOID's overarching policy objective. The HPM also had as side effect to ensure a minimum level of state revenue from the royalties, which had also been substantially affected by the nickel ore oversupply and the corresponding depressed prices due to the successful policy bias in favour of the stainless steel industry.
- (513) In January 2020, the GOID re-implemented the full export ban on nickel ore for all purity grades. This increased the already existing imbalance on the Indonesian nickel ore market to the benefit of smelters, and as a result the GOID decided to regulate through specific legislation the price of nickel ore and by using the HPM. Therefore, in April 2020, MEMR revised MEMR 7/2017 and issued MEMR 11/2020. This Regulation amends Article 2 concerning guidelines on selling metallic minerals and coal. Pursuant to the new Article 2: '(1) Holders of Metal Mineral Production Operation IUP, Coal Production Operation IUP, Metal Mineral Production Operation IUPK, and Coal Production Operation IUPK, in selling Metal Mineral or Coal produced, must refer to HPM or HPB.' Thus, pursuant to MEMR 7/2017 the miners had to be guided by the HPM in their sales transactions, pursuant to MEMR 11/2020 they had to use the HPM as a transaction price. As stated in recital (508) above, HPM shall mean 'the price of metal minerals that are determined at a sale point.' In other words, mining companies were obliged to set the price in line with the HPM and did so in practice.
- (514) Furthermore, MEMR 11/2020 added Article 2A concerning procedures and obligations for selling nickel ore, which reads as follows: '(1) Holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK that produce nickel ore, must refer to HPM in selling the nickel ore produced. (2) The obligation to refer to HPM as referred to in paragraph (1) also applies to holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK in selling nickel ore produced to their Affiliates. (3) Other parties that refine nickel ore originating from holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK are required to purchase nickel ore with reference to HPM.'

⁽¹¹⁰⁾ <https://www.tambang.co.id/harga-patokan-mineral-akan-diterapkan-di-bulan-oktober-15712/>

⁽¹¹¹⁾ <https://www.ap3i.or.id/News/News-Update/Oktober-ESDM-Terapkan-Harga-Patokan-Mineral.html>

- (515) Article 3 reads '(1) HPM Metal as referred to in Article 2 is: a. the lower limit price in calculating the obligation to pay production fees by the holders of Metal Mineral Production Operation IUP and Metal Mineral Production Operation IUPK'. The same article also states that '(3) In the terms that there is a difference in the reference period for the Reference Metal Mineral Price in the HPM Metal calculation with the transaction quotation period, penalties for impurities, or bonuses for certain minerals, for the sale of nickel ore shall be made with the provisions: a. if the transaction price is lower than HPM Metal in the quotation period according to the Reference Metal Mineral Price or there is a penalty for impurities, the sale can be made under HPM Metal with a maximum difference of 3 % (three percent); or b. if the transaction price is higher than HPM Metal in the quotation period according to the Reference Metal Mineral Price or there is a bonus for certain minerals, the sale must follow the transaction price above the Metal HPM'.
- (516) As a continuation of the pricing mechanism enacted at the end of 2017, the regulated price for nickel ore as transposed into legislation mirrors the same approach and logic. It is a price set by the government whose main objective is to ensure that nickel ore is supplied at a significant discount to the international LME for the benefit of the stainless steel industry. At the same time, the price seeks to also take into account the interests of miners to ensure continuity of supply at this discounted price, and avoid bankruptcies and social unrest. Finally, it ensures a minimum level of revenue for the State, although a much lower one than if there was no discount as compared to the international price. This has been confirmed by the Acting Director General of Mineral and Coal who said, as mentioned, that it intended to find 'justice for smelters who want the lowest possible prices. But on the other hand, [it] must ensure that nickel mining activities provide sufficient margin for mining.'⁽¹¹²⁾ In other words, the price of nickel ore in Indonesia is not freely determined according to market conditions but is fixed within a narrow price corridor by the GOID in order to achieve its respective policy objectives.
- (517) The fact that the HPM as transposed into legislation in April 2020 was a continuation of the 2017 mechanism has also been corroborated in the investigation. The main difference was that before MEMR 11/2020 entered into force, in the sale-purchase agreements for nickel ore the price of the nickel ore was stipulated as an absolute value. After the MEMR 11/2020 entered into force, the price of nickel ore in the sale-purchase agreements was set up as the government HPM. The empirical evidence collected in the investigation (i.e. purchases of nickel ore of the IRNC Group) confirmed that the prices during the IP before and after the entry into force of MEMR 11/2020 are substantially the same, that is in line with the HPM mechanism in its version pre- and post-April 2020.
- (518) The investigation also revealed that the price formula as from April 2020 was adjusted with '1-moisture content%'. IRNC stated that the government formula was for dry nickel ore, and as the nickel ore was sold in a wet form, this formula had to be adjusted accordingly. If this is the case, then that contradicted the GOID's claim that the HPM was used in the past only for the calculation of royalties. Indeed, the investigation revealed that the purchase price of IRNC and its related companies during the investigation period was very close to the government price. Moreover, there was no price difference between purchases of nickel ore from related suppliers as compared to from unrelated suppliers. Finally, the sales transactions during the investigation period of the sole nickel miner that submitted such information in the framework of the investigation showed that a very similar price was charged to all clients for the same nickel ore type. This shows that the government-determined price for nickel ore was followed in practice.
- (519) On the basis of all the above evidence, the Commission concluded that the 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.
- (520) However, in addition to the government regulation of nickel ore prices, there are other market distortions by the GOID that specifically affect nickel ore prices in Indonesia which confirms that these prices cannot serve as benchmark. In particular, the government's obligation on smelters to process nickel ore domestically coupled with

⁽¹¹²⁾ <https://www.esdm.go.id/en/media-center/news-archives/-new-regulation-on-mineral-ore-benchmark-price-issued>

specific production targets results in oversupply in the domestic market and hence depresses domestic prices. The export restrictions also contributed to the oversupply of nickel ore on the domestic market and hence to a depression of prices. No single transaction for nickel ore in Indonesia escapes the fact that the various market distortions directly or indirectly affecting prices result in all nickel ore prices in Indonesia being distorted.

- (521) As a result, the Commission concluded that the whole domestic nickel ore market is affected by these measures and it was impossible to establish an undistorted price of nickel ore in the Indonesian market according to the prevailing domestic conditions. Accordingly, there were no domestic prices which could be used as an appropriate benchmark.
- (522) Therefore, the Commission had to look for an appropriate out-of-country benchmark ⁽¹¹³⁾. In that regard, the Commission noted that since Indonesian exports of nickel ore stopped in 2014, exports of nickel ore from the Philippines have developed considerably, in particular to the main consumption market, that is the PRC. The Philippines' laterite nickel ore has the same properties as the Indonesian laterite nickel ore. It is extracted according to the same open mine process as in Indonesia and has similar nickel content as Indonesian ore. Both Philippine and Indonesian ores are extracted in a similarly wet climate, so they have a relatively high and similar water content. Consequently, as the Philippine nickel ore is unaffected by the government measures distorting the Indonesian market and as the prevailing market conditions in the two countries, including quality, availability, marketability, transportation and other conditions of purchase or sale, are similar, the Commission considered Philippine and Indonesian nickel ore to be comparable. There is also geographical proximity, which also contributes to making the situation of the Philippine nickel ore comparable to the one that would prevail in Indonesia in the absence of the GOID's distortive measures.
- (523) Therefore, the Commission considered that, in line with Article 6(d), second subparagraph, (ii) of the basic Regulation, 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. The price considered as a reference for Philippines' nickel ore is the Philippines FOB price as reported by the FerroAlloyNet with a nickel content of 1,8 %. This information was submitted by the complainant on a quarterly basis. In addition, the complainant supplied benchmarks (also on a quarterly basis) for products with a nickel content of 1,5 %, 1,6 %, 1,9 % and 2,0 %. These benchmarks were used to establish benchmarks for other grades purchased by the IRNC Group based on the nickel content (1,3 %, 1,4 %, 1,7 %, 2,1 %, 2,2 %, 2,3 % and 2,4 %).
- (524) These benchmarks were compared to the reported purchase prices of the companies within the IRNC Group (IRNC, GCNS, ITSS, SMI and TSI) in the IP according to both the nickel content and the appropriate quarter. Differences obtained from this comparison were calculated for each Group company in IDR. It follows from the above recitals that the Indonesian domestic nickel ore prices were consistently lower than the benchmark proxy price (Philippine FOB prices). Hence, the Commission concluded that the measures of the GOID oblige nickel ore mining companies acting as public bodies and/or as entrusted or directed by the GOID to provide nickel for less than adequate remuneration to the Indonesian stainless steel industry.
- (525) Therefore, the Commission compared the actual domestic purchase price of nickel ore to the cooperating producers with the undistorted benchmark price in the Philippines.
- (526) In their comments on the final disclosure, the GOID and IRNC Group disagreed over the benchmark for nickel ore based on the nickel ore from the Philippines, because: (i) the Philippines laterite has the properties of nickel ore of Ni <1,5 % (limonite), while the Indonesian laterite nickel ore has the properties of nickel ore of Ni >1,5 %, (ii) the quantity of laterite nickel ore produced in Indonesia is more than double the production of the Philippines, and (iii) the cost/ton production of nickel in Indonesia is lower than that of the Philippines, since the average thickness of nickel laterite is 30 m in Indonesia, while in the Philippines is only 20 m, and the deposit of nickel in Indonesia is at the level of 1,8 % nickel content, whilst in the Philippines is of 1,6 % nickel content. Moreover, both the GOID and IRNC claimed that the Indonesian export ban, while depressing domestic price, pushed up prices of nickel ore from the Philippines. The right benchmark should be, according to the GOID, the actual production cost of nickel ore of

⁽¹¹³⁾ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted on 19 December 2014. para. 4.158.

IRNC, as established in the anti-dumping investigation on imports of certain hot rolled stainless steel sheets and coils ⁽¹¹⁴⁾, or, according to the IRNC Group, the actual production costs, actual SG&A and an appropriate profit of the Indonesian nickel ore producers investigated.

- (527) The complainant responded that in their view the Philippines nickel ore remained the most appropriate benchmark for Indonesian nickel ore. The complainant added that, should the Commission consider that the Philippines nickel ore would not constitute an appropriate benchmark, it supported the reference to the LME nickel international price as the sole existing alternative benchmark. The complainant recalled that the published Indonesian HMA price for nickel, used to define the domestic sales price of nickel ore (HPM), is itself based on LME. Since the LME refers to dry metric tonnes, according to the complainant it should be adjusted by the moisture content. The complainant clarified that this would be a conservative approach, because it does not take into account the iron content of nickel ore.
- (528) IRNC provided a rejoinder to EUROFER's response concerning the use of LME as alternative benchmark. IRNC Group highlighted first that nickel, to which the LME refers, and nickel ore are different products. According to IRNC Group, the different trends in price data for the nickel based on the LME, which was decreasing, and for the Philippines nickel ore, which was increasing, would cast doubt on its use because the demand and supply of nickel and nickel ore would be different. Second, IRNC Group argued that the formula proposed by EUROFER overstates the nickel ore price because: (i) not all nickel content contained in the nickel ore can be extracted from the nickel ore and further processed into pure nickel, but a yield ratio from nickel ore to nickel should be considered; (ii) the price of pure nickel reflects all costs and expenses necessary to bring pure nickel to the market (e.g., nickel ore cost, energy cost, depreciation expense of machinery, labour cost, transportation expense, SG&A, and profits of producers and traders etc. The IRNC Group concluded that, in its view, the formula based on the LME overstated the benchmark, and that a proper benchmark would be based on the actual production costs, the actual SG&A and a proper profit of investigated Indonesian nickel ore producers.
- (529) The Commission considered carefully all arguments raised by the parties. Starting with the request by GOID and IRNC Group to use an in-country benchmark based on the cost of production, SG&A and an appropriate profit margin of Indonesian producers of nickel ore, the Commission concluded that this would not be feasible and in any event would not be in line with the relevant legislation. Due to the non-cooperation of nickel ore producers, the Commission did not have available on file in-country data on cost of production and SG&A of Indonesian nickel ore producers, nor did it have information on an appropriate profit margin in Indonesia. Therefore, it would not be feasible to construct the benchmark as requested by these parties. In any event, the Commission noted that in view of the pervasive domestic distortions in the Indonesian nickel ore market as detailed in Section 4.4.3.2.2, the Commission concluded at recital (521) that it could not find any suitable in-country benchmark and thus it had to resort to an out of country benchmark. Therefore this in-country alternative benchmark was rejected.
- (530) The Commission then carefully assessed the arguments concerning the formula based on the LME price of nickel. At the outset, the Commission considered that the LME is among the world's largest financial markets covering base metals. With regard to the price of nickel, the Commission noted that the LME price is based on actual transactions and that its conditions are well aligned with the Indonesian market conditions. More importantly the Commission considered convincing the argument that the LME nickel price is the starting point of the methodology used by the GOID itself to set the domestic reference price of nickel ore, as this would constitute a closer link to the Indonesian market and situation. Therefore, the LME nickel prices do constitute an appropriate basis for the calculation of nickel ore in Indonesia. At the same time, the Commission noted that the formula proposed by the complainant with regard to nickel prices would need to be adapted to reflect some of elements mentioned by the IRNC Group in its rebuttal submission. Due to the absence of sufficient evidence on file at the extremely late stage of the investigation, it was however impracticable for the Commission to perform the aforementioned adaptation and thus use LME prices as the benchmark in the investigation.

⁽¹¹⁴⁾ Commission Implementing Regulation (EU) 2020/1408 of 6 October 2020, imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan (OJ L 325, 7.10.2020, p. 26).

- (531) In view of the forgoing, the Commission then considered the arguments raised by the parties on the benchmark based on the Philippines actual prices of nickel ore on an FOB basis used for the benefit calculation. The Commission noted that the GOID and the IRNC Group did not substantiate how the elements they referred to on different technical characteristics and output quantities between the Indonesian and the Philippines nickel ore impacted those Philippine prices, nor did they submit any evidence attempting to quantify any possible adjustments resulting from these differences to the Philippines prices used as benchmark. The argument that the Indonesian export ban artificially depressed domestic Indonesian prices and also resulted in higher Philippines prices did not affect the fact that the Philippines prices represented an appropriate benchmark, because they reflected actual market prices of nickel ore resulting from all concurring market circumstances and regulatory choices of the various countries (including Indonesia) and thus did not undermine the actual market representativeness of these prices. With regard to the claim of a different nickel content in nickel ore in the Philippines, the benchmark used by the Commission accounts for such difference (the Commission constructed a benchmark for each type of nickel ore purchased by IRNC Group). As for the claim that the cost of production of nickel ore in Indonesia is lower than in the Philippines, as stated in recital (528) the Indonesian nickel ore miners have not cooperated in the investigation and therefore the Commission was not able to assess such costs. The Commission therefore confirmed its choice to use the Philippines benchmark as the most appropriate in these circumstances, also considering the substantial quantities exported from the Philippines and the fact that the main buyers of the Philippines nickel ore were Chinese stainless steel producers using the same technology as IRNC Group to produce the product concerned. The arguments by the GOID and IRNC Group in this respect were therefore dismissed.
- (532) The GOID also claimed that nickel ore was not a direct raw material for SSCR. On the contrary, nickel ore was a raw material for NPI and hot-rolled stainless products, which are in turn upstream inputs for SSCR. According to the GOID, this fact should be taken into consideration in the calculation of the benefit.
- (533) IRNC Group claimed that the entity IRNC was selling the purchased nickel ore within IRNC Group and therefore no benefit deriving from its purchased nickel ore should be included in the calculation of the benefit. This argument was reiterated by IRNC Group after additional final disclosure.
- (534) The Commission confirmed that it took into account both of these aspects in the calculation of the amount of subsidisation for IRNC Group. First, for the related suppliers on inputs, the benefit found in those companies was allocated using the proportion of their turnover which related to the exporting producer. This allocated benefit was then added to the benefit of the exporting producer and included in the subsidy calculations of this producer. At the level of the exporting producer, the denominator of the benefit was the total turnover of the company. The detailed calculation methodology was disclosed to IRNC Group in its individual disclosure as it contained confidential information.
- (535) The Commission noted that the end-use of the nickel ore purchased, whether for the product concerned or for sales to related companies for further processing, is irrelevant as, in the calculation of the subsidy rate, the denominator is the total turnover of IRNC Group. Therefore, the claim was rejected.
- (536) The benefit amount so calculated amounted to 9,64 % for the IRNC Group.

4.4.3.2.3. Specificity

- (537) 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 ⁽¹¹⁵⁾.

⁽¹¹⁵⁾ Appellate Body Report DS 436, para. 4.398.

- (538) In their comments on final disclosure the GOID claimed that there was no specificity in the nickel ore policies, because they did not apply only to the stainless steel sector, but to a various range of products.
- (539) The Commission rejected this claim. Indeed, the GOID's nickel ore policies focused always on nickel ore as a raw material for the stainless steel sector. As a matter of fact, documents in the investigation file showed that nickel ore employed for the production of stainless steel must have a nickel content > 1,7 %. On the contrary nickel ore with < 1,7 % finds different applications, for example in batteries for electric vehicles. Evidence of that is the fact that, as of GR 1/2017 and until MEMR Regulation 11/2019, the export ban concerned only nickel ore with nickel content > 1,7 %, i.e., only nickel ore employed in the stainless steel sector. Therefore, the claim was rejected.

4.4.3.3. Conclusions

- (540) 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.
- (541) There was not sufficient 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.
- (542) The subsidy amount established with regard to the provision of nickel ore for less than adequate remuneration during the investigation period for the IRNC Group amounted to:

Company	Overall subsidy amount
IRNC Group	9,64 %

4.5. Cooperation between Indonesia and China and the Morowali Industrial Park

4.5.1. Introduction and factual context

- (543) The complaint alleged that as part of its plan to develop the stainless steel industry, the GOID relied on financial support provided by the GOC. This support was specifically linked to the development of the Morowali Park that is essentially run by Chinese companies, notably Shanghai Decent Investment (Group), the holding company of Tsingshan Group. According to the complaint, the GOID not only actively sought, acknowledged and adopted as its own the Chinese financing, but it also allegedly exercised pressure on the GOC to support Chinese companies that were previously smelting the nickel ore imported from Indonesia into NPI in China to move their smelting activities to Indonesia.
- (544) The historical and factual background to the very close cooperation between Indonesia and China to develop a completely integrated downstream stainless steel industry relying on the nickel ore reserves available on Indonesia, and on the finances and the know-how brought in by China is introduced at Section 4.3. As explained, Indonesia has significant nickel ore reserves and is one of the largest players in that market worldwide. As from 2005 the extraction of nickel ore increased substantially, and so did exports (see Tables 1 and 2). The tables also show that China progressively became the overwhelmingly largest destination of nickel ore exports, given that the Indonesian ore was the most suitable for stainless steel production. The GOID was concerned that its nickel ore reserves would be depleted by exports as it did not have sufficient domestic capacity to further process the ore, and thus the country would not gain sufficient benefits from them.
- (545) Through the new Mining Law of 2009 the GOID decided to increase the domestic added value by promoting the domestic processing of minerals including nickel ore, mainly via a domestic processing obligation (see recitals (401) to (404)). It also decided to introduce export restrictions after a grace period of 5 years to ensure that the sufficient domestic capacity would be built to absorb the nickel ore production and to ensure that miners would provide it for less than adequate remuneration (see previous section).

- (546) In this context, the GOID started talks with potentially interested third countries with a domestic stainless steel industry. For instance, the GOID sought to convince Japan and its nickel ore processing industry to invest in Indonesia. However, the Japanese government was opposed to the planned Indonesian export restrictions as it considered them incompatible with WTO rules and threatened to launch a case against Indonesia at the WTO ⁽¹¹⁶⁾.
- (547) The GOID was successful when it approached the Chinese government. As a result of the bilateral cooperation sanctioned in the agreements in 2011 and 2013, and then further stepped up, the Chinese started building and developing smelters in Indonesia. The exports to China peaked in 2013 to 58 million tonnes, whereas the domestic capacity in Indonesia increased progressively from 7,81 million tonnes in 2014, when the domestic processing obligation and the export restrictions entered into force, up to 61 million tonnes in 2019 (see Table 3).

4.5.1.1. Legal basis

- (548) The relevant bilateral agreements signed over the years between the GOID and the GOC, and the statements jointly delivered, include:
- The Joint Declaration between Indonesia and the PRC on Strategic Partnership, signed in Jakarta on 25 April 2005;
 - The Plan of Action for the Implementation of the Joint Declaration on Strategic Partnership between the GOID and the GOC, signed in Jakarta on 21 January 2010;
 - The Agreement between the GOID and the GOC on Expanding and Deepening Bilateral Economic and Trade Cooperation, signed in Jakarta on 29 April 2011;
 - The Joint Communiqué between the GOID and the GOC on Further Strengthening China-Indonesia Strategic Partnership, delivered in Jakarta on 29 April 2011;
 - The Protocol Amending the Memorandum of Understanding between the Ministry of Marine Affairs and Fisheries of Indonesia and the State Oceanic Administration of the PRC on Marine Cooperation, signed in Jakarta on 29 April 2011;
 - A joint statement, inviting Chinese enterprises to increase their investments in Indonesia, delivered in Beijing on 25 March 2012;
 - The Indonesia-China Five Year Development Program for Economic and Trade Cooperation, signed in Jakarta on 2 October 2013;
 - The Agreement between the GOID and the GOC on Indonesia-China Integrated Industrial Parks, signed in Jakarta on 2 October 2013;
 - The Joint Statement on Strengthening Comprehensive Strategic Partnership between the PRC and Indonesia, delivered in Beijing on 26 March 2015;
 - The Plan of Action for the Implementation of the Comprehensive Strategic Partnership between the GOID and the GOC (2017-2021), signed in Beijing on 14 May 2017;
 - The Memorandum of Understanding on Promoting Cooperation on the Development of Regional Comprehensive Economic Corridors between the Coordinating Ministry of Maritime Affairs of Indonesia and the National Development and Reform Commission of the PRC, signed in Bogor on 7 May 2018; and
 - The Memorandum of Understanding on Establishing a Joint Steering Committee for the Development of Regional Comprehensive Economic Corridors between the Coordinating Ministry of Maritime Affairs of Indonesia and the National Development and Reform Commission of the PRC, signed in Beijing on 23 October 2018.
- (549) In addition, some domestic pieces of legislation enacted by the GOID implemented the above-mentioned bilateral agreements or were related to them:
- The Masterplan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 (MP3EI) published in May 2011; and
 - The Decree of the Ministry of Industry of Indonesia No. 432/M-IND/Kep/7/2014 on the Cooperation Team or the Indonesia-China Integrated Industrial Estate, dated 22 July 2014.

⁽¹¹⁶⁾ <https://kemenperin.go.id/artikel/3594/Let-Japan-Process-Nickel-in-Indonesia-Industri-minister>

4.5.2. *Partial non-cooperation and use of facts available in relation to support in the Morowali Park*

4.5.2.1. Application of the provisions of Article 28(1) of the basic Regulation in relation to the GOID

- (550) The Commission requested the GOID to provide certain information concerning the bilateral cooperation framework set out by the GOID and the GOC and, in particular, the conditions under which Morowali Park was originally established and whether and to what extent the Morowali Park and the financial assistance provided by the GOC was part of the bilateral cooperation between the respective governments of Indonesia and China.
- (551) The Commission specifically requested the GOID to provide a document, signed on 3 October 2013 by Xiang Guanda of Shanghai Decent Investment and Halim Mina from Bintang Delapan Group in the presence of the Chinese and Indonesian presidents. The GOID failed to provide this document, which according to the information available to the Commission, sets out the agreement to jointly establish IMIP and the subsequent development of the Morowali Industrial Park ⁽¹¹⁷⁾. Furthermore, during the RCC of the GOID, the GOID confirmed the existence of this agreement; however, the GOID claimed that it did not have it.
- (552) As explained in recital (573), the Commission requested the GOID to provide the list of priority projects that have been selected for implementation as per the provisions of the Indonesia-China Program. The GOID instead provided a different list of projects, i.e. the list of Indonesia and China cooperation projects under the high-level economic dialogue (HLED).
- (553) Furthermore, as explained in recitals (639) et seq., the Commission requested the GOID to submit documentation relating to the implementation of the agreements provided, and the consultation mechanisms put into place by the GOC and the GOID in this respect. However, the GOID replied that the KIT Indonesia team created in this regard had not generated meaningful policies and refused to provide any documentation in this regard.
- (554) Therefore, the Commission informed the GOID that it might have to resort to the use of facts available under Article 28(1) of the basic Regulation when examining the existence and the extent of the alleged subsidisation for companies located in the Morowali Industrial Park.
- (555) 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 those matters.

4.5.2.2. Application of the provisions of Article 28(1) of the basic Regulation in relation to the GOC

- (556) As recalled above in recital (15), the Commission in the Notice of initiation invited the GOC to become an interested party and, on the same day of its publication, sent the Notice of initiation to the GOC, expressly drawing its attention to the invitation. By email of 19 February 2021, the GOC confirmed that it had registered as an interested party.
- (557) The Commission sent a request for information to the GOC in order to collect information regarding an overview of the financial sector in China, information related to China Banking and Regulatory Commission, and information about financial support, export guarantees and insurance in the context of the Morowali Park and Overseas Trade and Cooperation Zones. However, the GOC refused to submit this information.

⁽¹¹⁷⁾ IMIP Annual report 2017;
<https://www.business.hsbc.com.cn/en-gb/belt-and-road/story-5>;
www.etsingshan.com/Art/Art_38/Art_38_69.aspx;
<https://www.dsppatech.com/dsppa-pa-system-applied-in-indonesia-morowali-industrial-park.html>

- (558) Therefore, the Commission informed the GOC 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. No comments were received from the GOC.
- (559) 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 those matters.

4.5.3. *Legal and policy documents of the bilateral cooperation framework between the GOID and the GOC*

- (560) The cooperation instigated by the GOID with the GOC on the preferential treatment to set up and favour the creation and development of the Indonesian stainless steel industry can be traced back to the early 2000s. It consists of a number of bilateral documents setting up the legal and policy framework leading to the adoption of several specific support policies and preferential programmes constituting countervailable subsidies covered by this investigation.
- (561) These documents show that over the years the two countries set up a cooperation framework on the basis of a number of bilateral legal and policy documents to increase progressively their cooperation. They contain all the terms of the cooperation and the primary objective to set up and develop a domestic stainless steel industry in Indonesia via a number of different preferential measures and policies applicable to Sino-Indonesian entities encouraged and supported by the respective governments to implement this cooperation.
- (562) The cooperation between the GOID and the GOC in the mining and the metallurgical sector started in 2005 by the signing of a Joint Declaration between Indonesia and China on strategic partnership, stating that both parties will 'enhance investment cooperation by increasing mutual understanding and networking among investment authorities, including the private sectors, and by creating more conducive eco-socio-political and legal climates for the flow of investments'. Already at that time, the GOC had requested assurance from the GOID to guarantee the interests of foreign investors to gain profits⁽¹¹⁸⁾. It was further stated at that time that in the last ten years of economic development, the Chinese government had always guaranteed that every investment in China was profitable. This cooperation was in line with China's 'going out' policy that started in 1999 and favoured the establishment abroad and export and internationalisation of Chinese companies.
- (563) In January 2010, as an implementation of the 2005 Joint Declaration, Indonesia and China signed the Indonesia-China Plan of Action ('Plan of Action 2010') document to further their strategic partnership. This document contains a plan to encourage Chinese investment in resource-based industries in Indonesia, including mining⁽¹¹⁹⁾. In Section 3.2 on 'Trade Cooperation', Article 3.2.14 referred to 'formulate and implement the five-year plan for the China-Indonesia economic and trade cooperation', which was indeed signed shortly thereafter (see below). The chapter on 'Investment Cooperation' provides for the encouragement of the participation of private actors (Article 3.4.3) and encouragement of 'Chinese investment in resource-based industries in Indonesia, such as (...) mining and energy (...)' (Article 3.4.8). The document also refers to a Memorandum of Understanding between GOID and the GOC on Infrastructure and Natural Resources Cooperation signed on 25 April 2005.
- (564) The investigation found that three memoranda of understanding and one technical regulation signed by the representatives of the Chinese and of the Indonesian governments during a visit of the then China's Prime Minister, Mr Wen Jiabao, in Jakarta at the end of April 2011. The Commission requested the GOID to provide these three memoranda of understanding and the technical regulation.
- (565) The GOID submitted three documents. The first document was a Protocol amending the memorandum of understanding between the Ministry of marine affairs and fisheries of Indonesia and the State oceanic administration of the PRC on marine cooperation signed on 29 April 2011.

⁽¹¹⁸⁾ <https://koran.tempo.co/read/ekonomi-dan-bisnis/44119/cina-minta-indonesia-jamin-investor>

⁽¹¹⁹⁾ <https://treaty.kemlu.go.id/apisearch/pdf?filename=CHN-2010-0093.pdf>

- (566) The second document was an Agreement between the GOID and GOC on expanding and deepening the bilateral economic and trade cooperation signed on 29 April 2011. Pursuant to this agreement, the 'two governments agreed to encourage enterprises' to carry out economic cooperation of various forms in several fields such as the steel industry, industrial park and export processing zone.
- (567) The third document was a Joint Communiqué between the GOID and GOC on further strengthening China – Indonesia strategic partnership signed on 29 April 2011. Pursuant to this Communiqué, 'The two sides expressed satisfaction over the Plan of Action for the Implementation of the Joint Declaration on Strategic Partnership between the GOC and GOID signed on 21 January 2010, and agreed to take concrete measures to implement the Plan of Action and promote pragmatic cooperation in various fields between the two countries'. Furthermore 'The Chinese side also hopes to strengthen the cooperation with the Indonesian side on the development of the Economic and Trade Cooperation Zone'.
- (568) On 25 March 2012, the GOID and the GOC agreed, in a joint statement delivered in Beijing at the end of an official visit of Indonesian President Yudhoyono, to develop a bilateral Indonesia-China economic and trade cooperation agreement in accordance with the specific preferential policies in the 12th Five-year plan of the GOC and the MP3EI of the GOID ⁽¹²⁰⁾. Moreover, the GOID encouraged Chinese enterprises to participate in enhancing Indonesia's industrial capacity and promised to 'continue creating conducive investment atmosphere for foreign investors, including those of China'. More specifically, the GOID expected Chinese enterprises to 'invest more in Indonesia's mining industry' and 'briefed China on its efforts to improve the management of its mining resources'. Finally, both parties agreed to 'gear up efforts to further solidify and expand cooperation in [...] mining'. This statement shows that the two sides sought to implement their respective domestic preferential policies, notably in order to strengthen Indonesia's downstream industrial capacity by involving and keeping updated China on the development of the policy on raw materials.
- (569) With regard to Indonesia, the MP3EI acknowledges that the industry needs to be further developed in Indonesia and brands Sulawesi as a development area for the industry. To support the development of the steel industry the GOID envisaged, among other actions, regulatory changes to facilitate the provision of raw materials, build national upstream and downstream business partnerships, the cluster development of downstream steel industry and prioritization of integration of steel smelting and stainless steel production ⁽¹²¹⁾. In addition, the natural resources, and specifically mining and nickel, are also targeted with the objective of increasing Indonesia's industrial processing to capture higher added value. On nickel, the focus is strengthening downstream nickel industries with the facilitation of strong partnerships between upstream and downstream industries ⁽¹²²⁾.
- (570) With regard to the PRC, the 12th Five-Year Plan for National Economic and Social Development, in force at the time of the establishment of IMIP, highlights the strategic vision of the GOC for improvement and promotion of key industries. It indicates that the GOC formulates policies to support the technical improvement of enterprises in order to improve market competitiveness. Past investigations showed that the steel industry figured prominently among these key industries ⁽¹²³⁾. Moreover, the GOC issued a specific plan for the steel industry, i.e. the 12th Five Year Plan for the Steel Industry ('the 12th Five-Year Steel Plan'), in force at the time of the establishment of IMIP as well. The 12th Five-Year Steel Plan highlights that the steel industry is an important basic industry of the national economy and emphasizes the importance of 'strengthen[ing] the connection of fiscal, financial, trade, land, energy saving, environmental protection, safety and other policies with the steel industrial policy'. Past investigations showed that these plans are legally binding ⁽¹²⁴⁾ and revealed the predominant role of the GOC via SOEs in the steel

⁽¹²⁰⁾ https://tingroom.com/print_173679.html

⁽¹²¹⁾ Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025. pg 65-68.

⁽¹²²⁾ Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025.

⁽¹²³⁾ Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China, (OJ L 146, 9.6.2017, p. 17), recitals 49 et seq.

⁽¹²⁴⁾ *Ibidem*, recital 55.

sector⁽¹²⁵⁾. The predominant role of the GOC in the steel sector and ensuing significant market distortions are further confirmed by the Commission Staff Working Document on significant distortions in the economy of the PRC for the purpose of trade defence investigation, which stated that '[w]ith the high level of government intervention in the steel industry and a high share of SOEs in the sector, even privately owned steel producers are prevented from operating under market conditions' and recognised the 'substantial ownership, control and/or government intervention with respect to the allegedly privately-owned steel companies'⁽¹²⁶⁾.

- (571) On 2 October 2013, the Minister for Economic affairs of Indonesia and the Minister of Commerce of China signed in Jakarta 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation' ('the Indonesia-China Program'). The Indonesia-China Program envisaged 'to boost trade investment between the two countries and push forward the implementation of common priority projects'⁽¹²⁷⁾, which were expected to be the concrete expression of the program.
- (572) Chapter III of the Indonesia-China Program, the GOID and GOC clarified that the programme is materialised through the priority projects whose 'selection principle should meet strategic interest and socioeconomic development needs of the two countries, be consistent with mid and long term planning for economic development of both countries, and fit the development plans of the enterprises involved'.
- (573) The Commission requested the GOID to provide the list of priority projects that have been selected for implementation as per the provisions of the Indonesia-China Program. However, the GOID instead provided a different list of projects i.e. the list of Indonesia and China cooperation projects under the high-level economic dialogue (HLED). Based on the application of Article 28(1) due to this refusal to cooperate, the Commission inferred that the Morowali Project was also included in this list of priority projects under the bilateral cooperation. Indeed, this is an important project where the presence of Chinese companies is significant.
- (574) The Indonesia-China Program also confirmed the statement of 2012 that one of the main objectives of the cooperation was to implement preferential policies for the steel sector at Chapter I, point 1.2.3, stating that one of the overarching objectives of the bilateral cooperation was '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's MP3EI and to encourage competitive and reputable Indonesian enterprises in the development of the GOC's 12th five-year plan'⁽¹²⁸⁾.
- (575) The Indonesia-China Program shows that both governments identified the key areas⁽¹²⁹⁾ of cooperation, which, amongst others, were included mining, metallurgical industry and Industrial parks (including special economic zones). In the actions devoted to mining, in section 2.4.2, GOID and GOC expressly agreed to 'Collaborating in the exploration, refineries and processing of mineral resources, including ...nickel...', 'Expediting and facilitating bilateral cooperative on mining and metallurgical projects', 'Promoting the development of mineral resources by building dedicated industrial parks and zones in the six economic corridors...', 'Collaborating in the development of mineral resources in Indonesia'.

⁽¹²⁵⁾ Commission Implementing Regulation (EU) 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ L 116, 3.5.2019, recitals 37 and 70.

⁽¹²⁶⁾ Commission Staff Working Document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2, 20.12.2017, p. 360. More generally on the steel sector in the PRC, see Chapter 14 – Steel sector, pp. 346-376 of the same document.

⁽¹²⁷⁾ 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation', (Chapter I and Chapter III).

⁽¹²⁸⁾ 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation', (Chapter I., 1.2.3).

⁽¹²⁹⁾ 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation', (Chapter II).

- (576) In section 2.7.8 of the Indonesia-China Program, addressing the Metallurgical Industry, the GOID and GOC had specifically agreed to 'Encourage Chinese metallurgical producers to make direct investments in Indonesia, to utilize Indonesia's natural resources and to invest in the form of integrated metallurgical industrial parks to help improving its metallurgical industry chain and increase the value added of mineral projects' ⁽¹³⁰⁾. The Program equally confirms that Chinese metallurgical producers are encouraged to form joint ventures with Indonesian companies. In section 2.9 on Industrial parks (including special economic zones), the GOID and GOC agreed on the Promotion of industrial parks, 'encourage Chinese's enterprises to invest in Indonesia industrial parks...', '...facilitate and provide policy support in the development of industrial parks'. Thus, the GOID actively sought and accepted the policy support granted by the GOC to the specific projects such as the industrial park in Morowali.
- (577) On 27 March 2015 both governments released the 'Joint Statement on strengthening comprehensive strategic partnership between the PRC and Indonesia' ⁽¹³¹⁾. In this statement '...Both sides pledged to actively implement the Five-Year Development Plan of China-Indonesia Economic and Trade Cooperation and to finalize the list of priority projects at an early date with a view...'. Similarly, both governments '... held the view that the initiative of the 21st-Century Maritime Silk Road proposed by President Xi Jinping and the strategy of the Global Maritime Fulcrum initiated by President Joko Widodo are highly complementary to each other'. Likewise both governments '... promised to speed up the construction of China-Indonesia Integrated Industrial Parks and establish the inter-governmental coordinating committee as soon as possible.' The Indonesian side '.... will introduce preferential policies for the industrial parks to provide safeguard and facilitation for more Chinese enterprises to enter the park in accordance with the Indonesian laws and regulations, so as to accelerate the development of the Industrial Parks.', and China committed to '...continue to provide financing support for Indonesia's infrastructure construction and large projects through bilateral and multilateral financial channels.'
- (578) On 7 May 2018, the GOID and GOC signed the Memorandum of Understanding 'on promoting cooperation on the development of regional comprehensive economic corridors' in which both side agreed to undertake cooperation on developing *inter alia* North Sulawesi. In this Memorandum, both sides agreed to 'mobilize and coordinate relevant governmental agencies, qualified enterprises and institutions to participate in the formulation of the development plan for these corridors.'
- (579) On 23 October 2018 the GOID and the GOC signed a Memorandum of Understanding 'on establishing a joint steering committee for the development of regional comprehensive economic corridors'. This Memorandum set up the organisational structure of the cooperation: joint secretariat, joint working groups, working mechanisms, steering committee, etc. Once again, this structure shows that the bilateral cooperation framework is jointly implemented through specific joint administrative bodies.
- (580) The above bilateral agreements and documents show that the bilateral cooperation materialised in agreements specifying the terms and the contribution of each government. The details on the financing, the management through IMIP and the other bilateral administrative mechanisms will be described in the following sections. However, the documents covered in this section confirm that the two governments put in place specific agreements to implement their preferential policies in favour of the specific industries and projects covered by this cooperation. They show that the 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. The IRNC Group was a clear beneficiary of these policies agreed under the bilateral cooperation.
- (581) The above agreements and documents show the framework of the cooperation between Indonesia and China and the evolution and constant deepening of such cooperation over the years. This deepening cooperation permits Chinese investment and companies to benefit from Indonesia's raw materials and geographical location. The Chinese side provides financing for investments in the selected 'corridors' under the Belt and Road Initiative ('BRI'), while the Indonesian side actively maintains a conducive legislative, policy and political framework to encourage projects to

⁽¹³⁰⁾ 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation', (Chapter II, 2.7.8).

⁽¹³¹⁾ <https://www.mfa.gov.cn/ce/cebe/eng/mhs/t1249201.htm>

be implemented in specific parts of its own territory. The setting up of the Morowali Park in the Sulawesi Province and the establishment of the main exporting producer fully integrated therein took place within this framework and context, as explained in further details in the following sections.

4.5.4. *Preferential financial support in the context of the bilateral cooperation*

- (582) One of the pillars of the bilateral cooperation on 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 access to the Chinese companies to its large reserves of nickel ore suitable for their production process.
- (583) As seen above, already back in 2005 in the context of the Joint Declaration between Indonesia and China on strategic partnership the Chinese government highlighted the need to protect the interests of investors to achieve a profit, and show that in the previous years the Chinese government had always ensured that this objective would be achieved. These were the years in which the Chinese 'going out' policy was being successfully deployed after its introduction in 1999 in order *inter alia* to promote and incentivise Chinese foreign investment and export expansion.
- (584) Article 3.1.10 of the Plan of Action 2010 in the context of 'Financial cooperation' states that the two sides will 'strengthen regular bilateral consultations and coordination to expedite the utilization and implementation of the *Preferential Exports Buyer's Credit facility, Concessional Loan* and other development support financial schemes.'
- (585) It has been reported in the press ⁽¹³²⁾ that already in 2011 the Industrial and Commercial Bank of China (ICBC) and the Bank of China committed to provide a USD 8 billion capital loan to China-based companies wanting to invest in Indonesia.
- (586) The main document sanctioning the Chinese provision of preferential funding was the written Agreement between the GOID and the GOC of 29 April 2011 on expanding and deepening the bilateral economic and trade cooperation. Article VI unequivocally states that 'The Parties agree to *encourage their respective financial and insurance institutions to give priority to financing and insurance support for those projects [...]*'.
- (587) The Indonesia-China Program for Economic and Trade Cooperation of 2 October 2013 also explicitly states in Chapter V on Financial Services, at Point 5.2.1, that '*Chinese financial institutions are encouraged to support financing for investment and project construction undertaken by Chinese-funded enterprises in Indonesia with respect to domestic laws and regulation*'.
- (588) As explained in the previous section, the financing was provided 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 MP3EI and to encourage competitive and reputable Indonesian enterprises in the development of the GOC's 12th five year plan' ⁽¹³³⁾. The reference to the respective domestic preferential policies, including for their stainless steel industry, tie in with the objective to provide preferential financing to achieve the bilateral agreement on the Morowali Industrial Park in favour of the stainless steel industry.
- (589) During the Indonesia/China summit at the presence of the respective Presidents of State, on 2 October 2013 the founding shareholders of IMIP, PT Bintangdelapan Investama ('BDI') and Shanghai Decent Investment Group ('SDI') (see recitals (626) and (777)), signed an investment and financing agreement with the China-ASEAN Investment Cooperation Fund (CAF) to develop activities in the Morowali Park ⁽¹³⁴⁾. The China-ASEAN Fund (CAF) is an offshore equity fund approved by the State Council of the Peoples Republic of China and the National Development and Reform Commission. The establishment of the fund is sponsored by the Export-Import Bank of China together

⁽¹³²⁾ Bisnis, 'China-based lenders back investment in Indonesia', 26 April 2011, <https://bisnis.tempo.co/read/331438/cina-diminta-investasi-pengolahan-hasil-tambang>

⁽¹³³⁾ 'The Indonesia-China Five-Year Development Program for Economic and Trade Cooperation', (Chapter I. 1.2.3).

⁽¹³⁴⁾ <http://www.china-asean-fund.com/sub-fund-3-detail.php?id=1>

with other Chinese and international institutional investors. CAF focuses on investment in infrastructure, energy and natural resources sectors in the ASEAN, and serves as the pioneer to promote the 'South-South Cooperation' between China and the emerging markets, and facilitates the 'going out' strategy for the Chinese enterprises.

- (590) It was also reported that during the visit of the Chinese President in Indonesia in October 2013, 23 agreements were signed, covering in particular nickel. Of that figure, as much as 60 percent entered the manufacturing industry sector with a total investment of USD 32,8 billion (Rp 36,1 trillion) ⁽¹³⁵⁾. This further demonstrates that the GOID directly sought the Chinese financing in the nickel industry.
- (591) The joint statement of March 2015 reaffirmed the GOC commitment to '...continue to provide financing support for Indonesia's infrastructure construction and large projects through bilateral and multilateral financial channels.'
- (592) Furthermore, it has been reported by the chairman of IMIP, the company managing the Morowali Industrial Park where the exporting producer IRNC is located, that the 'project' (park and the related tenants) 'had easy access to mid- and long-term financing. When the project was in its earliest days, policy banks including China Development Bank, the Export-Import Bank of China, and state-owned Chinese banks including Bank of China pitched in with mid- and long-term financial support.' ⁽¹³⁶⁾
- (593) Finally, it is clear that the GOID could not have been ignorant of the provision of such preferential financing by the Chinese banks, as its officials were present on several occasions to witness the signature of such financing. One example was already provided in recital (589) above. Another example relates to the signature by ITSS and PT. Dexin Steel Indonesia (DSI), another related company located in the IMIP Park, of a Term Loan of 170 million USD and a Memorandum of Understanding with China Development Bank in the evening of May 7, 2018. This took place at a dinner party of the Indonesia-China Business Summit hosted by Premier Li Keqiang of China and Vice President Jusuf Kalla of Indonesia.
- (594) These 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. Rather than providing such a support directly, the GOID set up a bilateral cooperation framework with the GOC to ensure that the GOC, in order for Chinese companies to secure the necessary supply of nickel ore, provided preferential financing for the investment of Chinese companies in Indonesia in the context of preferential policies. As the investigation has shown (see Section on IMIP and Section on preferential financing), the IRNC has been a major beneficiary of this preferential financing provided by the Chinese policy and State-owned banks to finance the construction and operating activities of the smelters and related downstream stainless steel producers in the Morowali Industrial Park.

4.5.5. *The Morowali Industrial Park*

- (595) With regard specifically to the nickel ore processing and stainless steel industry, the close cooperation between the GOID and the GOC within the territory of the exporting country culminated with the establishment and operation of the Morowali Industrial Park. The GOID and the GOC provided 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 ⁽¹³⁷⁾.
- (596) The Morowali Park is an industrial park focused on building a fully integrated stainless steel industry, from mining of nickel ore to the final downstream stainless steel product. The park is located in Bahodopi, Morowali district, Central Sulawesi Province.

⁽¹³⁵⁾ www.beritasatu.com/whisnu-bagus-prasetyo/ekonomi/142063/sby-presiden-tiongkok-hadiri-penandatanganan-bisnis-lebih-rp-36-t

⁽¹³⁶⁾ <https://www.business.hsbc.com.cn/en-gb/belt-and-road/story-5>

⁽¹³⁷⁾ Jindal Stainless Indonesia did not benefit from any preferential financing scheme, as it was not part of the bilateral cooperation between the GOC and the GOID, and did not receive any loans at preferential terms.

- (597) The main cooperating Indonesian exporting producer, IRNC, is located in the Morowali Park. The park covers an area of 2 500 ha and includes 29 tenants, out of which more than half of the tenants are related to IMIP. The main investor in IRNC and IMIP is the Chinese Tsingshan Steel Group.
- (598) The relevant bilateral regulatory framework mentioned before shows that Indonesia and China agreed to set up and develop a special area in the Morowali Industrial Park to support eligible companies to implement their cooperation. The Morowali Park benefited from the status of a recognised industrial estate subject *inter alia* to the preferential Indonesian domestic rules for industrial estates.
- (599) It is noteworthy that the Morowali Park is classified by the GOC as an Economic and Trade Cooperation Zone in Indonesia ⁽¹³⁸⁾.
- (600) While the cooperation to develop IMIP was first announced at a 2013 summit between China's president, Xi Jinping, and Indonesia's then-president, Susilo Bambang Yudhoyono, its development can be traced back to 2007, when Bintangdelapan Group started its mining operations in a 47 000-hectare concession in Morowali ⁽¹³⁹⁾. The company approached Chinese investors to invest in nickel-based mining activities as China was at the time the largest market for Indonesia's nickel export ⁽¹⁴⁰⁾.
- (601) In 2009, and thus coinciding with the stricter measures to keep nickel ore in Indonesia contained in the 2009 Mining Law, BDI and SDI formed a joint venture to develop the mining industry in the area. The two parties formed PT Sulawesi Mining Investment (SMI), involved in the production and export of nickel ore mainly to China. This partnership was in line with the 'going out' policy of SDI. It has been reported on the website of SDI that 'to actively implement the "going out" policy SDI established a partnership with SMI in 2009 to be a pioneer in mining and exporting of Indonesia nickel ore and ferronickel smelting and invested in the construction of PT IMIP which is of great importance to economic cooperation between China and Indonesia and between China and ASEAN' ⁽¹⁴¹⁾.
- (602) The Joint Communiqué on further strengthening China-Indonesia strategic partnership of 29 April 2011 stated that 'The Chinese side also hopes to strengthen the cooperation with the Indonesian side on the development of the Economic and Trade Cooperation Zone'.
- (603) In May 2011, it was reported that the Indonesian Investment Coordinating Board (BKPM) requested Chinese investors to invest in the processing of mining commodities (including nickel in Southern East of Sulawesi): 'The Investment Coordinating Board (BKPM) is directing potential investors to invest in mining product processing. (...) In addition, BKPM also asked China to invest in nickel processing in Southeast Sulawesi' ⁽¹⁴²⁾. Furthermore, for a project that involved building an aluminium smelter, constraints regarding acquisition of land were highlighted. This shows again the GOID's push to obtain Chinese investment in Indonesia.
- (604) The GOID-GOC Five-Year Development Program for Economic and Trade Cooperation of 2 October 2013 in its Section 2.9 on Industrial Parks (including Special Economic Zones (SEZ)) states: '*Encourage Chinese enterprises to invest in Indonesia Special Economic Zones, Economic and Technological Development Park, Economic and Trade Cooperation Park, Industrial Parks, Technology Demonstration Area, and other forms of industrial parks. The two sides agreed that the Government would facilitate and provide policy supports in the development of Industrial Parks*'.
- (605) The two Governments also signed on 2 October an Agreement on Indonesia-China Integrated Industrial Parks. Article V specifies the Policy Supports agreed by the countries: 'The Government of the People's Republic of China confirms to provide relevant support and facilitation for the construction, business attraction and operation of the Industrial Parks in compliance with the prevailing laws, regulations and policies of both Countries. The Government of Indonesia will endeavour to provide support and facilitate on measures in compliance with its national prevailing laws, regulations and policies. The details of the support policies shall be decided through bilateral discussions.'

⁽¹³⁸⁾ <http://www.cccme.org.cn/cp/cooperation/zones.aspx>

⁽¹³⁹⁾ <https://enterpriseasia.org/apea/indonesia/awards/id-2015/halim-mina/>

⁽¹⁴⁰⁾ <https://www.thejakartapost.com/news/2017/11/15/morowali-investors-jittery-over-policy-uncertainties.html>

⁽¹⁴¹⁾ <http://www.decent-china.com/index.php/index/about/index?cid=15>

⁽¹⁴²⁾ <https://bisnis.tempo.co/read/331438/cina-diminta-investasi-pengolahan-hasil-tambang>

- (606) Furthermore, in addition to the 'Indonesia-China Program' both governments signed on the same day, 2 October 2013, another bilateral agreement specifically devoted to the development of integrated industrial parks in Indonesia. Under Article 1 of this agreement, the GOID and the GOC agreed to 'support the establishment of Indonesia-China Integrated Industrial Parks in Indonesia' which 'shall be prioritized to be established in the Indonesia's mineral resource-rich regions'.
- (607) In this agreement, the GOC committed to 'provide relevant support and facilitation for the construction, business attraction and operation of industrial parks in compliance with the prevailing laws, regulations and policies of both countries' ⁽¹⁴³⁾. At the same time, the GOID declared that it would 'endeavour to provide support and facilitate on measures in compliance with its national prevailing laws, regulations and policies' ⁽¹⁴⁴⁾.
- (608) An important bilateral document regulating the Morowali Park was the Agreement between the GOC and the GOID on the Indonesia-China Integrated Industrial Parks of 2013 ('Agreement on Integrated Industrial Parks'). Article 1 states that 'The objective of this Agreement is to support the establishment of Indonesia-China Integrated Industrial Parks in Indonesia', hereinafter referred to as 'Industrial Parks'. 'The Industrial Parks shall be prioritized to be established in the Indonesia's mineral resource-rich regions.' Article 3.1 states that 'The scope of cooperation of this Agreement shall cover the coordination, facilitation and consultation on the establishment of Industrial Parks.' Chapter V of this Agreement on 'Policy support' states at Article 5.1 that 'The Government of the People's Republic of China confirms to provide relevant support and facilitation for the construction, business attraction and operation of the Industrial Parks in compliance with the prevailing laws, regulations and policies of both Countries.'
- (609) During the bilateral summit on 3 October 2013, Chinese President Xi conveyed a plan to construct a 21st-century maritime silk road. On the previous day of the summit, on 2 October 2013, the Indonesian and Chinese governments signed the 'Indonesia-China Five-Year Development Program for economic and trade Cooperation' and the 'Agreement between the Governments of the People's Republic of China and the Government of the Republic of Indonesia on the Indonesia-China Integrated Industrial Parks'. These cooperation agreements are to be embodied by selected priority projects.
- (610) The China/Indonesia Joint Statement on Strengthening Strategic Partnership of March 2015 stated that the GOID '.... will introduce preferential policies for the industrial parks to provide safeguard and facilitation for more Chinese enterprises to enter the park in accordance with the Indonesian laws and regulations, so as to accelerate the development of the Industrial Parks'.
- (611) Further to the Joint Statement, the GOID introduced a Regulation No. 142/2015 on Industrial Estates to replace an earlier Regulation on Industrial Estates from 2009 so as to bring it in line with the bilateral Joint Statement of 2015 and with the 2013 bilateral Agreement on Integrated Industrial Parks. This Regulation sets out the main incentives for companies that set up in these Industrial Estates such as the IRNC Group in Chapter 8. They included Article 4(i), which stated that the authorities of the Minister cover the 'stipulation of guidelines on reference sales price or rent of Industrial blocks and/or buildings within an Industrial Estate based on Industrial Estate Committee proposals'. Article 41(1) provided that 'An Industrial Estate Company and an Industrial Company located at an Industrial Estate is granted taxation incentives'. Article 45(1) stipulated that 'The Government may initiate the development of Industrial Estates as Industrial infrastructure (a) in the event the private sector is not interested in nor unable to develop an Industrial Estate; and/or (b) to accelerate the spread and even distribution of Industrial development'. Furthermore, the GOID implemented tight involvement and monitoring of the companies managing these Estates via the body foreseen in Article 51(1): 'For the purpose of supporting Industrial Estates development, Industrial Estate Committee is established'.
- (612) The comprehensive processing integration of the park aligns with the policy development objectives of the GOID. Specifically, the smelting facilities comply with the legal requirements of 2009 Mining Law and the related regulations regarding value-added to primary material from the Ministry of Industry. Under this law and regulations, nickel ore mining companies must build their own smelters capacities with the objective of developing higher value-added industries in Indonesia (see previous section).

⁽¹⁴³⁾ Agreement between the Governments of the People's Republic of China and the Government of the Republic of Indonesia on the Indonesia-China Integrated Industrial Parks, 5.1.

⁽¹⁴⁴⁾ Agreement between the Governments of the People's Republic of China and the Government of the Republic of Indonesia on the Indonesia-China Integrated Industrial Parks, 5.2.

- (613) The development of the Morowali Park encompasses key elements, which are set as a priority by the GOID in its development plans. In this sense, the Morowali Park is situated in the strategic geographical area of Sulawesi, operates in the encouraged steel sector, foster upstream and downstream integration and enhance the creation of value added of natural resources and mining, namely nickel.
- (614) From a geographical perspective, the Morowali Park is situated in the Sulawesi ⁽¹⁴⁵⁾ corridor, one of the six economic corridors identified and promoted by the Government of Indonesia as axes of the country's economic development plans. Nickel mining is identified as one of the sectors to substantiate the development of the area.
- (615) The Morowali Park has been granted a special formal status by both the Indonesian and Chinese authorities.
- (616) The Indonesian government officially granted the status as a National Strategic Project ⁽¹⁴⁶⁾ ('PSN'). This is relevant from two perspectives, the development of priority industrial areas/special economic zones and smelter development projects. PSNs are selected in line with the development policies in Indonesia, receives a close monitoring from the government and are eligible to be provided with certain privileges ⁽¹⁴⁷⁾. Furthermore, having the status of a PSN, IMIP was allowed to begin the development of the industrial complex and to start building the plants while waiting for the building construction permit.
- (617) The Chinese Government, and in particular its Ministry of Commerce, formally recognised the Morowali Park as a designated overseas trade and economic cooperation zone in 2016 ⁽¹⁴⁸⁾, and *de facto* as early as 2009 ⁽¹⁴⁹⁾.
- (618) According to MOFCOM's website ⁽¹⁵⁰⁾, formal recognition of an overseas economic and trade cooperation zone refers to an industrial park with complete infrastructure, clear leading industries, sound public service functions and concentrated and radiated effects for investment and construction of Chinese-owned enterprises registered within the territory of the PRC. In carrying out the construction of an overseas economic and trade cooperation zone, an enterprise shall, in accordance with the relevant provisions on overseas investment, complete the formalities for the record or approval of the state's foreign investment in china, obtain the certificate of overseas investment of an enterprise issued by the competent department of commerce, and complete the relevant registration procedures in accordance with the laws of the host country, and establish an enterprise in the cooperative zone. The construction enterprise acquires the land by purchasing or leasing the land and completes the complete land legal procedures. The enterprises in the construction area shall formulate clear plans for the construction and operation of the park and the industrial orientation, complete the infrastructure construction of water, electricity and roads required for the park, and formulate clear service guidelines for the enterprises entering the zone to attract enterprises to invest and produce in the area.
- (619) As expressed in one article, 'Under the government departments' guidance in the framework of the "One Belt, One Road", and in connection with the host country strategy at the highest level, overseas cooperation zones have become a vehicle to implement the "One Belt, One Road" and international production capacity cooperation' ⁽¹⁵¹⁾. This corridor is also eligible under the BRI as one of the areas encouraged by this instrument.
- (620) The above framework confirms that establishment and development of the Morowali Park took place under a special regime framed by legislation pertaining to industrial estates with the aim to promote the industrialisation and development of Indonesia through industrial parks. This legal framework provides various advantages and specific support from the Indonesian authorities, such as the facilitation of licensing, provision of infrastructures and tax incentives. This was confirmed by the findings of the investigation as detailed in the next sections ⁽¹⁵²⁾. Moreover, through its actions, the GOID unequivocally sought the preferential financial support of the GOC to companies in the Morowali Park and adopted such support as its own.

⁽¹⁴⁵⁾ Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025. pg 120-140.

⁽¹⁴⁶⁾ Committee for Acceleration of Priority Infrastructure Delivery (KPIP) and Regulation of the President of the Republic of Indonesia Number 3 of 2016 on Acceleration of the Implementation of National Strategic Projects.

⁽¹⁴⁷⁾ As stipulated by Presidential Regulation No. 3 of 2016 on Acceleration of the Implementation of National Strategic Projects.

⁽¹⁴⁸⁾ <http://www.scio.gov.cn/ztk/wh/slxj/31200/Document/1493265/1493265.htm>

⁽¹⁴⁹⁾ <https://mscconference.com/wp-content/uploads/MSC18-presentations/Evolving-Seascape-3-Xue-BRI.pdf> and http://www.acfic.org.cn/zzjg_327/nsjg/llb/llbgzhdzt/2019zhinan/2019zhinan_1/201910/t20191029_144336.html. See also https://www.etsingshan.com/Art/Art_19/Art_19_103.aspx and <https://link.springer.com/content/pdf/10.1007/s11442-018-1526-5.pdf>

⁽¹⁵⁰⁾ <http://fec.mofcom.gov.cn/article/jwjmhzq/article02.shtml>

⁽¹⁵¹⁾ Annual Report on Development in Africa, No.19 (2016-2017, Yellow Books of Africa, p. 13.

⁽¹⁵²⁾ 'Regulation Industrial estates 142/2015 vs 24/2009' and subsequent 'Regulation Industrial estates 142/2015'.

4.5.6. Joint management through IMIP

- (621) The entity developing and managing the Morowali Park is an Indonesian company, PT Indonesian Morowali Industrial Park ('IMIP'). This was established and incorporated under Indonesian law in September 2013.
- (622) While the cooperation to develop IMIP was first announced at a 2013 summit between China's president, Xi Jinping, and Indonesia's then-president, Susilo Bambang Yudhoyono, its development can be traced back to 2007, when Bintangdelapan Group started its mining operations in a 47 000-hectare concession in Morowali ⁽¹⁵³⁾. The company approached Chinese investors to invest in nickel-based mining activities as China was at the time the largest market for Indonesia's nickel export.
- (623) In 2009, BDI and SDI formed a joint venture to develop the mining industry in the area. The two parties formed PT Sulawesi Mining Investment (SMI), involved in the production and export of nickel ore mainly to China. SDI is a subsidiary to Tsingshan Steel Group, the ultimate mother company of the main cooperating exporting producers, IRNC. On the other hand, BDI, is a subsidiary of Bintang Delapan Group, a conglomerate that includes mining companies with large nickel ore deposits in Indonesia.
- (624) The current shareholders of IMIP are SDI (49,7 %), BDI (25 %) and SMI (25,3 %). SMI became a shareholder in 2015.
- (625) During the summit of October 2013, an agreement was signed between SDI and BDI to establish IMIP. During the RCC, the GOID confirmed the signing of this agreement. However, it claimed that it did not have a copy of this agreement. Furthermore, IMIP refused to submit this agreement during the investigation as well.
- (626) During the same summit, on 2 October 2013, the founder shareholders, BDI and SDI, also signed an investment and financing agreement with the China-ASEAN Investment Cooperation Fund (CAF) to develop activities in the Morowali Park ⁽¹⁵⁴⁾. The China-ASEAN Fund (CAF) is an offshore equity fund approved by the State Council of the Peoples Republic of China and the National Development and Reform Commission. The establishment of the fund is sponsored by the Export-Import Bank of China together with other Chinese and international institutional investors. CAF focuses on investment in infrastructure, energy and natural resources sectors in the ASEAN, and serves as the pioneer to promote the 'South-South Cooperation' between China and the emerging markets, and facilitates the 'going out' strategy for the Chinese enterprises.
- (627) Following the establishment of the company IMIP, the Morowali Park developed rapidly. Infrastructure, supporting facilities and production factories were successively built. The investments in the park by December 2017 were estimated to amount 6 billion USD ⁽¹⁵⁵⁾. IMIP is a shareholder in several of the companies established in the park, including the cooperating exporting producer. IMIP is a related company of the exporting producer.
- (628) Although the Tsingshan Group appears to be a private company, it strictly follows the policy of the GOC, and in Indonesia also of the GOID due to the bilateral cooperation framework. It has been reported by the Chairman of Tsingshan Holding Group that 'Every move the company has made closely relates to the national strategy and structural transformation of China's economy' ⁽¹⁵⁶⁾. Furthermore, it has been reported by Tsingshan Steel Group ⁽¹⁵⁷⁾ that Tsingshan Steel Group has actively implemented the Chinese BRI by accelerating the development of international strategy, building large industrial parks in Indonesia and other countries. Finally, independent sources describe Tsingshan Group as having 'significant linkages to the Zhejiang provincial government' ⁽¹⁵⁸⁾.

⁽¹⁵³⁾ <https://enterpriseasia.org/apea/indonesia/awards/id-2015/halim-mina/>

⁽¹⁵⁴⁾ <http://www.china-asean-fund.com/sub-fund-3-detail.php?id=1>

⁽¹⁵⁵⁾ Tenggara strategic Briefing paper: Belt and Road Initiative: What's in it for Indonesia?, <https://tenggara.id/assets/source/Insights/BRI-Briefing-Paper-English.pdf>

⁽¹⁵⁶⁾ http://www.chinatoday.com.cn/english/report/2016-11/29/content_731597.htm

⁽¹⁵⁷⁾ <https://www.tssgroup.com.cn/en/tsingshan-became-a-newcomer-of-the-fortune-500/>

⁽¹⁵⁸⁾ <https://pandapawdragonclaw.blog/2021/01/17/indonesia-morowali-industrial-park-how-industrial-policy-reshapes-chinese-investment-and-corporate-alliances/>

- (629) IMIP, in its annual reports, manifests itself to be a pilot area of this Indonesia-China economic cooperation.
- (630) According to the IMIP's 2017 Annual Report (p.1, p.18 and p.80) and Eternal Tsingshan Group's website: 'On 3 October, witnessed by Chinese President Xi Jinping and then the Indonesian President Susilo Bambang Yudhoyono, the owner of China's Tsingshan Group Xiang Guangda and the owner of Indonesian Bintang Delapan Group Halim Mina signed a cooperation agreement to establish the Indonesia Morowali Industrial Park ("IMIP") and the first project in the area'. The same report states that 'The Indonesian President Joko Widodo and all levels of central, provincial and district governments pay close attention to, support and encourage the construction of the IMIP'.
- (631) Another link of IMIP with the two governments is that its activity and mandate must comply with the special rules on Industrial Real Estates in order to get the underlying benefits and implement its specific task carried out in the framework of the broader preferential policies put forward by the governments. The framework within which IMIP operates is that of the bilateral cooperation between Indonesia and China to implement one of the strategic projects agreed on, that is to develop the nickel ore processing industry in the Morowali Park. It therefore acts within the perimeter of the main documents of the bilateral cooperation.
- (632) Legally, the formal link with the two governments and the monitoring of the implementation of governmental policies takes place via the licensing system provided in the Indonesian Regulations on Industrial Estates, i.e. the one in force being Regulation No. 142 of 2015. Article 1.7 refers to the Industrial Estate Business Permit ('IUKI'), a license granted by the government to develop and manage an Industrial Estate. Chapter IV of Regulation No. 142, Articles 12 ff. sets out the rules to obtain the IUKI by the government. The Regulation also foresees the establishment of the Industrial Estate Committee, which is an organization formed by the Minister with the task of assisting in the implementation of policies for the development and management of Industrial Estates (Section 1.10). Chapter XII of Regulation N. 142 contains a list of administrative sanctions and the relevant procedure in case the managing companies do not comply with the relevant regulation.
- (633) Finally, there is publicly available evidence that IMIP is in regular contact with the authorities of the GOID and GOC, as shown for example in the meeting which took place between the Ministry of Industry, the CEO of Tsingshan, the Chinese ambassador in Indonesia and IMIP on 3 March 2017 to discuss the development of the Morowali Industrial Park ⁽¹⁵⁹⁾. Another example is a meeting that took place between the CEO of Tsingshan and the President of Indonesia in July 2019 to report on the development of Tsingshan's investments in the Park, as well as on the situation of IMIP's industrial investment promotion activities in the Park ⁽¹⁶⁰⁾.
- (634) These formal procedures demonstrating a close link between IMIP and the two governments, as well as the bilateral cooperation framework and more specifically the Agreement of October 2013 that the GOID and IMIP refused to supply, for which the Commission bases its inferences in accordance with Article 28 of the basic Regulation, show that IMIP is not a private company managing the Morowali Park according to market principles. To the contrary, IMIP's mission is to implement the overarching policy objective by the Indonesian and Chinese governments to facilitate the establishment and development of the stainless steel industry, and in particular IRNC, to achieve the successful implementation of this priority project agreed between the two governments.
- (635) In addition, the Commission notes that IMIP also facilitates the procurement of land for the companies established in the Morowali Park and of all other incentives set out in Chapter VIII of Regulation N. 142 of 2015 (see Section 4.8).

4.5.7. *Other bilateral administrative mechanisms implementing the bilateral cooperation*

- (636) In addition to IMIP, the two governments put in place a number of bilateral administrative bodies in charge of the implementation and monitoring of the several agreements concluded to seal their cooperation since 2005.

⁽¹⁵⁹⁾ <https://kemenperin.go.id/artikel/17208/Kunjungan-Chairman-Tsingshan-Holding-Group-Tiongkokhttps://kemenperin.go.id/artikel/17208/Kunjungan-Chairman-Tsingshan-Holding-Group-Tiongkok>

⁽¹⁶⁰⁾ https://www.etsingshan.com/Art/Art_14/Art_14_196.aspx

- (637) With regard specifically to the Morowali Park, as explained above the two governments signed on 2 October 2013 an Agreement on Indonesia-China Integrated Industrial Parks in Indonesia. Article IV provided a specific 'Cooperation Mechanism' between the parties: 'The two designated authorities will set up the cooperation mechanism comprising of: a. Indonesia-China Integrated Industrial Parks Intern-Governmental Coordinating Committee; b. Local Authority Coordinating Committee; and c. Industrial Parke Development Companies'.
- (638) In order to implement this agreement, Indonesia issued a Decree 432/M-IND/kep/7/2014. This created a specific team for the Indonesian side, that is the Cooperation team for the China-Indonesia integrated industrial estate ('KIT Indonesia'). KIT Indonesia is vested with the duties of providing 'directives on the implementation of Agreement between Government of Indonesia and Government of PRC concerning the Indonesia – China Integrated Industrial Estate' as well as 'to report the outcome of the preparation for the implementation of Agreement between Government of Indonesia and Government of PRC concerning the Indonesia – China Integrated Industrial Estate'. Furthermore, the 'Policy Support Team shall have the duty to conduct coordination and prepare the policy materials and facilitations in the framework of the establishment of Indonesia – China Integrated Industrial Estate.'
- (639) The Commission requested the GOID to indicate the progresses made on this as well to provide supporting documents concerning the setup of this cooperation mechanism. However, the GOID simply replied that the team created by Decree No 432/M-IND/KEP/7/2014 had not generated meaningful policies but did not submit any further documents.
- (640) Due to the lack of cooperation of the GOC, the Commission could not gain the relevant information on the implementation of this specific bilateral Committee by the Chinese side. However, evidence on file showed that it was the intention of the GOC to create such a committee, as can be seen in the 2015 Joint Statement on Strengthening Comprehensive Strategic Partnership between the People's Republic of China and The Republic of Indonesia, which declared that 'The two sides promised to speed up the construction of China-Indonesia Integrated Industrial Parks and to establish the inter-governmental coordinating committee as soon as possible ⁽¹⁶¹⁾'.
- (641) In any case, the evidence on file further showed that Indonesia and China did set up other joint administrative bodies in which the management and implementation of the Morowali Park could be addressed. Examples include the China/Indonesia bilateral cooperation joint committee and the China/Indonesia Joint Steering Committee for the Development of Regional Comprehensive Economic Corridors between China and Indonesia, in which BRI cooperation projects, as well as projects under the Comprehensive Economic Corridors, are being discussed. Both relate also to the Morowali Park.
- (642) Thus, due to the lack of cooperation by the GOC and the partial cooperation by the GOID on this aspect, the Commission had to rely on facts available. On the basis of the public statements seeking to establish entities to allow inter-governmental coordination between the GOID and the GOC, the refusal to provide any document in this respect by the two governments, as well as the existence of multiple joint committees between the GOC and GOID, the Commission concluded that there were bilateral implementation mechanisms in charge of assessing the successful development and monitoring of the Morowali Park for the nickel ore processing project. Through these implementation mechanisms, the GOID is capable of ensuring that the GOC complies with its commitments, including the provision of preferential support to the companies in the Morowali Park, guaranteeing the economic success of that project.

⁽¹⁶¹⁾ Joint Statement on Strengthening Comprehensive Strategic Partnership between the People's Republic of China and the Republic of Indonesia, available at <https://www.mfa.gov.cn/ce/ceindo/eng/zgyyn/zywx/t1249223.htm>

4.5.8. Legal assessment

- (643) The close cooperation between the GOID and the GOC within the territory of the exporting country culminated with the establishment and operation of the Morowali Park. 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.
- (644) Under Article 1.1(a) of the SCM Agreement, a subsidy only exists where there is a financial contribution by a government – or a public body – within the territory of the WTO Member.
- (645) In its submission of 21 October 2021, the GOC referred to its position in the AS656 case ⁽¹⁶²⁾ and argued that a so-called cross-country subsidy investigation is in violation of both the SCM Agreement and the EU Basic Regulation. The GOC referred to Article 1 and 2 of SCM agreement arguing that financial contributions to entities outside the territory of the granting Member do not qualify as subsidies within the meaning of the SCM Agreement, because a subsidy exists where ‘there is a financial contribution by a government or any public body within the territory of a Member’ and a subsidy is specific only if granted to an entity ‘within the jurisdiction of the granting authority’. The GOC further referred to Article 2 of the basic Regulation, arguing that the term ‘government’ is defined as ‘a government or any public body within the territory of the country of origin or export’. It also quoted Article 4.2 of the basic Regulation, which considers a subsidy specific when granted to ‘an enterprise or industry ... within the jurisdiction of the granting authority.’ On this basis, the GOC concluded that this investigation could not be extended beyond the territory and jurisdiction of Indonesia, and no act of the GOC could become the basis to determine the existence of Indonesian government’s subsidies.
- (646) The Commission observed that these comments tackle 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 WTO members. However, they do not speak to 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.
- (647) Indeed, as found in Case AS656 ⁽¹⁶³⁾, the terms ‘by a government’ in Article 3(1)(a) of the Basic AS Regulation and in Article 1.1(a)(1) of the SCM Agreement, interpreted *inter alia* in light of Article 11 of the ILC Articles on State Responsibility for Internationally Wrongful Acts (‘ILC Articles’) 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.
- (648) Under 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’. The commentary to the Draft ILC Articles confirms that the phrase ‘acknowledges and adopts the conduct in question as its own’ is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement. In this sense, as a general matter, conduct will not be attributable to a State under Article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it.

⁽¹⁶²⁾ Commission Implementing regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt (OJ L 189, 15.6.2020, p. 1).

⁽¹⁶³⁾ Commission Implementing regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People’s Republic of China and Egypt (OJ L 189, 15.6.2020, p. 1).

- (649) Moreover, acknowledgement and adoption of conduct by a State might be express or it might be inferred from the conduct of the State in question (such as cases where the State is at least aware of and consented to the conduct in question). In any event, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal. Therefore, Article 11 of the ILC Articles requires an *in concreto* examination of the behaviour of the exporting country indicating that it acknowledged and adopted as its own the conduct of a foreign government.
- (650) In this respect, rather than providing the subsidies directly, the Commission will 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. 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.
- (651) The Commission was thus entitled to verify whether the resources provided to the IRNC Group could be qualified as countervailable subsidies granted by the GOID within the meaning of Articles 2, 3 and 4 of the basic Regulation.

4.5.8.1. Financial contribution of a government or a public body

- (652) According to Article 3(1)(a) of the basic Regulation, a subsidy exists if there is a financial contribution by a government in the country of origin or export. Similarly, Article 1.1(a)(1) of the SCM Agreement states that a subsidy shall be deemed to exist 'if there is a financial contribution by a government'.
- (653) The GOID has provided IRNC Group with nickel ore, land, and a number of additional subsidies. These subsidies are thus operated and granted directly by the GOID.
- (654) However, ever since the start of the bilateral cooperation with the Joint Declaration between Indonesia and China in 2005 and the Memorandum of Understanding on Infrastructure and natural Resources Cooperation as per recitals (563) et seq., the GOID has proactively induced the GOC to provide financial support to companies in Indonesia by specifically contributing to the creation and development of the stainless steel industry in Indonesia through the Morowali Park. This is clearly stated in the 2010 Indonesia-China Plan of Action, namely in the chapter on 'Investment Cooperation' (see recital (563)). The cooperation was further strengthened with three documents signed between GOID and GOC in 2011 (see recitals (548) et seq.). In the Agreement of 29 April 2011 (recital (566)), the governments '*agreed to encourage their respective financial and insurance institutions to give priority to financing and insurance support for those projects*', including in the steel industry and industrial parks (such as Morowali). The GOID, via its Investment Coordinating Board (BKPM) expressly asked China to invest in nickel processing in Southeast Sulawesi, i.e. where the Morowali Park is located (see recital (603)).
- (655) A key year in the stepping up of the cooperation was 2013. The GOID and the GOC signed the Indonesia-China Five-Year Development Program for Economic and Trade Cooperation, which identified key cooperation areas including the metallurgical industry, nickel projects and industrial parks, and encouraged Chinese enterprises and financial institutions to participate in the development of economic corridors and specific priority projects (see recitals (604) and (609)). The cooperation was then sealed at the highest political level with the visit of the President of China to the President of Indonesia in October 2013 mentioned.

- (656) The Morowali Park is managed by the company IMIP, as explained above. This Chinese-Indonesian company was formally established in 2013 and has received the formal recognition by the GOID as a National Strategic Project in 2016 and by the GOC as overseas investment area project under the Chinese BRI. These formal government recognitions entail that the company is acting to carry out State policies and is subject to specific regulations and controls in the fulfilment of its tasks of public interest. Already this shows that IMIP is not merely a private company but the expression of the two governments' agreement to implement their cooperation to develop the nickel ore processing industry in the Morowali Park for the benefit of the IRNC Group. This is confirmed by IMIP itself, which has declared itself to be a pilot project of the bilateral cooperation.
- (657) Furthermore, IMIP is an entity with close ties to the highest political levels in China and Indonesia, as shown by the endorsement of the respective Presidents who were present at the signature of the Agreement for its establishment in October 2013. Significantly, both the GOID and IMIP repeatedly refused to provide this agreement. Due to the lack of cooperation on this aspect by GOID and IMIP, the Commission inferred on the basis of Article 28(1) of the basic Regulation that this agreement also contained specific evidence of IMIP being entrusted by the two governments to implement the nickel ore project as one of the strategic projects agreed by the governments. Moreover, IMIP is subject to the licensing and monitoring requirements by the GOID under Regulation No. 142 of 2015 to fulfil its obligations stemming from being recognised as an Industrial Estate.
- (658) Based on all these elements, the Commission concluded that the Morowali Park and IMIP were expressions of the joint management by the GOID and GOC of the nickel ore processing project for the benefit of the IRNC Group.
- (659) The GOID and the GOC have also put in place joint administrative and cooperation bodies in charge of ensuring the smooth implementation of their bilateral cooperation, including via the Morowali Park and IMIP. Among them, the bilateral Cooperation team under the China-Indonesia Agreement on Indonesia Integrated Industrial Parks included government representatives elected by the GOID (KIT Indonesia), and based on inferences under Article 28(1) of the basic Regulation, in particular the bilateral cooperation framework, also by the GOC.
- (660) The joining forces by the GOID and the GOC served several purposes.
- (661) From the Indonesian perspective, the objective was to induce China to bring in investments, know-how, and capital in order to develop the whole value chain of the stainless steel industry and thus maximise the added value of the large nickel ore reserves for the country. Indonesia was unable to achieve this objective on its own and thus needed Chinese cooperation and support. The GOID leveraged its privileged position of having the large nickel ore reserves that the Chinese industry badly needed to induce the GOC to actively engage in providing the necessary support to the specific project. As an additional incentive, as concluded above, the GOID put on the table the provision of nickel ore for less than adequate remuneration.
- (662) From the Chinese perspective, given the situation the GOC had little choice but to agree to the Indonesian request. The Chinese stainless steel industry had relied for some time on imports of Indonesian nickel ore, which in terms of quality matched perfectly with the technology and production processes of its industry. This is confirmed by the export statistics to China in Tables 1 and 2. The change of the GOID's policy by stepping up the domestic value chain by banning exports of nickel ore put at risk the Chinese stainless steel production. The Chinese industry tried to source nickel ore from the Philippines, but this attempt was unsuccessful. Therefore, China agreed to enter into the bilateral cooperation framework with Indonesia.
- (663) With the progressive deepening of the cooperation, the GOC relied on its BRI to prioritise this project and provide the corresponding preferential financing and other support. According to MOFCOM's 13th Five-Year Plan for the Development of Foreign Trade, one of the main tasks under the OBOR initiative is to enhance the trade cooperation with countries along the BRI in order to promote and expand exports as mentioned in the following statement: 'Stabilize exports of advantageous products such as labour-intensive products to the aforesaid countries, seize the opportunities of constructing infrastructure for such countries, and foster exports of large-sized complete sets of equipment, technologies, standards and services. Adapt to the trend of transformation and upgrade of industries of

these countries, and accelerate exports of electromechanical and high-tech products. ... Intensify the expansion of emerging markets, and after comprehensively considering economic scale, growth speed, resource endowment, risk degree and other factors, select several emerging markets for primary expansion. Expand exports of advanced technical equipment, and promote exports of high-quality, high-grade and comparatively advantageous industries and products.'

- (664) Envisaged measures to achieve these tasks include the 'development of State-level economic and technological development zones and various parks'. The Morowali Park falls in this context. Furthermore, 'Focus on countries with good resource conditions, strong supporting capabilities and great market potential along the "Belt and Road", continue to improve the investment cooperation mechanism with relevant countries, strengthen coordination [...] and orderly promote the export of advantageous production capacity, prevent rush and disorderly competition [...] encourage advantageous steel enterprises to set up steel production bases as well as processing and distribution centers overseas, drive exports of advanced equipment, technology and management' ⁽¹⁶⁴⁾. The deal with the resource-rich Indonesia fits perfectly with this objective.
- (665) Furthermore, the 13th Five Year Plan on Steel adjustment and upgrade, states that China shall 'encourage advantageous steel enterprises to set up steel production bases as well as processing and distribution centers overseas, drive exports of advanced equipment, technology, and management.' Once again, this shows the GOC policy bias in favour of high value-added steel industries like the stainless steel industry.
- (666) Overseas zones, such as the one at Morowali Park, thus serve several strategic objectives also for China. First, they help increase demand for Chinese-made machinery and equipment. Second, by producing overseas and exporting to Europe or North America, Chinese companies are able to avoid trade frictions and barriers imposed on exports from China (there are anti-dumping duties already in place on imports of stainless steel products from China, and the import market share from China is almost non-existent). Third, they assist China's efforts to boost its own domestic restructuring and to assist its industries to move up the value chain at home ⁽¹⁶⁵⁾.
- (667) The Chinese investor Tsingshan Group, the main investor in the exporting producer IRNC Group, has explicitly confirmed that it has actively implemented the Chinese BRI (see recital (628)).
- (668) It follows from the above that the GOID induced China to provide *inter alia* preferential financing to stainless steel producers through the close cooperation within the Morowali Park. As explained above, the GOC had little choice but to engage in the bilateral cooperation, including the provision of financial support, and it used the BRI context to finance this project which, as previous cases have shown ⁽¹⁶⁶⁾, is used by the GOC to provide preferential financing to Chinese companies.
- (669) Under these circumstances, the Commission considered that the term 'by the government' in Article 3(1)(a) of the basic Regulation should include not only measures directly emanating from the GOID, but also those measures by the GOC which can be attributed to the GOID on the basis of the available evidence.
- (670) From the start of the cooperation as early as 2005, the GOID proactively sought the Chinese financial support to encourage its nickel and downstream industries, which materialised in the Morowali Park. As amply detailed above, in particular the 2011 and 2013 Agreements between Indonesia and China as well as the Chinese provisions on the implementation of OBOR and of the steel policies, the provision of preferential financing was an integral part of the deal between Indonesia and China. For instance, the 2011 Agreement states that 'The Parties agree to *encourage their respective financial and insurance institutions to give priority to financing and insurance support for those projects.*' Point 5.2.1 of the Indonesia-China Program stated that '*Chinese financial institutions are encouraged to support financing for investment and project construction undertaken by Chinese-funded enterprises in Indonesia.*' The deal was then sealed at a summit in 2013 with the presence of then Indonesia President Susilo Bambang Yudhoyono and China's President Xi Jinping. The 2013 Indonesia-China Five-Year Development Program for Economic and Trade Cooperation also unequivocally shows that the GOID acknowledged and endorsed the Chinese preferential support also for industrial parks, such as the Morowali Park.

⁽¹⁶⁴⁾ Section IV – 8 of the 13th Five Year Plan on Steel adjustment and upgrade.

⁽¹⁶⁵⁾ D. Brautigam & Xiaoyang Tang; *Going Global in Groups: Structural transformation and China's Special Economic Zones overseas*, World Development Vol. 63, 2014, pp. 78–91.

⁽¹⁶⁶⁾ GFF anti-subsidy investigation and Tyres case (sections 4.3.3 and 3.7).

- (671) The characteristics of the Chinese BRI are public knowledge. Articles 30 to 36 of the Guiding Opinions of the State Council on the Promotion of International Production Capacity and Equipment Manufacturing Cooperation of 13 May 2015 list all the policy support that companies ‘going abroad’ can receive. They include fiscal and tax support policies, concessional loans, financial support through syndicated loans, export credits, and project financing, equity investment, and finally export credit insurance. Article 31 thereof refers to ‘concessional loans’ which shall ‘support enterprises to participate in the export of large-scale complete sets of equipment, project contracting and large-scale investment projects’. In practice, this policy has led to numerous preferential financing schemes by banks or the specifically set-up ‘Silk Road Fund’ under Article 35 of the Guiding Opinions, as recently established by the Commission in another case ⁽¹⁶⁷⁾.
- (672) As the Presidents of Indonesia were no doubt aware that the Chinese BRI involves heavy State financing through preferential financing and other financial instruments (see recitals (577) and (589)), there was a clear act of acknowledgment and adoption at the highest political level of such preferential financing from the GOC by the joint setting up of the Morowali Park.
- (673) The fact that Indonesia proactively sought the preferential financing from China as one of the main points of their bilateral cooperation confirms that the preferential support granted by the GOC should be attributed to the GOID. This underpins the conclusion that Indonesia acknowledged and adopted Chinese preferential financing as its own. This is based *inter alia* on Article VI of the 2011 bilateral Agreement and Article 5.2.1 of the Indonesia-China Programme. The Indonesian government was also in agreement that China would designate the Morowali Park and IMIP as an ‘overseas investment area’ under its laws for the purpose of the BRI Initiative, and mirrored it with the formal domestic recognition of this project as a National Strategic Project under Indonesian law. Since ‘overseas investment areas’ are a vehicle of the BRI and since this initiative uses preferential financing as a tool, such a designation of the Morowali Park and of IMIP had the consequence that IRNC Group became eligible to ask for preferential lending from Chinese policy banks and preferential export insurance terms. As already found in a number of previous investigations ⁽¹⁶⁸⁾, the Chinese preferential financing is not operated by clearly prescribed funding programs with strict eligibility criteria, but rather by the identification at the highest level of a number of encouraged industries ⁽¹⁶⁹⁾. The official designation of the Morowali Park and IMIP in Indonesia as an overseas investment area for Chinese companies in the aftermath of a common agreement between the two governments to support financing fits perfectly into the usual Chinese pattern of activating preferential financing by its policy banks. This records the shared understanding of Indonesia and China that the GOC was not to provide financing at market rates, but proactively provides State incentives also in view of the huge investments amount required and the associated risks of project failure. This once more shows the benefits or preferences granted to them.
- (674) The Chinese preferential measures in favour of the Chinese entities established in Indonesia were thus clearly and unequivocally ‘identified’ and ‘acknowledged and adopted as its own’ by Indonesia.
- (675) Moreover, the GOID was closely involved in the activities of IMIP as the vehicle chosen to manage the Morowali Park, via the authorisations to settle in the area of the Park, the facilitation to procure the land (see below). Equally important means of government intervention are the licensing system via the IUKI and the monitoring activities prescribed by Regulation No. 142 of 2015 through the Industrial Estate Committee. These enable the GOID to closely control and monitor the activities of companies managing industrial estates, such as IMIP. Moreover, Indonesian officials were continuously present in the bilateral implementation mechanism set up in 2014 under the bilateral Agreement on Integrated Industrial Parks (recital (605)). The GOID was also in charge of conferring the formal status of eligible industrial estate to IMIP as administrator of the Morowali Park by issuing the temporary license to operate under this status, and subsequently to check that all the requirements of the relevant laws and policies were fulfilled in order to grant the permanent licence.

⁽¹⁶⁷⁾ Commission Implementing Regulation 2018/1690 imposing definitive countervailing duties on imports of certain tyres from China (OJ L 283, 12.11.2018, p. 1), Recitals 409-412.

⁽¹⁶⁸⁾ Such as Commission Implementing Regulation (EU) 2017/96 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 146, 9.6.2017, p. 17).

⁽¹⁶⁹⁾ Commission Implementing Regulation 2018/1690 imposing definitive countervailing duties on imports of certain tyres from China (OJ L 283, 12.11.2018, p. 1), Recital 377.

- (676) Furthermore, as regards more specifically the preferential financing, the GOID has a monitoring process in place to be able to check the any financial flows for foreign investors and foreign capital, including the need to channel overseas funds via local Indonesian branches. Moreover, in the case of the specific loans and financial support provided to the companies in the IRNC Group, the funds were provided by SOCBs or policy banks located in China, but the loan agreements signed by the companies located in Indonesia also provided for so-called 'agent' banks. These consisted of local Indonesian branches of the Chinese banks, whose role was to act as intermediaries to channel the funds from China to the recipient companies in Indonesia. Thus, the GOID could properly monitor the agreed financial support.
- (677) Through all these mechanisms, Indonesia also showed its full endorsement and close control of the Chinese preferential financing for the benefit of the stainless steel producer in the Morowali Park.
- (678) It follows from the evidence available, and despite the lack of cooperation of the GOID and the GOC related to this part of the investigation, that the preferential financing from Chinese public bodies to IRNC Group can be attributed to the GOID as the government of the country of origin or export under Article 3.1(a) of the basic Regulation. The evidence showed that the GOID proactively sought from China and hence endorsed the preferential financial support to the stainless steel producer in the Morowali Park in line with the agreed commitments to develop and support the development of the stainless steel industry in Indonesia.
- (679) In this context, the Commission further noted that the possibility for governments to provide a financial contribution indirectly through private bodies is neither exogenous to the basic Regulation nor to the SCM Agreement ⁽¹⁷⁰⁾. 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 ⁽¹⁷¹⁾. 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.
- (680) Consequently, the Commission considered that the preferential financing granted by the GOC to the SSCR exporting producers in Morowali Park amounted to a financial contribution by the GOID in the sense of Article 3(1)(i) of the basic Regulation ⁽¹⁷²⁾.

4.5.8.2. Benefit

- (681) The Commission then considered whether these financial contributions attributable to the GOID conferred a benefit on IRNC Group under Article 3(2) of the basic Regulation. It recalled that the IRNC companies were operating in Indonesia and were incorporated under Indonesian law. Hence, it was in principle appropriate to inquire whether these recipients of the financing received better terms than they would have received on the Indonesian financial market. As mentioned in recitals (732) and (733), the Commission verified this point and was satisfied that this was the case.
- (682) However, the Commission also took into consideration the exceptional circumstances of this case. It is recalled that the exporting producers are related to Chinese parent companies. Chinese public bodies granted the preferential financing after negotiation and signature of the relevant documents in China, and the recipients received them directly or indirectly through the channel of their parent company in China (inter-company loans). The loan agreements specified that the funds would be used for the projects in Indonesia. Through the setting up of the bilateral cooperation framework triggered by the GOID's actions to induce the Chinese smelting capacity to be moved to Indonesia, the GOID sought and endorsed that those entities received preferential support, including cheap loans in line with Chinese law, i.e. under Chinese conditions. The Chinese public bodies provided such financing according to the preferential financing policies implemented in China.

⁽¹⁷⁰⁾ See Article 3(1)(a)(iv) of the basic Regulation and Article 1.1(a)(1)(iv) of the SCM Agreement.

⁽¹⁷¹⁾ Appellate Body Report, US – DRAMS, (WT/DS296/AB/R), para. 112.

⁽¹⁷²⁾ Incidentally, the facts at issue may also be considered from the angle of Article 16 of the ILC Articles. The close cooperation between the GOID and the GOC not only resulted in acknowledgment and adoption of Chinese acts by the GOID, but also served to potentially circumvent actual and potential duties imposed by the EU on Chinese exports of the product concerned made in Indonesia.

- (683) The Commission therefore concluded that the adoption and acknowledgement by the GOID of the financial contributions from the Chinese public bodies to IRNC included also the preferential/benefit aspects thereof. It hence established Chinese market rates for the preferential financing and calculated the benefit accordingly. Those details are further elaborated upon in section 4.6 below. The Commission noted that this reasonable approach resulted in lower subsidy amounts than the ones derived from applying a hypothetical Indonesian benchmark.

4.5.8.3. Specificity

- (684) Concerning the third point on specificity, the Commission examined whether these subsidies were specific as required by Articles 4(2) through (4) of the basic Regulation.
- (685) 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.
- (686) 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.

4.5.9. Comments on final disclosure

- (687) The complainant, the GOID, the GOC and IRNC Group submitted comments on final disclosure concerning the cooperation between the GOID and the GOC.

4.5.9.1. Comments on financial contribution

- (688) The GOID, the GOC and IRNC Group claimed that this investigation, insofar it tackles subsidies for the production of the product concerned granted by a country other than the exporting country, is in violation of both the SCM Agreement and the basic Regulation. According to them, the anti-subsidy investigation could not be extended beyond Indonesia's territory and jurisdiction.
- (689) The GOC further recalled that it had already expressed its position in the GFF anti-subsidy investigation. In the case at hand, the GOC understood recital (646) as a confirmation that the Commission shares the GOC's view that the SCM Agreement does not involve the relationship between one government and producers located overseas.
- (690) Along these lines, the GOC and IRNC Group claimed that, according to Articles 1 and 2 of SCM Agreement, financial contributions to entities outside the territory of the granting country do not qualify as subsidies within the meaning of the SCM Agreement. More specifically, the GOID stated that Article 1.1(a)(1) (i) – (iv) of the SCM Agreement also mentions “a government/government” in each of the paragraphs which refer to the same entity in its chapeau and those references cannot be construed to mean that a government outside of the territory of the country granting the financial contribution would be included
- (691) The GOID added that the WTO case-law interpreted Article 1.1(a)(1) of the SCM Agreement as an ‘exhaustive closed list’ ⁽¹⁷³⁾, which ‘defines and identifies the government conduct that constitutes a financial contribution for purposes of the SCM Agreement’ ⁽¹⁷⁴⁾ and ‘from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies’ ⁽¹⁷⁵⁾. In relation to the interpretation of Article 1.1(a)(1) of the SCM Agreement through Article 11 of the ILC Articles, referred to in recitals (647) to

⁽¹⁷³⁾ 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, para. 7.955.

⁽¹⁷⁴⁾ 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, para. 614.

⁽¹⁷⁵⁾ Panel Report, *US – Exports Restraints*, cit., paras. 8.65 and 8.73.

(650), the GOID recalled the WTO case-law on the interpretation of the WTO agreements ⁽¹⁷⁶⁾. Then, it claimed that the Commission, by interpreting 'by a government' in Article 1.1(a)(1) of the SCM Agreement as including a possible attribution of the provision of subsidies to other governments, added words that are not in the text of the SCM Agreement.

- (692) The GOID, the GOC and IRNC Group further argued that, since the term 'government' included in Article 2 of the basic Regulation is defined as 'a government or any public body within the territory of the country of origin or export', GOC's alleged subsidies could not fall within the scope of this investigation. According to the GOC and to IRNC Group, Article 4(2) of the basic Regulation reinforces this view through a reference to the 'jurisdiction of the granting authority'.
- (693) The Commission disagreed with all of the above claims. The Commission noted that the arguments made by the GOID, the GOC and IRNC mostly overlapped and for some issues invoked separate arguments. The Commission analysed the overlapping points together and tackled the remaining arguments made by each party separately.
- (694) At the outset, the Commission referred to the arguments developed in case AS 656, in particular at recitals (685) and following, and at recitals (709) and following, which would already be sufficient to dismiss the claims of these parties. Nevertheless, the Commission provided the following clarifications to support further its position.
- (695) With regard to the interpretation of the WTO provisions and the provisions of the basic Regulation, the Commission noted that the parties failed to refer to the relevant WTO jurisprudence. The WTO Appellate Body ('AB') held in the US-Gasoline case ⁽¹⁷⁷⁾ that WTO law cannot be read in clinical isolation from general international law. General international law principles thus form part of the WTO legal order, which is not a self-contained regime ⁽¹⁷⁸⁾. In line with Article 3.2 DSU and Article 31(3) (c) of the Vienna Convention on the Law of Treaties (VCLT), '[a]ny relevant rules of international law applicable in the relations between the parties' must be taken into account in the assessment of the context of the terms of a treaty. These 'rules' include customary international law ⁽¹⁷⁹⁾, which are by definition binding on all WTO members, including Indonesia, China, and the European Union. The 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. The rules in the ILC Articles are also 'relevant' within the meaning of Article 31(3) (c) VCLT 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. In this respect, the notion of attribution becomes relevant to interpret the terms 'by the 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, as in the case at hand ⁽¹⁸⁰⁾. Therefore, the ILC Articles can thus be used to interpret the terms 'by the government' in the chapeau of Article 1.1(a)(1) of the SCM Agreement in order to attribute the conduct (granting of a subsidy) to the GOID, even in cases where the financial contribution has not been made directly by the GOID.
- (696) With regard to the claims concerning Article 2(b) of the basic Regulation, this Article provides that "Government" means a government or any public body within the territory of the country of origin or export.' The Commission concurred with the interpretation that this provision covers actions of the government from whose territory the subsidised products are exported to the EU. This is precisely the case here. The product concerned is manufactured in Indonesia and exported from Indonesia to the EU. However, Article 2(b) of the basic Regulation does not speak to the separate question which action the government may authorise on its territory and acknowledge as its own. Just like with the notion of 'public body', the notion of 'government' is open to interpretation, taking into account

⁽¹⁷⁶⁾ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291, para. 268 and Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9, para. 45.

⁽¹⁷⁷⁾ WT/DS2/AB/R – *US – Reformulated Gasoline*, Appellate Body Report adopted on 20 May 1996, p. 17.

⁽¹⁷⁸⁾ See in detail J. Pauwelyn, *The Role of Public International Law in the WTO – How far can we go?*, *American Journal of International Law* (2001), pp. 535 and following; Graham Cook, *Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP 2015).

⁽¹⁷⁹⁾ WT/DS379 – *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report adopted on 11 March 2011, §§308; M.E. Villiger, "Commentary on the 1969 Vienna Convention on the Law of Treaties" (Martinus Nijhoff, 2009), p. 433.

⁽¹⁸⁰⁾ WT/DS379/AB/R, paras. 304 – 322.

its context, object and purpose. Thus, the actions attributable to the government of the country of origin or export may not only be actions directly emanating from such a government but also actions imputable to such a government. This is further confirmed by the terms in Article 3(1)(a) of the basic Regulation when referring to a financial contribution 'by' a government. For the same reasons, the other arguments invoking the provisions of the SCM Agreement, namely Article 1.1(a)(1), are of no avail.

- (697) Therefore, based on the interpretation of Articles 2(b), 3(1)(a), and 4(2) of the basic Regulation in conformity with the relevant provisions of the WTO SCM Agreement and the ILC Articles, 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. The Commission therefore rejected these claims.
- (698) With regard to recital (646), the IRNC Group claimed that, by changing the topic to attribution, the Commission circumvented the prerequisites for taking countervailing measures. According to the IRNC Group, the Commission concluded that the GOID was the granting authority without a proper explanation and analysis, through attribution based only on Article 11 of the ILC Articles, although such a reference was not made. The IRNC Group claimed that, in order for Article 11 of the ILC Articles to allow the attribution to the GOID of the GOC's financial support, the Commission needed to prove that the alleged financial support granted by the GOC was an 'internationally wrongful act' in the first place, otherwise, the whole basis of the Commission's argument would not exist. As the WTO considers that developing countries are entitled to make full use of their own resources for economic development, bilateral cooperation between two developing countries could not fall within the definition of 'internationally wrongful acts'. IRNC Group added that, even if the Commission somehow established attribution, there is still a considerable logic gap from 'GOID is accountable' to 'GOID is the granting authority' itself.
- (699) The Commission explained at length via its cross-reference to the arguments and legal reasoning developed in the case AS656 combined with the further explanations at recitals (647)-(651) how Article 11 of the ILC Articles applied in this investigation. In addition, Section 4.5.8.1 detailed all the legal arguments and underlying evidence to support the attribution of the financial contribution and the relevant subsidies to the GOID. The Commission recalled that according to 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'. The commentaries to the Draft ILC Articles confirm that the phrase 'acknowledges and adopts the conduct in question as its own' is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement. In particular, conduct is not attributable to a State under Article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. The act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal⁽¹⁸¹⁾. Therefore, Article 11 of the ILC Articles requires an *in concreto* examination of the behaviour of the exporting country indicating that it acknowledged and adopted as its own the conduct of a foreign government. The Commission has done exactly that in its detailed analysis in Section 4.5.8.1, concluding that the GOID sought, acknowledged and adopted as its own the conduct of the GOC. The actions consisting of granting of countervailable subsidies of the GOID and GOC were at odds with the provisions of the SCM Agreement and of the basic Regulation, and thus they fall squarely within the scope of Article 11 of the ILC Articles. Whether or not such preferential lending triggered from a normative point of view also the international responsibility of China for a breach of the SCM Agreement is irrelevant. In other words, the Commission attributed Chinese 'conduct' (namely, the granting of the preferential lending) to the GOID and not 'wrongful acts'. Therefore, the arguments of the parties were rejected. The GOC sought a clarification from the Commission concerning whether the Commission's reliance on Article 11 of the ILC Articles is applicable to the interpretation of the basic Regulation, that is to say, according to the GOC, whether customary international law can be used to interpret the EU domestic law.
- (700) The Commission noted at the outset the settled case-law of European Courts, under which the provisions of the basic Regulation must be interpreted, insofar as possible, in light of the corresponding provisions of the WTO Agreements⁽¹⁸²⁾. This requirement to interpret secondary EU legislation in a manner consistent with an international agreement presupposes that it is possible to achieve consistency between the different provisions and

⁽¹⁸¹⁾ Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) ("ILC Commentaries"), Article 11, para. (8).

⁽¹⁸²⁾ See judgments of 22 May 2014, *Guangdong Kito Ceramics and Others v Council*, T-633/11, EU:T:2014:271, para. 38; of 11 July 2017, *Viraj Profiles v Council*, T-67/14, EU:T:2017:481, para. 88; and of 10 April 2019, *Jindal Saw*, T-300/16, ECLI:EU:T:2019:235, para. 101.

applies only 'insofar as is possible'. The Commission further noted that the Court has previously ruled that the primacy of international agreements concluded by the EU over secondary EU legislation requires that the latter be interpreted, in so far as possible, in a manner consistent with those agreements, including when the provisions of the latter do not have direct effect ⁽¹⁸³⁾.

- (701) The provisions of the basic Regulations at stake, that is Articles 2(b), 3(1)(a), and 4(2), stem from obligations contained in corresponding provisions of the SCM Agreement, namely Article 1.1(a)(1), and must thus in principle be interpreted in conformity. The fact that Article 1.1(a)(1) of the SCM Agreement, and the corresponding provisions of the basic Regulation, do not refer explicitly to the possibility to attribute financial support provided by one State to another State is not an obstacle to interpret the terms in line with the attribution principles in the ILC Articles. Article 11 of the ILC Articles is relevant since it concerns the same subject matter as the treaty terms being interpreted ⁽¹⁸⁴⁾. The interpretation of the terms 'by the government' in these provisions in line with Article 11 of the ILC Articles permits to 'ascertain the common intention of the parties to a particular agreement' ⁽¹⁸⁵⁾. Thus, the proper interpretation of Article 1.1 of the SCM Agreement and of the Basic AS Regulation do require the taking into account of the ILC Articles, which have already been explicitly considered by the Court of Justice in a number of cases ⁽¹⁸⁶⁾.
- (702) IRNC Group asserted that, even if cross-country subsidy investigations were permissible under the SCM Agreement, the Commission would have failed to establish financial contribution in this case. Indeed, according to IRNC Group, the fact that the GOID identified, acknowledged and adopted as its own the Chinese preferential measures (recital (674)), the full endorsement and the close control of Chinese preferential financing (recital (677)), as well as the clear and explicit link between the actions of the GOC and of the GOID (recital (679)), are logically flawed and not supported by substantial evidence.
- (703) In this respect, IRNC Group underlined that the Commission did not demonstrate the contribution by the GOID or by a public body. The Commission did not prove the full endorsement of the GOID, whilst the alleged close control corresponded in the IRNC Group's view to few normal administrative functions and normal control on foreign financial flows. Also the involvement of local branches in the repayment of the loans corresponded to a common business practice. The Commission considered these arguments baseless. This entire Section 4.5 explains in great detail how the cooperation led to the GOID acknowledging and accepting as its own the financial contribution provided by the GOC. This is then specifically dealt with in a separate Section 4.5.8.1. Contrary to this party's assertion, there is ample substantial evidence supporting these conclusions, and this evidence has not been rebutted by parties. The assessment concludes that the financial contribution was provided by financial institutions established in the PRC acting as public body (see also recitals (727)-(731)), and that this financial contribution was proactively sought by the GOID, which made it its own. The GOID and GOC have put in place a number of bilateral administrative bodies in charge of implementing the Morowali project, as detailed among others in Section 4.5.7. Finally, the Commission noted that not only did the Chinese preferential funding have to transit via Indonesian 'agency banks' (see recital (751)), but also that offshore loans linked to development projects like the Morowali one are subject to specific approval and monitoring by an inter-Ministry *Team for Offshore Commercial Loans (Tim Pinjaman Komersial Luar Negeri or 'PKLN')* according to Presidential Decree No. 39 of 1991, as explained in more detail at recitals (752) and following). These arguments were therefore rejected.

4.5.9.2. Comments on the Morowali Park

- (704) The GOID reacted to the Commission's findings by stating that it is open to international cooperation and it has many bilateral agreements in place. However, this does not mean that the GOID gives a preference to foreign investments, since any investment in Indonesia is carried out in accordance with Indonesian law. The GOID refused to address any of the documents cited by the Commission because it regarded all of them as non-binding. In addition, the GOID highlighted that the cooperation with the GOC does not focus on the stainless steel industry or on industrial parks.
- (705) At the outset, the Commission observed that the GOID (and the GOC) did not contest the accuracy of the facts and the relevant evidence regarding the cooperation between these two governments as described in Section 4.5.

⁽¹⁸³⁾ See, in particular, judgments of 7 June 2007, *Řízení Letovského Provozu*, C-335/05, EU:C:2007:321, para. 16, and of 8 March 2011, *Lesoochrannárske zoskupenie VLK*, C-240/09, ECLI:EU:C:2011:125, paras. 45 and 51, which concerns interpretation of the basic Regulation in conformity with the WTO Anti-Dumping Agreement.

⁽¹⁸⁴⁾ WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R), adopted 25 March 2011, para. 308 ('In order to be relevant, such rules must concern the same subject matter as the treaty terms being interpreted').

⁽¹⁸⁵⁾ WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R), adopted 25 March 2011, para. 312.

⁽¹⁸⁶⁾ See in particular judgments of 6 May 2010, C-63/09, *Axel Walz*, ECLI:EU:C:2010:251, paras. 27 – 29; and of 6 October 2020, C-66/18, *European Commission v. Hungary*, ECLI:EU:C:2020:792, para. 90. See also AG Kokott's Opinion of 15 April 2010, C-334/08, *European Commission v. Italian Republic*, ECLI:EU:C:2010:187, paras. 29 and 30.

- (706) The Commission further noted that the fact that the GOID is open to international cooperation and has many bilateral agreements with other countries – albeit referred to generically with no specific details - does not detract from the conclusion that the cooperation with the GOC in the Morowali Park went well beyond an ordinary international cooperation or other unspecified bilateral agreements. The Commission acknowledges that governments conclude cooperation agreements or other bilateral agreements for many purposes, including when they provide for certain provisions encouraging or promoting investment. These provisions alone would be insufficient to attribute countervailable financial support from the country providing them to the exporting country for the purposes of the basic Regulation. However, the present investigation was not concerned with the existence of a mere generic cooperation or ordinary bilateral agreement(s) between Indonesia and China. Instead, the Commission based its analysis and findings that the Chinese financial support was attributable to the GOID, on the existence of a large number of documents and elements which, taken together, showed that the cooperation between the GOID and the GOC went well beyond the mere promotion of development and attraction of investment. Instead, the two governments agreed to implement a very specific project in the Morowali Park and had established detailed bilateral administrative mechanisms to ensure the successful implementation of this project, as explained in detail in Section 4.5.5. The cooperation in the Morowali project was based on a series of specific bilateral agreements and documents which unequivocally foresaw *inter alia* the obligation for the Chinese side to provide massive preferential financing for the Chinese-based investors in the Morowali Park. The subsequent successful implementation of the project confirmed that its scope and objective went well beyond those of generic development and cooperation agreements. These arguments were therefore rejected.
- (707) The GOID claimed that any investment in the context of the cooperation with the GOC was carried out by the private sector.
- (708) The Commission noted that even if the actual investors in the companies producing the product concerned and in the related company operating the Morowali Park were private, this is irrelevant and does not affect the conclusion that the preferential financing provided by GOC and attributed to GOID constituted a countervailable subsidy. The purportedly private investors were simply the recipients of these countervailable subsidies, which were attributed to, and granted by the GOID. Therefore, this claim was dismissed.
- (709) The GOID further claimed that no list of priority projects exists under the high level economic dialogues with the GOC.
- (710) The Commission noted that it is undisputed that the Morowali project was formally recognised as a special eligible project both in the PRC under the BRI, and in Indonesia as a National Strategic Project. The Commission further noted that there were several references to the list of strategic projects under the bilateral cooperation, as specified *inter alia* in recitals (577) and (609). As explained at recitals (552) and (573), the GOID submitted a different list of projects than the list of priority projects under the high level economic dialogue, and the Commission inferred on the basis of facts available under Article 28(1) of the basic Regulation that the Morowali Project was among the priority projects identified by the GOID and GOC. Even if the claim of the GOID that there exists no formal list of priority projects under the high level economic dialogue were substantiated and true, this did not affect the conclusion that the Morowali project was formally recognised as a National Strategic Project by the GOID and under the BRI by the GOC, and certainly that it was in any event considered a strategic priority project closely followed and implemented by the two governments due to its importance. Therefore, even if it would have been properly substantiated – *quod non* - this argument would not have affected the conclusion that the Morowali Park was a priority project formally recognised by both governments in the context of their bilateral cooperation. Its investors were thus in receipt of countervailable subsidies in this context. The Commission therefore dismissed this claim.

- (711) In relation to recital (599), the GOID claimed that there was no evidence that IMIP was the Chinese Indonesian Economic and Trade Cooperation Zone. In any case, it submitted that this qualification did not imply any special treatment on the part of the GOID.
- (712) The Commission noted the overwhelming evidence already provided in recital (599), confirming that IMIP is indeed an Economic and Trade Cooperation Zone. In addition, in response to this claim, it is noted that the same information can be found on other GOC websites ⁽¹⁸⁷⁾. This claim was therefore rejected. The GOID also claimed that no special treatment was applied to IMIP concerning the industrial estate business license. The GOID clarified that IMIP is not regulated by the Agreement on Indonesia-China Integrated Industrial Parks but by GR No. 142 of 2015, which was not enacted to be in line with the bilateral agreements with the GOC. According to the GOID, (i) there is no reference to the agreements in it, (ii) it applies to all industrial estates, and (iii) the GOID simply provided incentives available also to companies outside industrial estates.
- (713) The Commission noted that, in addition to the Decree No. 142 of 2015, there was a specific bilateral agreement between Indonesia and China of 2 October 2013 identifying the importance of the Industrial Parks for the successful implementation of the bilateral cooperation in the Morowali Project, as specified in Sections 4.5.3 and 4.5.5. Decree No. 142 provided a number of special provisions applicable only to eligible Industrial Estate companies under the specified conditions, which applied to IMIP. In any event, the Commission did not countervail subsidies provided by IMIP, but subsidies provided by the GOID, including by attributing to it financial support provided by GOC. The specific bilateral agreement on Industrial Estates between Indonesia and China constituted integral relevant context of the bilateral cooperation to implement the Morowali project. On this basis, the Commission considered this claim by the GOID irrelevant and dismissed it.
- (714) The GOID clarified that the qualification of National Strategic Project does not provide any financial contribution. The GOID added that it did not provide any financial contribution to IMIP, only general infrastructure in the surrounding area.
- (715) Similar to its rebuttal at recital (713), the Commission considered these arguments irrelevant with regard to the main findings of the investigation. Indeed, the Commission did not countervail financial contributions or other subsidies provided by IMIP, but only subsidies provided by the GOID. The qualification of National Strategic Project constituted relevant context showing that the Morowali Project was specifically encouraged and closely implemented by both the GOC via its official recognition under its Belt and Road programme, and by the GOID via this special qualification. The Commission considered the specific discipline linked to the qualification as a National Strategic Project in its assessment in this context, as specified at Recital (616). As for the argument concerning the general infrastructure, the Commission did not assess the provision of general infrastructure, which indeed is not countervailable according to Article 3(1)(a)(iii) of the basic Regulation. Therefore the Commission dismissed these claims as irrelevant.

4.5.9.3. Comments on specificity

- (716) The GOID contested the finding of specificity because it submitted that the cooperation with the GOC did not cover just industrial parks, but a number of areas.
- (717) In its analysis on specificity detailed in Section 4.5.8.3 and in particular at recital (686), the Commission explained that the countervailable subsidies covered by the cooperation between GOID and GOC were regionally specific as they were limited to eligible companies formally established in the Morowali Park as part of the implementation of the development project implemented by the two governments. This claim was therefore rejected.

⁽¹⁸⁷⁾ <http://fec.mofcom.gov.cn/article/jwjmhq/> and <http://www.cocz.org/index.aspx>

4.5.9.4. Comments on non-cooperation in relation to the GOID

- (718) The IRNC Group claimed that the missing agreement related to IMIP cannot constitute best facts available and cannot be the basis for the finding that IMIP is an entrusted private body. The IRNC Group conceded that the agreement could be one of the considerations, but not the only one, and argued that the Commission should reach a conclusion comprehensively from all the documents collected. These, according to IRNC Group show that there was no such entrusted function. The GOID reiterated that it does not possess the missing agreement, since IMIP was established and funded by private parties.
- (719) The Commission found this claim incorrect and irrelevant. The missing agreement, which IRNC deliberately failed to submit and which the GOID claimed not to possess, was used to draw certain inferences on the basis of Article 28(1) due to non-cooperation as explained at recital (634). These inferences were taken into account in the assessment of the joint management of the Morowali Park by the GOID and GOC, together with a number of other pieces of evidence and considerations as detailed at Section 4.5, and in particular in the legal assessment at Section 4.5.8. It was indeed just one of the elements and considerations which allowed the Commission to arrive at the conclusion that the IMIP was, among others, entrusted to implement the successful implementation of the Morowali Project by being the manager of the Morowali Park in conformity with the overarching bilateral cooperation agreed between the GOID and GOC. Therefore, contrary to what the parties argue, the missing agreement was neither the only nor the decisive piece of evidence used to arrive at that conclusion (notwithstanding the possibility, in the Commission's view, for the Commission to arrive at the same conclusion even just on the basis of that agreement, due to its importance coupled with the refusal of the IRNC and GOID to produce it). Therefore this claim was dismissed.

4.5.9.5. Comments on non-cooperation in relation to the GOC

- (720) The GOC asserted that it was not obliged to provide any information in the investigation, which is against Indonesia, and in which the recipients and beneficiaries of the supposed subsidies are Indonesian producers established in Indonesia.
- (721) The Commission noted that the GOID and the GOC put in place several administrative mechanisms in the context of their bilateral cooperation and in particular to successfully implement the Morowali project, as explained in Section 4.5.6. These cooperation mechanisms allowed the GOID to collect the requested information from the GOC. The fact that the one party of the joint cooperation (i.e. the GOC) decided not to provide any information does not automatically mean that the other party to the bilateral cooperation (i.e. the GOID) should not be held responsible with regard to this obligation. In the context of a joint cooperation, as the one undisputedly found between the GOID and the GOC, one party cannot use the inaction of the other to claim that it fully cooperated in the investigation to the best of its abilities. Otherwise, in similar circumstances in other cases the governments involved could deliberately decide not to submit the information requested by the Commission without incurring in any legal consequences for their failure to cooperate.
- (722) The Commission was not asking the GOID to use coercive means to collect the requested data from the GOC, but rather it gave the opportunity to the GOC to intervene and submit the relevant information since the very beginning of the investigation by treating it as an interested party. In particular, according to Point 5.3 of the Notice of Initiation the Commission specifically invited the GOC to participate as an interested party given the allegations in the complaint. The GOC requested to be registered with the investigation to have access to the file and explicitly confirmed to be an interested party by email of 19 February 2021. The provisions of Article 28 of the basic Regulation apply fully to all interested parties, as also clearly laid out in Point 10 of the Notice of Initiation. The Commission also recalled that the GOC was well aware of the legal situation since the GFF and GFR cases. On the basis of all these arguments, the Commission rejected this claim.

4.5.10. Conclusion

- (723) In conclusion, the Commission found that both the subsidies granted to companies operating in the Morowali Park directly provided by the GOID (provision of nickel ore, provision of land, and tax incentives) as well as the subsidies granted indirectly through the GOC's preferential financing are countervailable under Articles 2-4 of the basic Regulation. The latter are attributable to the GOID by virtue of the acknowledgment and adoption of the GOC's measures by the GOID as its own, for example through the bilateral agreement of 2011, the Indonesia-China Program of 2013 Cooperation Agreement, and the close cooperation and the various levels of cooperation mechanisms. The financial contributions also conferred benefits and were specific. The Commission examined all the relevant subsidies in more details below.

4.6. Preferential financing

4.6.1. *Loans from policy banks to IRNC and related companies*

4.6.1.1. State-owned banks acting as public bodies

- (724) The investigation revealed that all the loans to IRNC Group were provided by Chinese banks (Eximbank, China Development Bank, Bank of China, Industrial and Commercial Bank of China) except for IMIP who received loans from Eximbank Indonesia. The first loans were used to finance the construction of the plants and others were used for working capital needs.
- (725) The Commission first ascertained whether these banks were ‘public bodies’ within the meaning of Articles 3 and 2 (b) of the basic Regulation. The Commission thus sought information about State ownership as well as formal indicia of government control in the State-owned banks. The Commission also sought information about whether the GOC exercised meaningful control over the conduct of the State-owned banks with respect to their lending policies and assessment of risk.
- (726) As stated above, the GOC refused to cooperate in the investigation and provide the requested information. Therefore, the Commission resorted to the provisions of Article 28 of the basic Regulation in order to assess the conduct of the Chinese banks mentioned above as public bodies by relying on facts available, namely relevant information from previous investigations covering the period 2015 to 2020 ⁽¹⁸⁸⁾, including most recently the GFF anti-subsidy investigation and Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing definitive countervailing duties and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt ⁽¹⁸⁹⁾ (‘GFR investigation’).
- (727) As mentioned in Sections 3.4.1.2 to 3.4.1.5 of the GFF anti-subsidy investigation, as well as Sections 3.3.1.2 to 3.3.1.4 of the GFR investigation, Eximbank (EXIM), China Development Bank (CDB), Bank of China (BOC), Industrial and Commercial Bank of China (ICBC) are Chinese State-owned banks and there are formal indicia of control of the GOC over these banks. Furthermore, in the same Sections of the GFF anti-subsidy investigation and the GFR investigation, the Commission concluded that the GOC has created a normative framework that had to be adhered to by the managers and supervisors, appointed by the GOC and accountable to the GOC. Therefore, the GOC relied on the normative framework in order to exercise control in a meaningful way over the conduct of the State-owned banks.
- (728) In addition to the general legal framework set out in the GFF anti-subsidy investigation and the GFR investigation, the entire legal context stated in the framework of the bilateral cooperation set out in section 4.6.3.1, as well as the specific point for CDB raised in the next recital, applied to the loans provided by these banks to IRNC Group.

⁽¹⁸⁸⁾ Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 146, 9.6.2017, p. 17) (‘HRF case’), Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163 (OJ L 283, 12.11.2018, p. 1) (‘Tyres case’) and Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China (OJ L 16, 18.1.2019, p. 5) (‘E-bikes case’), the GFF anti-subsidy investigation.

⁽¹⁸⁹⁾ OJ L 201, 25.6.2020, p. 10.

- (729) In 2013, MOFCOM issued a 'Notice on Aspects related to the China Development Bank support to the establishment and development of overseas economic and trade cooperation zones'. According to this Notice, MOFCOM and CDB will 'provide policy support for investment and financing for enterprises and enterprises entering the zone in eligible cooperation zones'. CDB will 'clarify the basic conditions for priority financing in the cooperation zone in accordance with the requirements of the Ministry of Commerce and the Ministry of Finance', and CDB will 'selectively support the projects under construction and cooperation projects that MOFCOM has paid close attention to with the host governments of the cooperation zone.'
- (730) The Commission established that all State-owned Chinese financial institutions implemented the legal framework set out above in the exercise of governmental functions with respect to the SSCR sector. Therefore, they were public bodies in the sense of Article 2(b) of the basic Regulation read in conjunction with Article 3(1)(a)(i) of the basic Regulation and in accordance with the relevant WTO case-law.
- (731) In addition, even if the State-owned financial institutions were not to be considered as public bodies, the Commission established that they would be considered entrusted or directed by the GOC to carry out functions normally vested in the government within the meaning of Article 3(1)(a)(iv) of the basic Regulation for the same reasons, as set out above.

4.6.1.2. Benefit and calculation of the subsidy amount

- (732) The Commission considered that, in principle, for the beneficiaries located in Indonesia, it would be appropriate to inquire whether these recipients of the loans received better terms than they would have received on the Indonesian financial market. According to the information submitted by the GOID, the average interest rates on USD loans issued by Indonesian commercial banks during the period considered were broadly in line with the interest rates paid by the companies of the IRNC Group ⁽¹⁹⁰⁾.
- (733) However, the Commission considered that these statistics did not reflect the specific circumstances of the case, and more specifically the risk factors highlighted in recitals (737) to (742). Indeed, the statistics concern a multitude of loans, with varying amounts (including loans to SMEs), duration, purpose, credit risk, etc. No information was provided either about loans for start-up situations requiring significant amounts of financing with a huge underlying risk. Since the GOID ensured that the GOC would finance the necessary investments for the Chinese companies to bring their smelting capacity to Indonesia, it appears reasonable to conclude that there was no private lender in Indonesia that would have provided similar loans to the exporting producers. Furthermore, information about loans in Indonesia only concern loans provided by domestic banks to their domestic customers, and thus did not take into account the fact that in the case at hand, loans were provided by Chinese financial institutions to overseas customers. Since the interest rates on the financing provided were set by Chinese actors on the Chinese financial market, the Commission's calculation in this case took that fact into account.
- (734) In view of the exceptional circumstances mentioned in recital (682), the Commission thus calculated the amount of the countervailable subsidy taking into account the fact that the recipients obtained the preferential financing in China. For this calculation, the Commission assessed the benefit conferred on the recipients during the investigation period. According to Article 6(b) of the basic Regulation, the benefit conferred on the recipients is the difference between the amount of interest that the company pays on the preferential loan and the amount that the company would pay for a comparable commercial loan obtainable on the Chinese financial market.
- (735) The Commission decided to establish the market rates for the preferential loans from the Chinese banks with respect to hypothetical benchmarks from the perspective of Chinese market investors in accordance with Article 6(b) of the basic Regulation.

⁽¹⁹⁰⁾ <https://www.ojk.go.id/id/kanal/perbankan/data-dan-statistik/statistik-perbankan-indonesia/Default.aspx>

- (736) Therefore, the Commission decided to use the same calculation methodology as for loans denominated in foreign currencies, and issued by Chinese financial institutions in the PRC, and added the risk premium linked to the investment in Indonesia as follows.
- (737) The Commission first established the credit rating of the companies in the IRNC Group. During the investigation, IRNC and the other four related entities submitted their credit rating made by the Indonesian rating agency Pefindo during the period from 2017 to 2020. The rating varied between BBB and A. However, in the only complete credit rating report that was provided, it was clearly stipulated that one of the supporting factors for the rating was the fact that IRNC was supported by the Eximbank China and shareholders loans.
- (738) Furthermore, the Commission noted that the investment made in Indonesia was a green field investment, which entailed very high risks. Without the support of the GOC and GOID the credit risk of these companies would have been much higher.
- (739) Nickel is a commodity and the price of commodities, including the nickel ore and nickel pig iron prices, can fluctuate rapidly and are affected by numerous factors beyond the control of a company. These factors include world demand for commodities, production cost levels, macroeconomic factors such as expectations regarding inflation, interest rates and global and regional demand for, and supply of, commodities as well as general global economic conditions. These factors may have an adverse effect on the Company's activities as well as the Company's ability to fund those activities. As explained in section regarding nickel, the GOID, though its price mechanism, made sure that IRNC group had access to nickel ore at prices significantly below international prices.
- (740) Furthermore, as explained in the section regarding the land, the companies started to build their plants without having the building right certificates. Therefore, without the support of the GOID the IRNC Group could not have invested significant amounts of money to build their plants without actually having the legal right to do it.
- (741) Moreover, Indonesia is an emerging market and therefore investing in Indonesia involves greater risk than investing in more developed markets, including in some cases significant legal and economic risk. The mining industry is heavily regulated in Indonesia and it is changing continuously. IRNC Group is a foreign investment and in certain sectors of the Indonesian economy there are restrictions regarding the shareholding of foreign enterprises.
- (742) As a start-up entity, the credit risk of these companies was thus significant. As the companies started to produce and sell their products, their risk gradually decreased.
- (743) In view of these specific circumstances of the case, the Commission decided to establish two credit ratings. For the start-up period, the Commission considered that the companies were in a situation similar to private-equity start-up investments. Such investments entail high risk and would thus correspond to a credit rating equivalent to CCC or lower. For the subsequent period, where the companies operated under normal conditions, the Commission considered that the overall financial situation of the IRNC Group corresponded to a BB rating, which is the highest rating that does no longer qualify as 'investment grade'. However, the Commission found, as mentioned in recitals (757) to (759) below, that the companies of the IRNC Group had to complement their financing needs by taking out shareholder loans from their parent companies, and that they did not honour their debt repayment schedules on these loans.
- (744) In order to take into account the increased risk exposure of the banks highlighted by the existence of shareholder loans and debt forgiveness, the Commission thus decided to move down one notch in the risk rating scale and concluded that the use of a B (instead of BB) credit rating would be more appropriate to determine the market-based benchmark.
- (745) In line with other loans denominated in foreign currencies and issued by Chinese financial institutions in the PRC, B rated corporate bonds issued in USD during the investigation period were thus used to determine an appropriate benchmark for the period of normal operations.

- (746) For loans which were granted during the start-up period of the companies concerned, the Commission considered that a different benchmark was warranted, since these loans concerned very substantial amounts (several billion USD) for a very risky overseas project, and the banks did not benefit from any risk premium element in the form of capital (e.g. right of conversion into shares). Therefore, the relevant benchmark must reflect the particularity of the situation, which is similar to venture capital/private equity start-up investments. The Commission searched publicly available information, but found no readily available benchmarks for venture capital or private equity transactions as such. However, the Commission considered that a rate for high-yield bonds in USD (equivalent to a credit rating of CCC or lower) would be equivalent to the return that a private-equity fund would require on such transactions.
- (747) Finally, loans provided by Chinese financial institutions are normally granted to Chinese companies located in the domestic Chinese market. The IRNC Group on the contrary is located in Indonesia, and thus has a credit risk different from Chinese companies related to the external conditions prevailing in the country itself, as highlighted in recital (741) above. In order to take into account the specific credit risk environment prevailing in Indonesia, the Commission thus added a mark-up to the benchmark rate established for the Chinese sampled companies, in order to integrate the country risk into the market rate.
- (748) The premium related to country risk was determined based on the OECD classification of country risk for export credits, as well as the corresponding minimum premium rate set by the OECD. The country risk premium for loans provided by the Chinese banks was established at between 0,13 % to 0,88 % depending on the duration of the loan.
- (749) The subsidy amount thus established for support for loans from policy banks amounted to 1,84 %.

4.6.1.3. Comments on final disclosure

- (750) The GOID and IRNC Group submitted comments on final disclosure concerning the preferential financing from policy banks.
- (751) The GOID claimed that the Commission did not make any relevant finding nor has indicated that the GOID was the granting authority of financing to the IRNC Group, let alone preferential financing. According to the GOID, based on the erroneous interpretation of 'financial contribution' under Article 1.1(a)(1) of the SCM Agreement, the Commission attributed the foreign financing to the GOID by virtue of the 'acknowledgement and adoption'. The GOID further noted that nothing in the findings states or implies that the GOID or 'public bodies' of the GOID provided the financing and submitted that it is unfair to impose countervailing duties on the basis of financial contributions by foreign entities. Moreover, the GOID complained that it could not defend itself with regard to whether the Chinese financial institutions are 'public bodies' or not, since these entities are outside the GOID's jurisdiction. However, it stated that it is normal for any company to seek whichever financing they deem appropriate, and that the GOID itself was not in a position to reject or restrict the financing flow from Chinese financial institutions or any source.
- (752) In response, the Commission wishes to highlight first that general comments on the 'acknowledgement and adoption' of financing from Chinese sources by the GOID have already been addressed in section 4.5.8 above. Furthermore, the Commission noted that the funds provided by Chinese financial institutions, such as the EXIM Banks, were channelled through so-called 'agency banks', responsible for the day-to-day implementation of the disbursements and repayments on the loans. These agency banks were Indonesian branches of Chinese banks, subject to Indonesian banking legislation, and located on the territory of Indonesia.
- (753) Concerning shareholder loans, the Commission found that the loan agreements for such loans made a specific reference to 'the filing of periodic reports to the Bank of Indonesia, the Ministry of Finance and the Team for Offshore Commercial Loans (Tim Pinjaman Komersial Luar Negeri or "PKLN")'. The PKLN was formed according to Presidential Decree No. 39 of 1991 concerning Coordination of Management of Offshore Commercial Loans ('Presidential Decree No. 39') ⁽¹⁹¹⁾, and consists of representatives from various Ministries as well as from the Bank

⁽¹⁹¹⁾ Presidential Decree No. 39 of 1991 concerning Coordination of Management of Offshore Commercial Loans, dated September 4 1991.

of Indonesia. According to Article 2 of this Decree, loans falling under the remit of the PKLN need to be approved by the Team, are subject to periodic reporting requirements for their implementation and are closely monitored by the PKLN. Furthermore, Article 6 on the scope of this legislation specifies that loans subject to the remit of the Team are only loans 'connected with development projects', confirming that only loans linked to special development projects like the Morowali one are subject to this scrutiny and monitoring.

- (754) Although Presidential Decree No. 39 was revoked in July 2020 by Presidential Regulation No. 82 of 2020 concerning the Handling Committee for COVID-19 and the Recovery of the National Economy, this new Regulation also stipulated that the implementation of the duties and functions of the PKLN Team under the revoked PD 39 will continue to be carried out by the Ministry of Finance. This is indeed the case in practice, as can be seen from examples of on site monitoring visits of PKLN projects listed on the website of the Ministry of Finance ⁽¹⁹²⁾.
- (755) The Commission thus maintained its position that the preferential financing from Chinese sources was acknowledged and adopted by the GOID, and that the GOID was in a position to intervene in the financing flow.
- (756) IRNC Group contested the benchmark for the bank loans and claimed that it was not a start-up business, subject to very high risk, since it was part of the Tsingshan Group and benefitted from its mature manufacturing techniques and key technical and managerial staff. Moreover, IRNC Group noted that it has an outstanding cost advantage, as the factory is close to the raw materials and thus raw material prices and transportation costs are low.
- (757) The Commission observed that its practice is to make individual assessments of the companies in a group, and to determine either a single benchmark for the group as a whole based on this assessment, or to modulate the benchmark based on the specific circumstances of individual companies in the group. Indeed, the fact that a company belongs to a wider group does not impinge upon the fact that certain projects carried out by the group (such as the start-up of a plant) are more risky than others. As highlighted in recitals (738) to (744) above, various risk factors were taken into account by the Commission, such as the greenfield nature of the investment, the magnitude of the capital needed for the investment, risks related to the acquisition of assets and materials, as well as the increased risk exposure of the banks highlighted by the existence of shareholder loans and debt forgiveness. IRNC Group did not provide additional evidence that could have altered the Commission's assessment on these factors. Finally, in any event, the Commission was not in a position to make an assessment of the Tshingshan Group as such, since none of the parent companies in the group cooperated with the investigation.

4.6.2. Loans from shareholders to the IRNC Group companies

- (758) Over the period 2015 to 2019, the parent companies of the IRNC Group provided a series of inter-company loans (13 loans in total) to the various companies of the IRNC Group, for a total amount of USD 380 million.
- (759) These loans were subordinated to the bank loans. The investigation revealed that with the exception of the loans to GCNS as well as one loan to ITSS, IRNC and the other related companies were not paying at all an interest rate for these loans. In addition, in most cases, the loans did not have an end date, and the companies of the IRNC Group did not repay any capital on the outstanding loans. However, the parent companies did not take any measures to adjust the interest rates accordingly to reflect the real risk of the transactions, nor did they request payment of the amounts due.
- (760) Therefore, the Commission considered that these loans were in fact equivalent to additional capital contributions by the parent companies. As such, the treatment of these loans will be further developed in the section on support for capital investment below.

⁽¹⁹²⁾ <https://www.djppr.kemenkeu.go.id/page/load/3265> and <https://www.djppr.kemenkeu.go.id/page/load/2631>, last accessed on 19 January 2022.

4.6.3. Credit line costs

- (761) The purpose of a credit line is to establish a borrowing limit that the company can use at any time to finance its current operations thus making working capital financing flexible and immediately available when needed. Therefore, the Commission considered that in principle, all short-term financing of the sampled companies, such as short-term loans, bank acceptance drafts etc., should be covered by a credit line instrument.

4.6.3.1. Findings of the investigation

- (762) The Commission established that Chinese financial institutions provided credit lines to the IRNC Group in connection with the provision of financing. These consisted of framework agreements, under which the bank allows the sampled companies to use various debt instruments, such as working capital loans, bank acceptance drafts and other forms of trade financing within a certain maximum amount.
- (763) As mentioned in recital (760) above, all short-term financing should be covered by a credit line. Therefore, the Commission compared the amount of the credit lines available to the cooperating companies during the investigation period with the amount of short-term financing used by these companies during the same period to establish whether all short-term financing was covered by a credit line. Where the amount of the short-term financing exceeded the credit line limit, the Commission increased the amount of the existing credit line by the amount actually used by the exporting producers beyond that credit line limit.
- (764) Under normal market circumstances, credit lines would be subject to a so-called 'arrangement' or 'commitment' fee to compensate for the bank's costs and risks at the opening of a credit line, as well as to a 'renewal fee' charged on a yearly basis for renewing the validity of the credit lines. However, the Commission found that the IRNC Group benefited from credit lines mostly provided free of charge. Therefore, a benefit was conferred to the investigated groups of companies within the meaning of Article 6(d) of the basic Regulation.

4.6.3.2. Calculation of the subsidy amount

- (765) In accordance with Article 6(d)(ii) of the basic Regulation, the Commission considered the benefit conferred on the recipients to be the difference between the amount that they paid as a fee for the opening or the renewal of the credit lines by Chinese financial institutions, and the amount that they would pay for a comparable commercial credit line obtained at an undistorted market rate.
- (766) The appropriate benchmarks for the arrangement fee and for the renewal fee were established at 1,5 % and 1,25 % respectively by reference to publicly available data ⁽¹⁹³⁾ and benchmarks used in previous investigations ⁽¹⁹⁴⁾.
- (767) In principle, the arrangement fee and the renewal fee are payable on a lump sum basis at the time of the opening of a new credit line or the renewal of an existing credit line respectively. However, for calculation purposes, the Commission took into account credit lines which had been opened or renewed before the investigation period but which were available to the sampled groups during the investigation period and also the credit lines that were opened during the investigation period. Then, the Commission calculated the benefit based on the period within the investigation period during which the credit line was available.
- (768) The subsidy amount established under this scheme amounted to 0,06 % for IRNC Group.

4.6.4. Support for capital investment

- (769) In addition to the direct loans and intercompany loans, the IRNC Group also needed to cover its financial needs through capital contributions.

⁽¹⁹³⁾ See <https://www.barclays.co.uk/current-accounts/bank-account/overdrafts/overdraft-charges/>, last accessed on 18 August 2021, fees for executive overdrafts – 'overdrafts over £15 000 have a set-up fee of 1,5 % of the arranged overdraft limit, and a renewal fee of 1,5 %'.

⁽¹⁹⁴⁾ See GFF case, recitals 354 and 355.

(770) Previous investigations found that substantial subsidies were received at the level of the parent companies of Chinese groups to support foreign investment under the BRI, in the form of grants, preferential financing and equity injections. This was notably the case in the anti-subsidy investigation on Tyres ('the Tyres case'), as well as in the GFF anti-subsidy investigation and the GFR investigation ⁽¹⁹⁵⁾.

(771) The following legal framework is relevant in this respect:

- (1) 13th Five-Year Plan for the Development of Foreign Trade, issued by the Ministry of Commerce ('MOFCOM'), 26 December 2016;
- (2) Guiding Opinions of the State Council on the Promotion of International Production Capacity and Equipment Manufacturing Cooperation, issued in 2015 ('Guiding Opinions');
- (3) Made in China 2025, State Council, July 7, 2015.

4.6.4.1. Equity injection by the China-ASEAN Investment Cooperation Fund ('CAF')

(772) The investigation revealed that in October 2013, Reed International Ltd. acquired 24 % stake in SMI, a related company to IRNC.

(773) Reed International Ltd. is a special purpose investment vehicle, fully owned and controlled by CAF. As mentioned in the 2017 annual report of IMIP, 'Reed International Limited is a special investment company of China-ASEAN Investment Cooperation Fund set up for investment of the SMI project' ⁽¹⁹⁶⁾. In order to determine whether the CAF could be considered a public body, the Commission requested specific information from the GOC concerning CAF. Given the absence of any reply, for instance, about CAF's Articles of Association, the Commission had to rely on facts available under Article 28(1) of the basic Regulation to analyse this aspect.

(774) According to publicly available information, CAF is a USD-denominated offshore quasi-sovereign equity fund. It is owned and sponsored by several State-Owned Banks and other Chinese financial institutions (such as the Export-Import Bank of China ('EXIM Bank') and a China's sovereign wealth fund, China Investment Corporation ('CIC'), together representing more than 76 % of the shares in CAF) ⁽¹⁹⁷⁾. CAF is subject to the direction of the PRC State Council ⁽¹⁹⁸⁾ and approval by the National Development and Reform Commission. Exim Bank and CIC, have jointly founded the USD 1 billion private-equity fund. Exim Bank and CIC have each invested USD 300 million in CAF. Other shareholders include Bank of China Group Investment Co., Ltd., and China Communications Construction Co., Ltd, two Chinese state-owned financial institutions ⁽¹⁹⁹⁾. The CEO and the COO of the company both originate from the Exim Bank.

(775) The fund targets investment opportunities in infrastructure, energy and natural resources in the ASEAN countries ⁽²⁰⁰⁾. Its target investment sectors include notably natural resources in the Ferrous and Non-Ferrous Metals Sector ⁽²⁰¹⁾.

(776) In May 2010, Li Ruogu, president of China EXIM Bank, stated that the CAF is 'a major innovation in the financing model of the [China EXIM] Bank' ⁽²⁰²⁾. On 9 September 2013, Chinese Prime Minister Li Keqiang stated that the CAF is part of the Chinese strategy to deepen the cooperation between the PRC and ASEAN. In the speech, the Prime Minister said that 'China will activate a new round of special loans, make good use of the China-ASEAN Investment Cooperation Fund, and actively explore with other parties the creation of a financing platform for infrastructure development in Asia to fund major projects' ⁽²⁰³⁾.

⁽¹⁹⁵⁾ See section 4.3.3 of the GFF Investigation.

⁽¹⁹⁶⁾ IMIP annual report 2017, p. 84.

⁽¹⁹⁷⁾ <https://web.archive.org/web/20131029223637/http://www.chinaeconomicreview.com/node/43071>

⁽¹⁹⁸⁾ <http://www.china-asean-fund.com/about-caf.php?slider1=1>

⁽¹⁹⁹⁾ <https://business.sohu.com/20100524/n272300363.shtml>

⁽²⁰⁰⁾ <http://www.china-asean-fund.com/about-caf.php?slider1=1>

⁽²⁰¹⁾ <http://www.china-asean-fund.com/about-caf.php?slider1=1>

⁽²⁰²⁾ <https://business.sohu.com/20100524/n272300363.shtml>

⁽²⁰³⁾ http://eg.china-embassy.org/eng/rdwt/201309/201309/t20130915_7245108.htm

- (777) Moreover, point 35 of the Guiding Opinions mentioned in recital (770) above, explicitly mentions CAF as a vehicle for providing financial support under the BRI, as follows: ‘We will give full play to the role of the Silk Road Fund, China-Africa Fund, the China ASEAN Fund, and China Overseas Investment Corporation. We will actively support international production capacity and equipment manufacturing cooperation projects through equity investment and debt financing. We will encourage the domestic private equity fund management agencies to “go global” and give full play to their role of supporting enterprises “going out” to carry out greenfield investment, M&A investment, etc’. Of note, on the basis of the same evidence, the Commission found in the Tyres investigation that a similar fund (SRF) was a public body ⁽²⁰⁴⁾.
- (778) Finally, as mentioned in recitals (589) and (626) above, during the Indonesia/China summit on 2 October 2013, in the presence of the respective Presidents of State, the founder shareholders of IMIP, BDI and SDI, signed an investment and financing agreement with the CAF to develop activities in the Morowali Park ⁽²⁰⁵⁾. The equity investment of the CAF in SMI exactly coincides in time with the signature of this agreement, and corresponds to an investment to develop activities in the park. Furthermore, as can be seen in the recital above, financial support provided by the GOC via CAF can encompass either equity investment or debt financing. Therefore, such equity support would thus equally fall under the preferential financing agreed upon between China and Indonesia under the bilateral cooperation framework, attributed to Indonesia for the same reasons explained above and can thus be allocated to the products exported from Indonesia.
- (779) Despite the lack of cooperation on this aspect, the Commission concluded on the basis of publicly available information that CAF can be considered a public body within the meaning of Articles 3 and 2(b) of the basic Regulation, providing a financial contribution to SMI. Indeed, CAF is owned and subject to the GOC’s control. Its actions are directed by the State Council in line with the policy objectives set by the GOC and thus CAF is vested with government authority.
- (780) The Commission then analysed whether the financial contribution provided by the CAF conferred a benefit to the IRNC Group. As mentioned above, Reed International Ltd is a special purpose investment vehicle of the CAF, established specifically to invest in SMI, one of the companies of the IRNC Group. Pursuant to the terms of the Subscription Agreement with the other shareholders ⁽²⁰⁶⁾, Reed International Ltd was to sell its shares back to the other shareholders at the same price 5 to 6 years after its initial investment, irrespective of the actual market value of the shares. Furthermore, Reed’s acquired shares were special shares with very limited governance rights. These conditions already show that, contrary to what a market operator would ask, Reed International Ltd did not expect any reasonable return from the purchase of the shares; nor does the investor seek out any control rights. Thus, the operation cannot be qualified as made on market terms.
- (781) Moreover, the investigation revealed that after the start-up period, investment in SMI became less risky, and the financial position of the company became stronger. Therefore, the value of its shares increased over time, but this was not reflected in the sales price of Reed International Ltd. This does not reflect rational behaviour of an operator under normal market conditions. Based on the evidence on file, the Commission thus concluded that the financial contribution provided by the GOC via CAF, acting as a public body, conferred a benefit within the meaning of Article 3(2) of the basic Regulation.

4.6.4.2. Provision of capital in kind for less than adequate remuneration and shareholder loans

- (782) During their start-up period, all companies of the IRNC Group benefited from capital contributions in kind in the form of production equipment.

⁽²⁰⁴⁾ GFF case, recital 775; Tyres case, recital 357.

⁽²⁰⁵⁾ <http://www.china-asean-fund.com/sub-fund-3-detail.php?id=1>

⁽²⁰⁶⁾ The Chinese parent companies are part of Tsingshan Group.

- (783) Indeed, the investigation revealed that all the machinery for the production process of the IRNC Group were imported from related companies in China, which were not the manufacturers of the equipment. The Commission requested the invoices related to the purchase from the original manufacturers of the equipment, but due to the non-cooperation of the Chinese parent companies, these were not submitted, therefore preventing the Commission from verifying whether the prices were at arm's length and whether the origin was indeed China, as declared.
- (784) In addition, they benefited from shareholder loans which were equivalent to equity injections, as mentioned in recital (759).
- (785) In the absence of any reply from the Chinese parent companies providing the equipment and shareholder loans in question as well as from the GOC, and following the application of the provisions of Article 28(1) of the basic Regulation, the Commission had to rely partially on facts available for its findings concerning the acquisition of this equipment and these shareholder loans. In particular, the Commission had to use facts available in order to identify the origin of the equipment and the source of financing of the equipment and the loans provided by the Chinese parent companies to the companies of the IRNC Group.
- (786) To reach this conclusion, the Commission established the existence of a clear commitment from the Chinese parent companies to invest overseas in encouraged industries. In this respect, as mentioned above Tsingshan advertises itself on its website as 'always been following the national development strategy of globalization and actively responding to "The Belt and Road" initiative'. It even has a special subsidiary managing its overseas projects: 'Eternal Tsingshan Group is one of the entity-type enterprise management groups under the Board of Directors of Tsingshan Industry, and is responsible for managing all overseas projects planned by the Board of Directors of Tsingshan Industry. So far, Eternal Tsingshan Group has completed the international strategic layout in Indonesia, Singapore, India, the United States and other countries, and manages over 15 subsidiaries/representative offices ⁽²⁰⁷⁾.'
- (787) Furthermore, one of the main companies involved in the provision of equipment to the IRNC Group was Shanghai Dingxin Investment (Group) Co., Ltd. ('Dingxin Group'). It is one of the four major group companies under the board of directors of Qingshan Industrial. According to the website of the group, it has been the main force of Tsingshan Industrial to promote international operations. Dingxin Group also stated that it is mainly responsible for Overseas investment project management, export of mechanical and electrical products and other construction equipment to the Tsingshan Park in Indonesia.
- (788) All of these overseas projects fit within the wider context of China's 'going out' policy. In this respect, the Chairman of Tsingshan Holding Group, stated for example: 'Tsingshan Industrial Park is the biggest and most successful Chinese investment in Indonesia and will accommodate the production capacity transferred from China. It's a major project for us to fulfil our social responsibility and give back to the society. It's also important for the implementation of the Belt and Road Initiative ⁽²⁰⁸⁾'.
- (789) Furthermore, the Made in China 2025 Roadmap identifies 10 strategic sectors, which includes among others advanced materials in the iron and steel sector. For these key industries, the plan 'Made in China 2025' explicitly mentions in its Chapter 9 that China will:
- (a) 'Support enterprises to perform mergers, equity investment and venture capital investment overseas.
 - (b) Actively participate in and promote international industrial cooperation and implement major strategic plans like the Silk Road Economic Belt and the 21st-Century Maritime Silk Road to accelerate building interconnected infrastructure with surrounding countries and deep industrial cooperation.
 - (c) Make use of "opening up" along borders and build a number of overseas manufacturing cooperation parks in eligible countries.
 - (d) Encourage **the overseas transfer of high-end equipment**, advanced technology and strong industry' (emphasis added).

⁽²⁰⁷⁾ https://www.etsingshan.com/Art/Art_38/Art_38_69.aspx

⁽²⁰⁸⁾ http://www.minmetals.com/english/News/201706/t20170626_226241.html

- (790) Moreover, the 'Guiding Opinions' mentioned in recital (770) above include steel as a priority sector for international production capacity and equipment manufacturing cooperation (see chapter 3, point 7). They also state that 'Going global of Chinese equipment, technology, services and standards shall be promoted', especially in these priority sectors. Chapter 3, point 8 adds that steel production sites shall be built 'in priority countries with favourable conditions of resources... and with vast market potential by means of export of complete sets of equipment....' Finally, point 32 which refers to increased financial support, mentions among others the following means to support enterprises 'going global': 'support the "going global" enterprises with foreign assets and equity interests, as collateral to obtain loans and other mineral rights, and to improve their corporate finance capabilities.'
- (791) In other words, the provision of the shareholder loans and equipment by the Chinese parent companies to their subsidiaries in Indonesia squarely fits into the GOC's policy objective of promoting BRI projects in the steel industry, and the provision of foreign assets (in this case equipment) is seen as a means by the GOC to beef up collateral to improve the overall financial capabilities of such companies.
- (792) It is in this context that the IRNC Group's parent companies received a financial contribution from the GOC in the form of grants or preferential financing in order to implement these policies, including to fund their investments in Indonesia for the production of the product concerned. Due to the complete non-cooperation of these companies and of the GOC on this matter, the Commission was unable to identify the actual source of financing and substantiate in detail through which means such a financial contribution was made. However, on the basis of the facts available pursuant to Article 28(1) of the basic Regulation and based on all the above evidence on the funding under the BRI of projects outside of China including Indonesia, as well as on the findings in the Tyres case, the GFF anti-subsidy investigation and the GFR investigation, the Commission concluded that the Chinese parent companies received a financial contribution in the form of grants or preferential financing that were then used to provide shareholder loans and capital in kind to their subsidiaries to facilitate their financial capabilities and operations in Indonesia. In this respect, 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.
- (793) Specifically, in the Tyres case the Commission found that financing provided under the BRI was used to purchase shares in the Pirelli Group and amounted to an export subsidy⁽²⁰⁹⁾. In the GFF anti-subsidy investigation and the GFR investigation, despite partial cooperation, the Commission was able to trace the preferential funding originating in China and reconcile them to the funding finally contributed into the Egyptian producing entities. In both cases, the Commission could show that the financial contributions granted in China to the parent companies were fully transferred by the parents to the respective foreign subsidiaries in the exporting countries. In this case, due to the complete non-cooperation the Commission is unable to assess the tracing of the funds as it was unable to find these specific financial data in the public domain, despite searching also from Chinese sources. Therefore, the Commission needed to draw inferences on the basis of Article 28(1) based on the Tyres case, the GFF anti-subsidy investigation and the GFR investigation, which have very similar situation to this case because they involve projects financed under the BRI initiative following exactly the same pattern. Furthermore, the GFF anti-subsidy investigation and the GFR investigation have a number of similarities in that China provided preferential financing via their policy and State-owned banks to the Egyptian subsidiaries in the context of the BRI and the bilateral cooperation with the Egyptian government. These are mirror situations of the one in this investigation, where China is providing preferential financing via EXIM and the other SOCBs under the BRI for an investment project in Indonesia.
- (794) In the absence of any evidence provided by the Chinese companies or GOC, and based on the publicly available evidence namely in the Tyres case, the GFF anti-subsidy investigation and the GFR investigation, the Commission thus concluded that the provision of equipment and shareholder loans by the shareholders was just another means of financing the Indonesian subsidiaries and decided to countervail these as equity injections supported by the State, with the aim of setting up and expanding the production facilities of the IRNC Group in Indonesia. Such support would equally fall under the items agreed upon between China and Indonesia under the bilateral cooperation framework, attributed to Indonesia for the same reasons explained in recitals above and can thus be allocated to the products exported from Indonesia.

⁽²⁰⁹⁾ Tyres case, recitals 405 and 416.

- (795) The Commission then analysed whether the financial contribution provided by the GOC via the Chinese parent companies conferred a benefit to the IRNC Group. Once again, due to the non-cooperation of these companies, the Commission had to base its findings on the provisions of facts available according to Article 28 of the basic Regulation. 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.
- (796) 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 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 ⁽²¹⁰⁾, 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.

4.6.4.3. Calculation of the subsidy amount

- (797) For the first point, i.e. the equity injection provided by CAF, the benefit was calculated on the basis of a reasonable rate of return, i.e. what a market investor would have expected when selling the shares at the time the shares were purchased. For this, the Commission looked for similar transactions in the steel industry in the last years. Based on the result of 11 sales transactions of steel companies in the period 2006 to 2019, the Commission concluded that a reasonable price for the shares in a steel company would be 8 times the operating profit.
- (798) Therefore, the benefit was calculated as the difference between the value of Reed Investment's 24 % stake valued at 8 times the operating profit of SMI for 2018 less the price paid by Reed Investment. The benefit was then apportioned to the investigation period using the lockdown period mentioned in the Subscription Agreement, i.e. 5,5 years.
- (799) For the second point, i.e. the provision of equipment at preferential terms, the benefit was calculated as the difference between the purchase price paid by the companies in the IRNC Group and a market price for comparable equipment purchases. The Commission examined in this respect similar purchases of representative sets of equipment for cold-rolling mills in the last years, based on purchase transactions of steel companies. The resulting benefit was then allocated to the investigation period based on the useful life of the assets purchased.
- (800) For the third point, i.e. shareholder loans, since these loans were considered to be *de facto* equity injection through which the Chinese parent companies channelled the grants and preferential loans received, the Commission decided to treat the outstanding amounts of these loans during the investigation period as a grant. The benefit conferred was determined based on the outstanding capital amount of the loan minus the interest paid during the investigation period (if any). Since the loans were clearly linked to a long-term investment, the capital amount was depreciated over the duration of the loan, and only the amount allocated to the investigation period was taken into consideration. Finally, where necessary, the amount of the benefit was further adjusted to reflect only the number of days in the investigation period in which the loan was running.
- (801) The subsidy amount thus established for support for capital investment amounted to 6,02 % for the IRNC Group.

⁽²¹⁰⁾ Due to the full non-cooperation of the GOC, the Commission was unable to ask potential relevant information about prices of similar equipment in China to establish benchmarks on the basis of official statistics in China. Since the Commission could not find any information about prices in China and no information was provided about the origin of the equipment, the Commission decided to use a combination of prices for similar equipment from several countries as a proxy.

4.6.4.4. Comments on final disclosure

- (802) The IRNC Group complained about the inadequate disclosure concerning the benchmark for the capital injection by CAF, since the names of the companies in the benchmark were omitted and there was no indication on whether the transactions concerned special shares.
- (803) The Commission considered that revealing the detailed figures, the nature of the shares and individual names of the companies would reveal confidential information of transactions made by specific companies. Instead, the Commission provided a meaningful summary of the data, with indexed figures and an indication that all transactions were made by companies in the steel sector. This claim was thus rejected.
- (804) Eurofer noted that the benchmark was calculated on the operating profit (EBITA), but the information provided on the similar transactions for steel companies seemed to refer to the EBITDA. The EBITA is lower than the EBITDA. Therefore, if the Commission applied the calculation to the EBITA rather than to the EBITDA to which the benchmark refers, the benefit for SMI was underestimated. The complainant invited the Commission to reassess the calculation.
- (805) The financial statements of SMI do not contain EBITDA as such. Instead of trying to recalculate EBITDA based on the available data, the Commission indeed used the operating profit of SMI to calculate the benefit. This was considered to be a reasonable and prudent approach. In any event, after further analysis, the Commission found that the reassessment of the calculation would only have led to a negligible change of less than 0,1 %. The Commission thus maintained its original calculation.
- (806) On the provision of capital in kind for less than adequate remuneration, the IRNC Group submitted that, IRNC only imported one single cold rolling line and claimed that the rest of the equipment has no similarity with the cold rolling line. IRNC Group argued that the Commission did not explain why benefits have been conferred also to other types of equipment.
- (807) In this respect, the Commission first observed that the fixed assets register of a large production plant such as IRNC consists of hundreds of lines. The Commission therefore decided to sample representative sets of equipment to determine the benefit for the entire plant. The cold rolling lines represented an essential part of IRNC's production process, and the benefit for these production lines can thus be considered representative for the entire plant. Furthermore, the Commission did not just use one single type of equipment in its calculation, but several types of equipment which are part of a production line, such as parts of a twenty-roll reversible cold rolling mill, grinder, part of the bridge crane, winding unit, slitting machine and others. This claim was thus rejected.
- (808) IRNC Group also asked the Commission to disclose additional information on the methodology used to establish the benchmark for the purchases of machinery.
- (809) In this regard, the Commission notes that the benchmark used was adjusted for similar production capacity as IRNC's equipment, the origin of the equipment was either European or American and the purchase year of the equipment ranged from 2008 to 2020, i.e. both before and after IRNC's plant was set up. Since no meaningful price differences could be detected within this time range, the Commission concluded that all of the purchases within this time period were reasonable proxies for IRNC's purchases.
- (810) In its comments to the additional final disclosure, IRNC Group noted that the additional information provided by the Commission on the benchmark for the imported machinery refer to a benchmark outside of the 'country of provision or purchase', to which Article 14(d) of the SCM Agreement refers. According to IRNC Group, in this case, the 'country of provision or purchase' should be Indonesia or China, in line with the Appellate Body in *US – Softwood Lumber IV* ⁽²¹¹⁾. According to IRNC Group, the Commission should have established that private prices in Indonesia and China were distorted before referring to European or American equipment as a benchmark.

⁽²¹¹⁾ 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, para. 90.

- (811) Moreover, IRNC Group claimed that, even assuming that the Commission was justified in rejecting prices in Indonesia and China, the Commission did not explain why it chose American and European, instead of Indian prices for cold-rolling equipment, considering the similar level of economic development of India and Indonesia.
- (812) At the least, the Commission should have adequately adjusted prices to reflect the prevailing market conditions in China or Indonesia.
- (813) With respect to the 'country of provision or purchase' of the equipment, the Commission observed that the IRNC Group itself did not make any equipment purchases on the domestic Indonesian market. All of the equipment was imported. Using Indonesia as a benchmark would thus not have been aligned with the factual situation of the IRNC Group. As for China, the Commission recalls that the machinery was imported from related companies in China, which were not the manufacturers of the equipment. The Commission tried to determine the origin of the equipment by requesting the invoices from the original manufacturers, but due to the non-cooperation of the Chinese parent companies, this was not possible. Hence, the Commission had to rely on facts available with regard to the actual country of origin of the purchases.
- (814) In terms of facts available, the use of data from the Indian sampled company in the case at hand was not feasible. Full data on the equipment of the plant was not requested from the Indian manufacturers, as they were not necessary to determine subsidisation under the Indian subsidy schemes. As a result, no relevant data were available for one of the sampled companies. For the other company, the data were considered to be unfit for use as a benchmark since they related to inter-company purchases. On the other hand, Europe and the US both have a reputable industry for steel plant equipment, and the suppliers included in the benchmark sold cold-rolling mills around the world, including to Chinese steel manufacturers. Therefore, the Commission considered that such global players could be used as a reasonable proxy for a purchase of imported equipment from unknown origin.
- (815) Finally, the same reasoning applies for the adjustment of prices to reflect the prevailing market conditions in China or Indonesia. Since there is no evidence that the equipment was procured on either of these markets, the Commission sees no need to make any further adjustments. Therefore, these claims were rejected.
- (816) Concerning the non-cooperation by related companies on the origin of the equipment, the IRNC Group claimed to have provided sufficient information on the machinery imported from related companies in China and that there was no evidence to support the findings of the Commission in this relation.
- (817) The Commission disagreed with this claim. As mentioned in recital (782) above, the machinery was imported from related companies in China, which were not the manufacturers of the equipment. Contrary to what was stated by the company, the Commission requested the invoices related to the purchase from the original manufacturers of the equipment by the related companies, but due to the non-cooperation of the Chinese parent companies, these were not submitted. This information was necessary within the scope of the investigation in order to establish the arm's-length value of said equipment. The Commission thus maintains its position that insufficient information was provided on the equipment imported from related companies and that it therefore had to rely on best facts available.
- (818) On the shareholder loans, the IRNC Group claimed that the Commission failed to prove that the GOC provided a financial contribution via the Chinese parent companies or conferred a benefit to the IRNC Group. According to the GOID and IRNC Group, IRNC's shareholders are private companies, and the Commission failed to establish that the Tsingshan Group is a public body or entrusted by the GOC. It also recalled that shareholder loans were subordinated to bank loans from China, i.e. they were a pre-condition to obtain the bank loans. In the IRNC Group's view, if the shareholder loans had originated from the GOC just as the bank loans from China, the subordination would have been illogic.
- (819) The Commission recalls that in the absence of any reply from the Chinese parent companies providing the shareholder loans in question as well as from the GOC, the Commission had to rely partially on facts available for its findings concerning these shareholder loans. In particular, the Commission had to use facts available in order to identify the source of financing of the loans provided by the Chinese parent companies to the companies of the IRNC Group. The Commission established at length in recitals (785) to (790) above that there is a clear

commitment from the Chinese parent companies to invest overseas in encouraged industries and that the provision of these shareholder loans squarely fits into the GOC's policy objective of promoting BRI projects in the steel industry. As mentioned in recital (794), the conditions of the shareholder loans (including the fact that no interest was 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. The fact that IRNC's shareholders are private companies does not contradict these findings. As to the fact that the shareholder loans are a condition for the direct bank loans from the Chinese public bodies does not contradict the Commission's findings either. In the Commission's view, it only shows the existence of different channels to provide financial support, and it actually reinforces the Commission's point that there is a strong link between both types of loans. This claim was thus rejected.

- (820) Furthermore, the IRNC Group claimed that the shareholders loan from two companies, located in Hong Kong and Japan respectively, should not be countervailed as they were not located in China.
- (821) Concerning the loan from the company located in Hong Kong, the Commission observed that Luck Scenery did not cooperate during the investigation, and that the IRNC Group had not submitted any additional evidence after the final disclosure to substantiate its claim.
- (822) On the other hand, the claim was found to be justified for the Japanese company. Contrary to the other shareholder loans, information was actually provided for this company, showing that it had indeed been established in Japan with Japanese shareholders. Contrary to the other loans, no links could be found with the Chinese government, Chinese banks, the Tsingshan Group or other Chinese stakeholders. Therefore the Commission removed the loans of this company from the benefit calculation.
- (823) Concerning the non-cooperation by the IRNC Group's shareholders, IRNC Group recalled that the Commission should base its conclusions on the best facts available and claimed that evidence of non-cooperation could not derive from information, which was never required and should not be required from the IRNC Group, being outside the scope of this investigation.
- (824) The Commission noted that the scope of the investigation included subsidy schemes awarded under the bilateral cooperation between China and Indonesia. Point 6 of the general instructions also stated that 'In case where a related company has obtained any benefits from the subsidy schemes under investigation, the details shall be reported in line with the questions in this questionnaire'. As explained in recital (791), IRNC Group's parent companies received a financial contribution from the GOC in the form of grants or preferential financing in order to implement the GOC's preferential policies, including to fund their investments in Indonesia for the production of the product concerned. Therefore, both IRNC's shareholders and the shareholders of other IRNC Group's entities were required to provide their replies to the questionnaire. In addition during the investigation, the Commission requested specific information from all the parent companies and none of the Chinese shareholders responded to these requests. Therefore, the claim was rejected.
- (825) With reference to the benefit, IRNC Group noted that the end date of the shareholders' loans follows that of the bank loans since they cannot be paid before the bank loans. The IRNC Group also clarified that the shareholder loans are booked as liabilities and that IRNC Group's companies accrue interests. Therefore, in the IRNC Group's view, the Commission should not treat the outstanding amounts of all shareholder loans during the IP as a grant.
- (826) The loan agreements indeed stipulate that the bank loans are to be paid before the shareholder loans. However, contrary to the bank loans, which have a clear repayment schedule, the shareholder loans do not indicate any timeline for repayment after the maturity date of the bank loans. Furthermore, even if interest is accrued in the accounts of the company, this does not refute the Commission's findings that in practice the company did not have any actual cash outflow and could freely dispose of all of its liquid cash, thus procuring a clear financial benefit equivalent to a grant. Therefore, the Commission maintained its position.

4.7. Provision of coal for less than adequate remuneration

- (827) The complainant alleged that the exporting producers benefitted from cheap coal due to various government measures on the domestic coal market, notably the existence of a maximum domestic price, a domestic market obligation ('DMO') and a letter of credit requirement for export sales. These measures would serve to depress the domestic prices of coal and provide a benefit for coal users, including stainless steel industry. However, the investigation found that the alleged measures neither individually, nor taken together, had the alleged effect.
- (828) The investigation has determined that the maximum domestic price did not apply to, or provide, any benefit to the exporting producers. The regulated maximum price for thermal coal capped at USD 70 per tonne applied only to electricity companies selling energy to final customers ('public interest companies'). The exporting producers and their related suppliers of intermediate materials used all electricity they self-generated, therefore they were not 'public interest companies' and they did not benefit from the capped price.
- (829) Therefore, the investigation could not find that the exporting producers benefitted from this subsidy.

4.8. Provision of land for less than adequate remuneration

4.8.1. *The complaint and the subsidy scheme*

- (830) The complainant contended that IMIP channelled the direct support it received from the GOID, which provided facilities in terms of land, to the exporting producer with which IMIP is related to. According to the complainant, land acquisition and development, and arrangements on the rental of buildings, are important facilities that the GOID granted to IMIP and hence to the related exporting producer.

4.8.2. *Legal basis*

- (831) According to Articles 1 and 2 of the Basic Agrarian Law No. 5 of 1960 ('Basic Agrarian Law'), all land and natural resources in Indonesia are conceived as 'gifts of God' which are 'controlled by the State'. This 'right of control' of the State, consisting, *inter alia*, in regulating the appropriation and the use of the land, is exercised in order to achieve 'the maximum prosperity of the people'.
- (832) Pursuant to Articles 28 and 33, paragraph 3 of the Constitution of the Republic of Indonesia and to the Basic Agrarian Law, private persons are entitled to hold a ownership in the form of freehold over a plot of land (*Hak milik*). Moreover, a number of minor property rights exists, such as the exploitation right (*Hak guna usaha* – 'HGU'), the use right (*Hak pakai*, also translated as cultivation right) or the building use right (*Hak guna bangunan* – 'HGB', also translated as building right). The latter includes the right to use and to build over a plot of land. While the ownership is reserved only to Indonesian persons, HGU and HGB are available also to foreign-owned companies incorporated in Indonesia. However, in practice these formal rights still coexist with customary land claims. This is due to the fact that not all plots of land in Indonesia are officially registered because members of the customary communities (*Ulaia*) are not obliged to register their plots of land, and that the proof of the rights over a plot of land is provided by a corresponding certificate (*Sertifikat*) granted only on plots of land already registered. Certificates are different depending on the right they acknowledge, namely: *Sertifikat hak milik* – 'SHM' for the ownership; *Sertifikat hak guna usaha* – 'SHGU' for the exploitation right; and *Sertifikat hak guna bangunan* – 'SHGB' for the building use right.
- (833) As explained in the relevant section above, the Morowali Park is an industrial park incorporated in Indonesia under the special qualification of an industrial estate. Therefore, in tracing back the legal basis that regulates the land where the Morowali Park was established, account has to be taken not only of the laws concerning land ownership and spatial planning, but also of specific regulations concerning industrial estates.

(834) With regard to land ownership and spatial planning, laws that regulate the territory where IMIP is located include:

- The Basic Agrarian Law, which repealed land regulations in force before the independence of Indonesia and established the current arrangement of property rights. Similar to the land use right in the People's Republic of China, HGB can only be acquired for a limited period. In Indonesia this period corresponds to maximum 30 years, which can be further extended by 20 years;
- Government Regulation No. 40 of 1996, which regulates the transfer of HGUs, use rights and HGBs;
- Government Regulation No. 24 of 1997 on Land Registration, which lays the foundations of the current procedures of land registration and certification;
- Government Regulation No. 26 of 2007 on Spatial Management;
- Government Regulation No. 26 of 2008 on the National Spatial Plan;
- Morowali Regency Regulation No. 10 of 2012 on the Spatial Plan of the Morowali Regency for the Period 2012-2032, which stipulates the spatial plan for the Morowali Regency, i.e., the sub-provincial entity where IMIP is located;
- Presidential Regulation No. 17 of 2015 on the National Land Agency (*Badan Pertanahan Nasional* – 'BPN'), an agency within the Ministry of Agrarian Affairs and Spatial Planning, which determines the role of the BPN and of its local branches in the procedures of land registration and certification;
- Government Regulation No. 13 of 2017 on the Amendment of Government Regulation No. 26 of 2008 concerning the National Spatial Plan;
- Head of the BPN Regulation No. 1 of 2018 on Guidance for the Development of Regional Spatial Plan for Provincial, Regency and Municipal Level, which stipulates the general provisions for the development of the spatial plan at the level of provinces, regencies and local districts;
- Morowali Regency Regulation No. 7 of 2019 on the Spatial Plan of the Morowali Regency for the Period 2019-2039; and
- Articles 34 to 47 of Government Regulation No. 18 of 2021, which recently complemented in relation to HGB the Basic Agrarian Law and Government Regulation No. 24 of 1997 on Land Registration, prolonging the duration of HGB to 35 years, which can be further extended by 20 years.

(835) In addition, there are two laws relevant as background but not directly applicable to the Morowali Park:

- Law No. 2 of 2012 on Land Procurement for Development in the Public Interest, which was meant to address the difficulty in land purchase, originated by the complex system of property rights, for projects of public interest. Both IMIP and the GOID separately confirmed that the law did not apply to the Morowali Park since it applies only to 24 business sectors which do not encompass IMIP's activities. Law No. 2 of 2012 was subsequently and partially amended by Law No. 11 of 2020 on Job Creation ('Omnibus Law'). Law No. 2 of 2012 was implemented by Presidential Regulation No. 71 of 2012 on the Implementation of Land Procurement for Development in the Public Interest, which was in turn subject to three major amendments, the latter of which operated by Presidential Regulation No. 30 of 2015 on the Third Amendment to Presidential Regulation No. 71 of 2012; and
- Presidential Regulation No. 56 of 2017 on Social Impact Handling in Land Acquisition Process for National Strategic Projects, whose application to IMIP was denied by the GOID, since the law applies only to land procurement for national strategic projects on land over which individuals living there cannot prove customary or property rights. Thus, the law is meant to mitigate the effects of their displacement. Instead, individuals living on the land purchased by IMIP were able to prove their customary rights, which entitled them to compensation.

(836) With regard to the rules on industrial estates regulation, the following are relevant:

- Government Regulation No. 24 of 2009 on Industrial Estate, in force at the time of the establishment of IMIP. Among its provisions, Article 3, para. 4 stated that 'Development of Industrial Estates in the regency [...] area is carried out in accordance with the Regency [...] Spatial Planning'. Moreover, Article 4 added that 'The Ministers,

related ministers, and governors and regents/mayors in accordance with their respective duties and authorities are responsible for achieving the objective of Industrial Estate development'. In particular, according to Article 5, paragraph 2, point (d), 'The power [of the Minister] are exercised by: [...] (d) setting a benchmark price for selling or leasing plots and/or industrial buildings in the Industrial Estates at the suggestion of the National Team [Industrial Estates]' (Timnas-KI), whereas, according to Article 6, point (b), '[...] governors or regents/mayor provide: [...] (b) easiness in acquiring/acquiring land in the area designated for the development of Industrial Estate'. Furthermore, Article 10 provides that the area of an Industrial Estate must be at least 50 ha and Articles 13 and 14 that each Industrial Estate must apply for an Industrial Estate Business Licence, once they have obtained a Principle Approval. Finally, Article 18 allows Industrial Estate companies holding an Industrial Estate Business Licence to obtain a HGB on the land purchased and developed, and to divide this HGB up between the plots of land resold to the companies in the Industrial Estate;

- Agreement between the GOID and the GOC on Indonesia-China Integrated Industrial Parks, signed in Jakarta on 2 October 2013 (see recital (605));
- Decree of the Minister of Industry on the Cooperation Team for the Indonesia-China Integrated Industrial Estate No. 432/M-IND/Kep/7/2014 of 22 July 2014 (see recital (638));
- Government Regulation No. 14 of 2015 concerning the Master Plan of National Industry Development for 2015-2035, according to which one of the major infrastructure required by the Indonesian industry is the land for industrial estates. The provision of industrial land in Indonesia is carried out through the development of industrial areas, also translated as areas designated for industry or Industrial Designation Zone. Inside the industrial areas, land for industrial estates and non-industrial land are identified. The purposes of the model of the industrial estates are the following: developing the land in order to provide ready-to-use and/or ready-to-build land to industries, guaranteeing that land rights and permits can be easily obtained, and ensuring the availability of infrastructures and facilities needed by investors ⁽²¹²⁾;
- Joint Statement on Strengthening Comprehensive Strategic Partnership between the People's Republic of China and The Republic of Indonesia of March 2015 (see recitals (577) and (610)); and
- Government Regulation No. 142 of 2015 (see recital (632)), which replaced the previous Regulation No. 24 of 2009, requires that an entity, in order to be eligible for applying to an Industrial Estate Business Licence, must have a land certificate (or relinquishment of rights of previous occupants) related to its plot of land. Among the several provisions of Regulation No. 142, Article 4(i) states: [The authorities of the Minister cover] 'stipulation of guidelines on reference sales price or rent of Industrial blocks and/or buildings within an Industrial Estate based on Industrial Estate Committee proposals' Article 45(1) stipulates that 'The Government may initiate the development of Industrial Estates as Industrial infrastructure in the event the private sector is not interested in nor unable to develop an Industrial Estate; and/or to accelerate the spread and even distribution of Industrial development'. Article 48(1) reads: 'The Government may conduct land procurement in accordance with land procurement laws and regulations'.

4.8.3. Findings of the investigation

- (837) The GOID provided land for less than adequate remuneration to IMIP, and hence to IMIP's related companies of the IRNC Group, as part of the bilateral cooperation with the GOC. The deal between the GOID and the GOC relied on Indonesia agreeing to establish a special Industrial Estate in the Morowali Park and confer the management to IMIP (see recitals (560) et seq.). Among the terms of the agreement between the governments, the GOID would facilitate the procurement and acquisition of land for the exporting producers established in the Morowali Park, in accordance namely with the Joint Statement of March 2015 and Regulation No. 142 of 2015.

⁽²¹²⁾ Indonesian Ministry of Industry, *Industry Facts and Figures*, 2017, pp. 34-35, <https://kemenperin.go.id/majalah/11/facts-and-figures-industri-indonesia>

- (838) The investigation found that the GOID facilitated the necessary land to IMIP starting from 2013. The land in question was the property of the Indonesian State. IMIP agreed with the local authorities, and with the assistance of the Bahodopi district authorities, on a single average payment per square meters, as a compensation, for the individuals using the land at the time.
- (839) The investigation also showed that the tenants in the Morowali Park, including the IRNC Group, were able to start building their plants before actually obtaining the legal certificate for the building use right because IMIP was considered by the GOID a National Strategic Project ⁽²¹³⁾. For some plots, a legal certificate was available during the IP, and corresponded to either a full ownership right or a HGB. The recognition of IMIP as National Strategic Project provided a formal legal assurance to the IRNC Group that it could start building on the land received even before acquiring definitive title to the land. In addition, it is generally recognised that it is risky to buy land in Indonesia due to difficulties in obtaining and showing ownership title. The removal of this risk grants a decisive advantage to an envisaged investment.
- (840) The GOID alleged that the transfer of the land to IMIP was a transaction between private parties. This is incorrect. As a matter of fact, the GOID was the owner of the land. The fact that there were villagers occupying the land and that IMIP paid the agreed compensation to the villagers to purchase the land does not make such a transaction a transaction between two private parties.
- (841) Therefore, the Commission concluded that the GOID provided a financial contribution directly to IMIP in the form of provision of State land within the meaning of Article 3.1(a)(iii) of the basic Regulation.

4.8.4. *Benefit*

- (842) This financial contribution confers an advantage because IMIP simply paid a compensation pre-agreed with the local and district GOID's officials for the giving up of the occupation of the land, which was unrelated to the actual value of the land or any market considerations. The actual owner of the rights to the land, i.e. the GOID, never charged anything to IMIP for the actual value of the land. There was also no document showing that the land was properly evaluated. In fact, there is evidence on file that the amount for the compensation paid to the villagers was unrelated to the actual market value of the land and its potential to be used as industrial land.

4.8.5. *Specificity*

- (843) Similar to preferential financing, this scheme is both sectorally and regionally specific for the same legal reasons.

4.8.6. *Calculation of the subsidy amount*

- (844) In order to measure the advantage received by the exporting producer, the Commission resorted to an in-country benchmark for land. The most appropriate approach at this stage was to compare the value of developed land ready to build a plant on. However, the Commission could not consider the compensation awarded as comparable to prices paid for land transactions on the market. Therefore, the Commission considered only the development costs incurred by IMIP to transform the land purchased as forest and plantation into land ready for industrial use. The Commission compared these costs with an independent evaluation report for industrial land prepared for Jindal Indonesia. Jindal Indonesia is located in the Gresik Regency in the province of East Java and the evaluation report, prepared every few years for accounting purposes and at the request of lending banks, assessed the value of the HGBs held by Jindal Indonesia, *inter alia*, through comparison to prices in transactions concerning HGBs over developed land in the area. The Gresik Regency in East Java is an area comparable to the Morowali Regency in Central Sulawesi because it has a similar GDP, because of the presence of an industrial park and because they are both far from the capital Jakarta, whose land prices are far different from the rest of the country. Moreover, the value in the Jindal Indonesia's evaluation report is a conservative estimate, since they concern only HGBs, whereas, as mentioned, IRNC Group acquired from IMIP variably HGBs and full ownership rights, with a higher value compared to HGBs, on different plots of land.

⁽²¹³⁾ Art. 38.4, 39.1(d) of regulation 142 of 2015 on industrial estate.

- (845) In the calculation, first of all, the value of the evaluation report referred to 2020. Therefore, it was adjusted by the consumer price index (CPI) to obtain the value in each year in which each the IRNC Group had purchased a plot of land. The amount of benefit was established by deducting the compensation paid by IMIP from the benefit found.
- (846) Then, IMIP's land development costs by square meter were compared to the value of the evaluation report adjusted to the corresponding year to obtain the benefit per square meter. This figure was then multiplied by the area of land that each of the companies in the IRNC Group was actually using, in order to allocate the total benefit for the group to each of the companies in the group.
- (847) After that, the benefit was apportioned to the IP by using the useful economic life of the land, i.e. 30 years. This corresponds to the duration of HGBs in Indonesia. The total benefit received was allocated on the basis of the actual usage per square meter by each company of the IRNC Group in the Morowali Park.
- (848) Only the IRNC Group benefited from this subsidy scheme. No benefit was found for Jindal Stainless Indonesia, as it had acquired an already existing plant when it started operations.
- (849) The subsidy rate established with regard to this subsidy during the investigation period for the IRNC Group amounted to:

Provision of land for less than adequate remuneration

Company name	Subsidy rate
IRNC Group	0,83 %

4.8.7. *Comments on final disclosure*

- (850) The GOID and IRNC Group claimed that the Commission did not put forward evidence that land was property of the Indonesian State and it recalled that the land had been purchased from private individuals. The GOID clarified that this was certified by the regional government since the land was not registered under land deed, but that this did not mean that the purchase was agreed with local authorities. The GOID asserted that the State is only responsible for administering the ownership rights of the land, including certifying the transfer of ownership, until the land is registered. This certification is just for land administration purposes. Both parties further claimed that the price was set and agreed between IMIP and the private land owners, and the GOID added that the transaction in question as a sale and purchase transaction, not a compensation.
- (851) In response, the Commission observed that the land of the territory where IMIP was established is State Land ('Tanah Negara') with the status of former *Swapraja* land. This term refers to the land which, before the independence of Indonesia, belonged to local sultanates or kingdoms benefitting from a certain degree of self-government. After the independence, these areas and the customary communities living there still retained a certain degree of semi-autonomy.
- (852) The Basic Agrarian Law, enacted in 1960, provided that *Swapraja* land could be converted into private land until 1980. Failure to convert it into private land resulted, after 1980, in the GOID acquiring the right to administer and manage the former *Swapraja* land, thus becoming effectively State Land. Since the customary communities are not obliged to register the land, this change in land status led to large areas of the country where plots of land are not registered. Absence of registration implies that members of the customary communities living there have no certificate to prove their rights on the land where they live. This situation does not prevent members of the customary communities from demonstrating their customary use of a plot of land.
- (853) However, the rights of customary communities, even when recognised, still coexist with the right to administer and manage the former *Swapraja* land falling upon the GOID. In fact, the land transferred to IMIP was clearly labelled as State Land (Tanah Negara). Indeed, Art. 1(3) of the Government Regulation of the Republic of Indonesia No 24 of 1997 regarding land registration clearly states: 'State land (tanah negara) or land **directly controlled** by the State is land which is **not** possessed under a certain land right.'

- (854) As a consequence, the members of the customary communities can give up their customary use of the land and be compensated for it, but it is the GOID that retains the right to actually sell/transfer the land. As such, the GOID had to give its consent to the transaction.
- (855) In addition, Article 43 of the Agrarian Law of 1960 stipulates that: 'As far it concerns land directly controlled by the State, the right of use may only be transferred to another party with the permission of the authorized official'. Based on this, the Commission concluded that it was up to the GOID to decide whether the land would be transferred to IMIP or not.
- (856) In the context of IMIP's establishment, the GOID actively intervened in several ways to procure the land to IMIP in accordance with Article 48(1) and 45(1) of Regulation 142 of 2015.
- (857) First, the GOID amended the spatial planning of the Morowali Area, changing the purpose of the land from farmland to industrial land, more specifically linked to a nickel project. Indeed, Article 28 of Morowali Regency Regulation No. 10 of 2012 designated as nickel mining area the Bahodopi district, i.e., the sub-regency entity where IMIP is located. Moreover, Article 29 of the same Morowali Regency Regulation designated the Bahodopi district also as an Industrial Area 'based on mining raw materials'. More generally, the Morowali Regency identified a 'large industrial area in Bahodopi District' as a 'Regency strategic area from the point of utilization of natural resources' (Article 37). Finally, Article 9 of the same Morowali Regency Regulation identified Bahodopi district as the area where a special mining port terminal is located. This change of use left the villagers with no choice but to relinquish their right to occupy and use their land as they could no longer use it for farming activities.
- (858) Second, IMIP contacted the local authorities in the area, i.e., the mayors of the villages located in the area, and agreed with them on a compensation to be provided to the people that the village heads identified as occupants of the plots of land in the area. In this process, three elements have to be highlighted: (i) IMIP agreed on the compensation with the village heads also with the assistance of GOID's officials of the Bahodopi district, because the contracts show that they later witnessed the transaction and certified the use and the ensuing right to compensation of the villagers; (ii) the plots of land whose occupants were identified by the village heads have more or less all the same area (approx. 20 000 square metres each); and (iii) the compensations in the contracts is actually a single average price per square metre and it is not defined with the Indonesian word for 'price' (*Harga*), but with the Indonesian word for 'compensation' (*Ganti rugi*).
- (859) The evidence proved that the land purchase process undertaken by IMIP was actually a process where the State provides the land to the IMIP without any consideration, only with the requirement to pay the agreed compensation to the villagers. IMIP agreed with the local authorities, and with the assistance of the Bahodopi district authorities, on a single average compensation per square meters for the individuals owning the land. The right to compensation was acknowledged by local and district authority through the recognition of continued use of the land, absent a formal title.
- (860) On this basis, the claims of the GOID and of IRNC are rejected.
- (861) The GOID and IRNC Group also claimed that the benchmark employed referred to developed land, whereas the land acquired by IMIP consisted of forests and plantations.
- (862) The Commission indeed used a benchmark for developed land. However, on the side of IMIP, the Commission included in the calculation the original cost of the land plus the development costs for this land, as reported by IMIP itself. The Commission thus compared the cost of developed land for IMIP with the publicly available cost of developed land. Therefore, this claim was dismissed.
- (863) Finally, IRNC Group disputed the adjustment to the benchmark based on the CPI, since land is a capital good, not a consumption good, and thus the CPI does not include land prices.
- (864) The Commission disagreed with this statement. The CPI is a good indication of the general price inflation in the economy as a whole, including in relation to land prices. Indeed, the CPI contains among other factors rental prices, which provide a good indication of the evolution of land and real estate prices. This claim was thus rejected.

4.9. Provision of stainless steel scraps for less than adequate remuneration

- (865) The investigation determined that the exporting producers did not purchase stainless steel scrap. Therefore, the Commission concluded that there was no need to further investigate this scheme.

4.10. Provision of electricity for less than adequate remuneration

- (866) The investigation revealed that one exporting producer self-generated its electricity needs and the other one was buying it at market prices. Therefore, no subsidy relative to the provision of power was provided to them and there was no countervailable subsidisation of the provision of power.

4.11. Provision of gas for less than adequate remuneration

- (867) The investigation revealed that one exporting producer did not buy gas while the other one was buying gas at market prices. Therefore, no subsidy relative to the provision of power was provided to them and there was no countervailable subsidisation of the provision of power.

4.12. Government revenue foregone or not collected that is otherwise due

4.12.1. *Income tax holiday*

- (868) The Complainant claims that the GOID provides tax holidays to corporate taxpayers that perform investment in so-called 'pioneer industries'. The complainant argues that the respective regulation defines 'pioneer industries' as 'industries characterised by large connectivity, creation of added-value and high externality, introduction of new technology, and of strategic value to the national economy'. Among other sectors, those 'pioneer industries' include steel and non-steel upstream base metal industries.

(a) *Legal basis*

- (869) The legal basis for this program is the Regulation of the Minister of Finance Number 150/PMK.010/2018 (MOF 150/2018) regarding the Administration of Corporate Income Tax Deduction Facility. In 2020, the program was renewed by the MOF No. 130/2020.

(b) *Findings of the investigation*

- (870) The Commission found that on 9 August 2019 the IRNC received a tax facility benefit from the Directorate General of Taxation, which allows reduction in net taxable income for ferronickel product of 100 % for 7 years and 50 % for the next 2 years.
- (871) The other entities parts of IRNC group that have a ferronickel plant did not avail of this scheme.
- (872) IRNC explained that this program was applicable to only one of its plants, i.e. ferronickel plant. The IRNC submitted the Decision of the Director General of Taxes NUMBER KEP-161/PJ/2020 regarding the determination on utilisation of corporate income tax deduction facility for its ferronickel plant.
- (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; (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.

(d) *Calculation of the subsidy amount*

- (877) 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 facility and the income taxes paid in the IP.
- (878) The subsidy rate established for this specific scheme amounted to 1,65 % for IRNC group.

4.12.2. *Income tax allowance facility*

- (879) The Complainant claimed that this scheme grants income tax facilities for investments in certain business fields and or certain region to boost direct foreign and domestic investments in Indonesia.

(a) *Legal basis*

- (880) The scheme is based on Regulation of the Minister of Finance Number 89/PMK.010/2015⁽²¹⁴⁾ concerning procedures for the granting of income tax facilities for investment in certain business fields and/or in certain regions and transfer of assets and sanctions on domestic taxpayers given income tax facilities.

(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.

⁽²¹⁴⁾ <https://www.kemenkeu.go.id/media/6702/regulation-of-minister-of-finance-of-the-republic-of-indonesia-number-89-pmk010-2015.pdf>

(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.

(d) *Calculation of the subsidy amount*

(886) 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 facility and the income taxes paid in the IP.

(887) The subsidy rate established for this specific scheme amounted to 0,06 % for IRNC Group.

4.12.3. *Import duty exemption for machinery*

4.12.3.1. *For the construction of production facilities*

(888) This programme provides an exemption from the import tariffs for imports of machinery and equipment used in the construction of production facilities.

(a) *Legal basis*

(889) Regulation of the Finance Minister 176/PMK.011/2009 on the exemption from import duty on the imports of machines, goods and materials for the establishment or development of industry in the frame of investment as amended by MOF Regulation Number 76/PMK.011/2012 and MOF Regulation Number 188/PMK.010/2015.

(890) According to Article 2(3) of Regulation 176/2009, the exemption can be granted for the purchase of machines, goods and materials which: are not produced domestically; are not produced domestically but do not meet the required specifications; or are produced domestically but in insufficient number.

(b) *Findings of the investigation*

(891) The investigation revealed that IRNC and the four related companies (GCNS, ITSS, SMI and ITS) benefited from the import duty exemption for the imports of machinery during the phase of construction of the plants until they started the production. Consequently, import duties were not paid for machines imported during the respective construction periods of these plants.

(892) To benefit from this exemption, the company needed to obtain a confirmation letter from the local authority responsible for the project, which needs to be submitted to the local customs authority.

(893) According to Article 2 of Regulation 176/2009, the benefit is available only to companies producing goods, or services in certain sectors. For the industries producing services, the sectors are: tourism and culture, transportation, public health, mining, construction, telecommunications.

(894) The scheme aims at facilitating the import of goods, and in particular machines which are not available domestically. As explained in the Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), which aims at implementing the 2005-2025 Long-term National Development Plan, the main points for the country's 2025 development goals include the following: 1) 'increase value adding and expanding value chain for industrial production processes [and] increase the capability of the industry to access and utilize natural resources', and 3) 'to push for the strengthening of the national innovation system in the areas of production [and] process, [...] towards an innovation-driven economy' ⁽²¹⁵⁾.

⁽²¹⁵⁾ Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), page 15.

- (895) The Master Plan further notes that, when it comes to the country's challenges, 'Indonesia's current economic structure is primarily focused on agriculture and industries which extract and harvest natural resources. There are only limited industries which focus on products with added value' ⁽²¹⁶⁾. According to the Plan, 'to foster the economic growth in Indonesia, it will depend on the private sector participation which includes state-owned enterprises, and private domestic and foreign investors' ⁽²¹⁷⁾.
- (896) The steel sector is one of the 22 main economic activities that compose the 8 major programs which are set to support the acceleration and expansion of economic development in Indonesia ⁽²¹⁸⁾. Moreover, the Plan explains that it is crucial for the country to further develop downstream manufacturing. According to the it, 'without more downstream activities, Indonesia will miss the opportunity to increase employment and profit margins on the value chain because of the absence of downstream processing industries of iron ore and iron sand' ⁽²¹⁹⁾.
- (897) Against this background, the duty exemption scheme should be considered targeted towards certain sectors of the economy because its conditions seek to provide support to a selected number of industries, in line with the goal of pursuing additional value added from natural resources. In particular, the combined effect of the requirements of the establishment of a new plant, together with the domestic unavailability of the imported machine, make the scheme applicable only to certain sectors, like the steel production and nickel transformation, in which the government policy is seeking to encourage additional downstream transformation of natural resources.
- (898) Therefore, taking into account the legal requirements referred to above, which make it only available to manufacturing companies or to companies providing services in certain selected sectors, the scheme is to be considered specific in accordance with Article 4(2)(a) of the basic Regulation.
- (899) Even considering that the legal conditions for eligibility under the duty exemption scheme could suggest the appearance of a scheme of general application, the scheme would still be considered *de facto* specific in accordance with Article 4(2)(c) of the basic Regulation because, as explained above, the scheme is designed to be in practice available only to a selected and limited number of enterprises, which are active in certain industrial sectors in line with the above mentioned objectives of Indonesia's industrial and economic policy.

(c) *Application of the provisions of Article 28(1) of the basic Regulation*

- (900) IRNC and its related companies imported all the equipment from related companies from China. Furthermore, IRNC Group claimed that due to the Free Trade Agreement between Indonesia and China it did not need to pay import duty for this equipment. This claim was rejected as it was not substantiated.
- (901) 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.
- (902) 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.

⁽²¹⁶⁾ Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), page 19.

⁽²¹⁷⁾ Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), page 20.

⁽²¹⁸⁾ Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), page 22. Nickel is also included in this list.

⁽²¹⁹⁾ Master Plan for Acceleration and Expansion of Indonesia Economic Development 2011-2025 ('MP3EI'), page 67.

(903) During the RCC of the GOID, the GOID was asked to explain how the origin of the machinery imported by IRNC Group was established at the time of importation. 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.

(904) 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.

(d) *Conclusion*

(905) Therefore, 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 % based on the HS code of the equipment.

(906) This programme provides a financial contribution in the form of revenue forgone by the GOID within the meaning of Article 3(1)(a)(ii) as IRNC Group is relieved from payment of import tariffs which would be otherwise due. It also confers a benefit on the recipient companies in the sense of Article 3(2) of the basic Regulation.

(907) The programme is specific because only the industries mentioned in the Annex to Regulation 176/2009 can benefit from it and only the goods that cannot be produced in Indonesia or not in sufficient quantities or with an adequate quality can be eligible for this programme.

(e) *Calculation of the subsidy amount*

(908) The amount of countervailable subsidy is calculated in terms of the benefit conferred on the recipients, which is found to exist during the investigation period. The benefit conferred on the recipients is considered to be the amount of duties exempted on imported equipment. In order to ensure that the countervailable amount only covered the investigation period the benefit received was amortized over the useful life of the equipment according the company's normal accounting procedures.

(909) The amount of subsidy established for this specific scheme amounted to 0,16 % for IRNC Group.

4.12.3.2. *Building/Development of Industry/Service Industry*

(910) The investigation revealed that Jindal Indonesia could have possibly benefited from a partial exemption from import duties pursuant to Minister of Finance Decree No. 135/KMK.05/2000. Articles 2 and 3 of the Decree specify that if the import duty is higher than 5 %, a successful applicant for the import duty exemption will have to pay only a 5 % import duty. However, if the import duty is lower than 5 %, that duty will remain applicable.

(911) The investigation revealed that such potential benefit was very low (0,02 %). In view of the fact that this was the only program that Jindal Indonesia benefited from during the investigation period, and in view of the low potential benefit, the Commission did not investigate this scheme further.

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.

(a) *Legal basis*

— Ministry of Finance Regulation 147/PML.04/2011 and further amended by the Ministry of Finance Regulations 255/PPMK.04/2011 and 120/PMK.04/2013

— Regulation of the Ministry of Finance No. 131 of 2018, on bonded zones

(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 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) 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 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 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, 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 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.

(d) *Comments on final disclosure*

- (927) The IRNC Group claimed that no benefit should be calculated for inputs imported from China, Australia and Vietnam because of the existence of Free Trade Agreements of Indonesia with these countries.
- (928) This claim was found to be justified for Australia and Vietnam, and therefore the Commission revised the amount of subsidisation of the respective subsidy scheme. However, the Commission did not accept the claim with respect to spare parts imported from China. Indeed, the Commission noted that the vast majority of items imported from China were spare parts purchased from related companies. As highlighted in recitals (899) and (903), these spare parts concerned machinery for which the Commission contested the origin and for which the Commission concluded that an import duty was applicable, i.e. 5 % based on the HS code of the equipment. *Mutatis mutandis*, this also applies to the spare parts which are linked to this equipment.
- (929) IRNC Group argued that the bonded zone scheme is an export subsidy, and should thus be calculated based on export turnover, and subsequently deducted from the combined dumping and subsidy duties.
- (930) This claim was found to be justified as far as it relates to raw materials, which are used in the production of exported finished goods. Therefore, the Commission recalculated the respective subsidy margin.

(e) *Calculation of the subsidy amount*

- (931) The benefit was calculated as the difference between the amount of import duties due during the investigation period, and the actual amount of import duties paid during the investigation period. The amount of subsidy established for this specific scheme for the IRNC Group amounted to 0,28 % for spare parts and 0,90 % for raw materials.

4.12.4. *VAT exemption for machinery*

- (932) The Complainant alleged that the exporting producers benefited from VAT exemption for the imports of machinery. The investigation determined that the Indonesian tax administration timely paid the VAT refunds submitted by the companies during the IP for the excess amount of VAT paid. Therefore, the Commission concluded that there was no countervailable subsidisation related to these VAT exemptions.

4.12.5. *Land and building tax ('PBB') on mining industry*

- (933) The Complainant alleged that the GOID reduced the taxable value of the land and buildings belonging to the mining industry and its downstream industry. However, the Commission did not find any evidence of subsidisation for these schemes.

4.12.6. Conclusion on subsidisation

- (934) The Commission calculated the amount of countervailable subsidies for the cooperating companies in accordance with the provisions of the basic Regulation by examining each subsidy or subsidy programme, and added these figures together to calculate a total amount of subsidisation for each of the exporting producers for the investigation period. To calculate the overall subsidisation the Commission first calculated the percentage of subsidisation: the subsidy amount as a percentage of the company's total turnover. This percentage was then used to calculate the subsidy allocated to exports of the product concerned to the Union during the investigation period. The subsidy amount per tonne of product concerned exported to the Union during the investigation period was then calculated, and the rates below calculated as a percentage of the Costs, Insurance and Freight ('CIF') value of the same exports per tonne.
- (935) Following final disclosure, the complainant noted that the Commission's findings revealed that a large majority of the subsidies identified for the integrated exporting producers affect the upstream stages of the production process of SSCR. According to the complainant, this means that the non-integrated Indonesian producer of SSCR – Jindal Indonesia – might have also benefited from subsidies conferred to Indian and/or Indonesian upstream producers. This could happen in case of domestic sales of upstream products from IRNC Group to Jindal Indonesia or in case of Jindal Indonesia's purchases of subsidized upstream products of Indian origin.
- (936) The Jindal Group and Jindal Indonesia responded that there is no legal basis for such a pass-through to Jindal Indonesia, and that in any case there is no such a pass-through.
- (937) On the basis of the analysis of Jindal Indonesia's production process and the company's raw material purchases in the IP, the Commission concluded that the company could not have benefited from the purchases of subsidized upstream products of Indonesian origin.
- (938) Jindal Indonesia however purchased upstream products, namely hot rolled coils, from a related company in India, which may have benefited from the GOI provision of chromium ore for less than adequate remuneration (see Section 3.3.2). In this regard, the Commission could not make any findings since there was insufficient information on file on this matter. Therefore, the claim of the complainant was rejected.
- (939) The complainant further argued that the massive exports from Indonesia are not an incidental consequence of its policy in the stainless steel industry, but rather its very purpose. This would make many schemes *de facto* contingent on exports, in particular the provision of nickel ore for LTAR and the financial support granted in the context of the bilateral cooperation between the GOID and the GOC. The complainant urged the Commission to assess the *de facto* contingency on exports of these schemes and to countervail them based on the turnover of exports rather than the total turnover of the exporting producer.
- (940) As highlighted in recital (929) above, the Commission agreed with this claim for the scheme relating to the imports of raw materials in the bonded zone. However, the Commission disagreed with the claim for the other schemes. Provision of nickel ore for LTAR is a production subsidy, and there is no link with export sales of the finished product.
- (941) Concerning financial support, the situation is different from the Tyres case cited by the complainant. In that case, a subsidy was awarded by the Chinese government to a company located in China with the specific commitment to increase its export sales from China to the EU, via the acquisition of the global assets (most importantly its technical know-how and distribution channels in the EU) of a foreign-owned company under the umbrella of the BRI. Translating this into the current context would correspond to a subsidy provided by the GOC to Tsingshan Group's parent company in China with the commitment to increase its exports from China to Indonesia. Clearly, this was not the case here. On the other hand, in a context similar to the one at hand, as was the case in the GFF anti-subsidy investigation, financing support awarded under the bilateral cooperation between China and Egypt was not considered to be export contingent. This claim was thus rejected.
- (942) Since the subsidy amount for Jindal Indonesia is below the *de minimis* threshold, no duties will be imposed on this company.

- (943) A subsidy amount also had to be established for the sole cooperating non-sampled exporting producer in Indonesia. 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.
- (944) Given the fact that the Commission only calculated a duty rate for one exporting producer, and in view of the fact that cooperating non-sampled exporting producers benefit from a lower rate, as explained in the preceding recital, the Commission exceptionally decided to set the level of the duty for 'all other companies' at the level of the IRNC Group.

Company	Overall subsidy amount
IRNC Group	21,4 %
Jindal Indonesia	0,02 % (below <i>de minimis</i>)
Other cooperating companies	13,5 %
Residual	21,4 %

5. INJURY

5.1. Definition of the Union industry and Union production

- (945) The like product was manufactured by 13 known producers in the Union during the investigation period. They constituted the 'Union industry' within the meaning of Article 9(1) of the basic Regulation.
- (946) Following final disclosure the consortium of importers and distributors and one unrelated importer requested the disclosure of the identity of the 13 Union producers that made up the Union industry during the IP. Aside from the three sampled producers and the companies supporting the complaint (i.e. Acerinox, Outokumpu Nirosta GmbH, Outokumpu Stainless AB), these are Marcegaglia, Acroni, Arinox, Otelinox, and three re-rollers based in Germany (i.e. SAP Precision Metal, BWS, and Waelzholz).
- (947) The total Union production during the investigation period was established at around 3,1 million tonnes. The Commission established this figure on the basis of all the available information concerning the Union industry, namely the verified questionnaire reply received from Eurofer and remotely cross-checked questionnaire replies of the sampled Union producers.
- (948) As indicated in recital (25), three Union producers were selected in the sample, representing over 60 % of total Union production of the like product. They are all vertically integrated producers.

5.2. Union consumption

- (949) The Commission established the Union consumption on the basis of: (a) the verified Eurofer data concerning Union industry's sales of the like product to unrelated customers, whether direct or indirect sales, partially cross-checked with the sampled Union producers, as further set out in recital (976) below; and (b) imports of the product under investigation from all third countries as reported by Eurostat.

(950) The Union consumption over the period considered developed as follows:

Table 4

Union consumption (tonnes)

	2017	2018	2019	IP
Union consumption	3 873 092	3 717 114	3 442 541	3 206 766
<i>Index</i>	100	96	89	83

Source: Eurofer, sampled Union producers and Eurostat

(951) During the period considered, the Union consumption decreased by 17 %.

5.3. Imports from the countries concerned

5.3.1. Cumulative assessment of the effects of imports from the countries concerned

(952) The Commission examined whether imports of SSCR originating in the countries concerned should be assessed cumulatively, in accordance with Article 8(3) of the basic Regulation.

(953) That provision stipulates that the imports from more than one country shall be cumulatively assessed only if it is determined that:

- (a) the amount of countervailable subsidies established in relation to the imports from each country is more than *de minimis* as defined in Article 14(5), and the volume of imports from each country is not negligible; and
- (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the like Union product.

(954) The amount of countervailable subsidies established in relation to the imports from each of the two countries concerned are summarised under recitals (302) and (933). They are all, but for Jindal Indonesia, above the *de minimis* threshold laid down in Article 14(5) of the basic Regulation.

(955) The volume of imports from each of the two countries concerned was not negligible. Imports market shares in the investigation period were 3,4 % for India and 2,8 % for Indonesia.

(956) 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 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.

(957) The consortium of importers and distributors and one unrelated importer contested the cumulative assessment of the effects of the Indian and Indonesian imports on the Union industry's situation. The interested parties argued that the import volumes from both countries are low compared to the market share of the Union industry, the imports from India remained stable and were limited by the safeguard measures, and no proper analysis of the conditions of competition between imported products and between the imported products and the like Union products was conducted as requested by Article 8(3) of the basic Regulation.

(958) The consortium and one unrelated importer requested the disclosure of the theoretical models used to assess the conditions of competition in the Union market of the product under investigation and the countries concerned, and the confirmation that the competition and economic analysis services of the Commission have been consulted on these conditions of competition.

(959) The Commission did perform an analysis in which it compared the product types sold on the Union market by the exporting producers and the product sold by the Union producers, on the basis of the product control numbers (PCNs) given by the sampled companies. This analysis showed a high level of matching. The level of matching between each of the exporting producers and the sales by the Union industry is provided to the sampled exporting producers in their specific disclosure. Furthermore, the Commission also found a significant level of similarity in the product types sold by the exporting producers from Indonesia compared to the product types sold by the exporting producers from India. Therefore, the Commission concluded that the imported products from the countries concerned and the Union products were in clear competition with each other and a cumulative assessment of the effects of the imports to be appropriate. The consortium and unrelated importer did not provide any substantiated evidence why the analysis done by the Commission would be incorrect or insufficient. The fact that India has a country-specific quota within the safeguard measures does not affect this analysis in light of the conditions listed in Article 8(3). The claim was therefore rejected.

(960) Therefore, all criteria set out in Article 8(3) of the basic Regulation were met and imports from the countries concerned were examined cumulatively for the purposes of injury determination.

5.3.2. Volume and market share of subsidised imports from the countries concerned

(961) The Commission established the volume of subsidised imports on the basis of Eurostat data and the data of the exporting producers. Since the Commission found the exports of Jindal Indonesia to be subsidised below the *de minimis* level, they were taken out of the import figures. The market share of imports was thus established by comparing the volume of subsidised imports with the Union consumption.

(962) Given the limited number of parties that submitted some data, some of the figures presented below are in the form of ranges for reasons of confidentiality ⁽²²⁰⁾.

(963) Imports from the countries concerned over the period concerned developed as follows:

Table 5

Import volumes (tonnes) and market share

	2017	2018	2019	IP
India	114 865	120 729	105 359	108 885
<i>Index</i>	100	105	92	95
Market share	3,0 %	3,2 %	3,1 %	3,4 %
<i>Index</i>	100	110	103	114
Indonesia	[0-100]	[10 000 – 14 000]	[48 000 - 52 000]	[68 000 – 72 000]
<i>Index</i>	0	100	[400 – 450]	[550 – 600]
Market share	[0,0 - 0,1] %	[0,3 - 0,5] %	[1,4 - 1,7] %	[2,1 - 2,4] %
<i>Index</i>	0	100	[400 – 450]	[650 – 700]
Total countries concerned	[114 865 – 114 965]	[130 729 – 134 729]	[153 359 – 157 359]	[176 885 – 180 885]
<i>Index</i>	100	[115 – 117]	[136 – 138]	[154 – 156]
Market share	[3,0 - 3,1] %	[3,5 - 3,7] %	[4,5 - 4,8] %	[5,5 - 5,8] %
<i>Index</i>	100	[120 - 122]	[152 - 154]	[186 - 188]

Source: Eurostat, data of the exporting producers

⁽²²⁰⁾ The data on Indonesian import in this regulation is presented in ranges because of the risk that any sampled company reverse-engineers its competitors' data, especially given the limited number of exporting producers in this country.

(964) Imports from the countries concerned increased by around 55 % over the period considered, which allowed them to increase their joint market share from [3,0-3,1] % in 2017 to [5,5 - 5,8] % in the IP. This increase, both in volume of imports and in market share, can be attributed to the imports coming from Indonesia, which increased its import volumes almost 6 times in the period considered and its market share increased from practically zero to [2,1 - 2,4] %. The imports from India increased from 2017 to 2018, but showed a drop afterwards. This resulted in an overall drop in absolute terms during the period considered. On 1 February 2019, the Commission published a Regulation imposing definitive safeguard measures against imports of certain steel products ⁽²²¹⁾. India received a country-specific tariff quota for the product under investigation, limiting imports subject to the in-quota duty during the IP to a lower level than the 2018 level. As Indonesia was not subject to a country-specific tariff quota, but to the quota for all other countries, its imports were not as restricted as the Indian ones. However, the drop in Indian imports was less severe as the overall drop in Union consumption and thus India's market share still increased slightly from 3 % in 2017 to 3,4 % in the IP.

5.3.3. Prices of the imports from the countries concerned and price undercutting

(965) The Commission established the prices of imports on the basis of Eurostat data. The weighted average price of imports from the countries concerned during the period concerned developed as follows:

Table 6

Prices of the imports from the countries concerned (EUR/tonne)

	2017	2018	2019	IP
India	2 080	2 173	2 075	2 073
<i>Index</i>	100	104	100	100
Indonesia	N/A	[1 450 – 1 650]	[1 800 – 2 000]	[1 800 – 2 000]
<i>Index</i>	0	100	123 - 128	123 - 128
Average of the countries concerned	2 080	[2 000 – 2 150]	[1 900 – 2 050]	[1 900 – 2 050]
<i>Index</i>	100	100 - 102	96 - 98	96 - 98

Source: Eurostat, data of the exporting producers

(966) In case of India, the average import prices went up from 2017 to 2018 by 4 %, but remained stable in the overall period considered, while for Indonesia they increased by 28 % (imports in 2017 were negligible). Nevertheless, throughout the whole period considered, the average import prices from both countries concerned were consistently lower than Union producers' prices (see Table 10).

(967) The Commission determined price undercutting during the investigation period by comparing:

- (a) the weighted average sales prices per product type of the three sampled Union producers charged to unrelated customers on the Union market, adjusted to an ex-works level; and
- (b) the corresponding weighted average prices per product type of imports from the cooperating exporting producers in the countries concerned to the first independent customer on the Union market, established on a cost, insurance, freight (CIF) basis, with appropriate adjustments for post-importation costs.

⁽²²¹⁾ OJ L 31, 1.2.2019, p. 27.

- (968) The price comparison was made on a type-by-type basis for transactions at the same level of trade, duly adjusted where necessary, and after deduction of rebates and discounts. The result of the comparison was expressed as a percentage of the sampled Union producers' turnover during the investigation period. It showed undercutting margins of 5,8 % and 13,4 % for the Indian exporting producers and 12,4 % for the Indonesian exporting producer.
- (969) Following final disclosure, the consortium of importers and distributors and one unrelated requested the Commission to disclose the data and criteria used to determine both the import prices of the product concerned and to calculate the undercutting margin.
- (970) The prices of the imports from the countries concerned, as given in Table 6 above, are based on Eurostat. This information is publicly available. As explained in recitals (966) and (967) above, the undercutting margin was based on a comparison between the sales prices of the sampled Union producers charged to unrelated customers on the Union market and the corresponding prices of the sampled exporting producers to the first independent customer on the Union market, differentiated per product type and adjusted to be at equal sales terms. As the detailed sales prices per company is by definition business confidential, it was only provided to the companies concerned in their respective specific disclosures.

5.4. Economic situation of the Union industry

5.4.1. General remarks

- (971) In accordance with Article 8(4) of the basic Regulation, the examination of the impact of the subsidised imports on the Union industry included an evaluation of all economic indicators having a bearing on the state of the Union industry during the period considered.
- (972) As mentioned in recital (25), sampling was used for the determination of possible injury suffered by the Union industry.
- (973) For the injury determination, the Commission distinguished between macroeconomic and microeconomic injury indicators. The Commission evaluated the macroeconomic indicators on the basis of data from the verified questionnaire reply of Eurofer relating to all Union producers, cross-checked where necessary with the questionnaire replies from the sampled Union producers. The Commission evaluated the microeconomic indicators on the basis of data contained in the cross-checked questionnaire replies of the sampled Union producers. Both sets of data were found to be representative of the economic situation of the Union industry.
- (974) The macroeconomic indicators are: production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, the magnitude of subsidy and recovery of past unfair trade practices.
- (975) The microeconomic indicators are: average unit prices, unit cost, labour costs, stocks, profitability, cash flow, investments and return on investments.

5.4.2. Macroeconomic indicators

Production, production capacity and capacity utilisation

- (976) The total Union production, production capacity and capacity utilisation over the period considered developed as follows:

Table 7

Production, production capacity and capacity utilisation

	2017	2018	2019	IP
Total Union production (tonnes)	3 708 262	3 640 429	3 379 817	3 111 804

<i>Index</i>	100	98	91	84
Production capacity (tonnes)	4 405 623	4 517 379	4 530 146	4 572 365
<i>Index</i>	100	103	103	104
Capacity utilisation	84 %	81 %	75 %	68 %
<i>Index</i>	100	96	89	81

Source: Macro-economic questionnaire from Eurofer, questionnaires of sampled Union producers

- (977) Following final disclosure, the consortium of distributors and importers and one unrelated importer requested on the basis of which data the Commission came to the figures in Table 7 and claimed that the decrease in capacity utilisation is not linked to the imports from India and Indonesia, since the decrease was larger than the increase in imports from the countries concerned.
- (978) The data in Table 7 above is based on the cross-checked questionnaire replies of the sampled Union producers and, with regard to the other Union producers, on the basis of the verified macro-economic questionnaire of Eurofer. Eurofer provided data that it collected from its members and reasonable estimates for the remaining producers.
- (979) Indeed the decrease in production was larger than the increase in imports from the countries concerned. This is caused by a decrease in consumption, reflected in Table 4. As set out in section 6.2.3, the Commission concluded that this decrease in consumption did not break the causal link between the subsidised imports from India and Indonesia and the material injury suffered by the Union industry.
- (980) The consortium of distributors and importers and one unrelated importer requested to disclose the quantity imported by the Union producers from the countries concerned. The data available to the Commission showed that the sampled Union producers did not resell or further process any imports from the countries concerned.
- (981) The Union industry's production volume decreased sharply by 16 % in the period considered. The reported capacity figures refer to actual capacity, which implies that adjustments considered as standard by the industry – for set-up time, maintenance, bottle necks and other normal stoppages – have been taken into account. After the imposition of anti-dumping measures on imports of SSCR from the People's Republic of China ('PRC') and Taiwan in 2015 ⁽²²²⁾, some Union producers initiated the modernisation of their production capacity. This modernisation has led to a slight production capacity increase of 4 % over the period considered.
- (982) As a result of decreased production and slightly increased capacity, capacity utilisation decreased by 19 % over the period considered and dropped below 70 % in the IP.

Sales volume and market share

- (983) The Union industry's sales volume and market share developed over the period considered as follows:

Table 8

Sales volume and market share

	2017	2018	2019	IP
Union industry sales volumes (tonnes)	2 735 448	2 711 044	2 530 259	2 330 537
<i>Index</i>	100	99	92	85

⁽²²²⁾ Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (OJ L 224, 27.8.2015, p. 10).

Market share	70,6 %	72,9 %	73,5 %	72,7 %
<i>Index</i>	100	103	104	103

Source: Eurofer and Eurostat

- (984) The Union industry's sales volume decreased by 15 % over the period concerned.
- (985) The Union industry managed however to maintain and even slightly increase its market share by 2,1 percentage points over the period considered as the decline in consumption was even larger than the decline in the Union industry's sales volume, as Union sales partially replaced imports from other countries than the countries concerned.
- (986) Following final disclosure, the consortium of importers and distributors and one unrelated importer argued that the increase in market share of the Union industry indicated an absence of injury and that the increase of market share of the countries concerned did not negatively affect the market share of the Union industry. They claimed that the Commission was required to provide other positive evidence showing injury with regard to the other injury indicators.
- (987) As explained in recital (963), the slight increase in the market share of the Union industry during the period considered did not alter the fact that subsidised imports from the countries concerned did show an increase of around 55 % and were causing material injury to the Union industry. As set out in recitals (1006) and (1007), also the other injury indicators showed positive evidence that the Union industry suffered material injury in the investigation period. Therefore, the claim had to be rejected.

Growth

- (988) The above figures in respect of production and sales volume showed a clear decreasing trend over the period considered and demonstrated that the Union industry was not able to grow in absolute terms. A slight growth in relation to consumption was only possible because the Union industry chose to respond to the price pressure of the subsidised imports by lowering its sales prices.

Employment and productivity

- (989) Employment and productivity over the period considered developed as follows:

Table 9

Employment and productivity

	2017	2018	2019	IP
Number of employees	13 411	13 495	13 968	13 660
<i>Index</i>	100	101	104	102
Productivity (tonnes per staff)	277	270	242	228
<i>Index</i>	100	98	88	82

Source: Eurofer

- (990) The level of Union industry employment related to the production of SSCR increased by 4 % between 2017 and 2019 and showed a decrease of 2 percentage points between 2019 and the IP, resulting in an increase of 2 % over the period considered. In view of the sharp decrease in production, the productivity of the Union industry's workforce, measured as tonnes per employee (in full time equivalent) produced per year, decreased significantly by 18 % over the period considered.

Magnitude of the subsidy margin and recovery from past unfair trade practices

- (991) All subsidy margins, excluding Jindal (Indonesia) as indicated above, were significantly above the *de minimis* level. The impact of these subsidy margins on the Union industry was not negligible, given the volume and prices of imports from the countries concerned.
- (992) Aside from the separate anti-dumping investigation into SSCR from the countries concerned ⁽²²³⁾, imports of SSCR have already been subject to an earlier anti-dumping investigation. The Commission found that the situation of the Union industry during 2013 was significantly affected by dumped imports from the PRC and Taiwan, resulting in the imposition of definitive anti-dumping measures on imports from these countries in October 2015 ⁽²²⁴⁾. These anti-dumping measures were extended in September 2021 ⁽²²⁵⁾. The Union industry's situation was therefore unlikely to be more than marginally affected by the unfair trade practices throughout the period considered.

5.4.3. Microeconomic indicators

Prices and factors affecting prices

- (993) The weighted average unit sales prices of the sampled Union producers to unrelated customers in the Union developed over the period considered as follows:

Table 10

Sales prices in the Union

	2017	2018	2019	IP
Average unit sales price (EUR/tonne)	2 252	2 312	2 206	2 175
<i>Index</i>	100	103	98	97
Unit cost of production (EUR/tonne)	1 958	2 064	2 019	2 013
<i>Index</i>	100	105	103	103

Source: Sampled Union producers

- (994) After showing a slight increase of 3 % from 2017 to 2018, average unit sales prices decreased by 6 % from 2018 to the IP, resulting in a decrease of 3 % over the period considered. Over the same period, the costs of production showed a simultaneous increase of 5 %, after which they stabilised at a cost level which was 3 % higher than at the start of the period considered. To a large extent the cost evolution was driven by important raw material price increases, such as nickel and ferrochromium. Due to the price suppression from the subsidised imports, the Union industry was not able to pass on this cost increase to its sales prices and was even forced to lower its sales prices.

⁽²²³⁾ 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 (OJ L 410, 18.11.2021, p. 410).

⁽²²⁴⁾ Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (OJ L 224, 27.8.2015, p. 10).

⁽²²⁵⁾ Commission Implementing Regulation (EU) 2021/1483 of 15 September 2021 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 327, 16.9.2021, p. 1).

Labour costs

(995) The average labour costs of the sampled Union producers developed over the period considered as follows:

Table 11

Average labour costs per employee

	2017	2018	2019	IP
Average labour costs per FTE (EUR)	72 366	70 663	71 659	70 324
<i>Index</i>	100	98	99	97

Source: Sampled Union producers

(996) The average labour costs per employee of the sampled Union producers fell by 3 % in the period considered. This shows that Union producers were able to lower labour costs as a reaction to the deteriorating market circumstances in an attempt to limit its injury.

Inventories

(997) Stock levels of the sampled Union producers developed over the period considered as follows:

Table 12

Inventories

	2017	2018	2019	IP
Closing stocks (tonnes)	125 626	148 777	125 480	98 835
<i>Index</i>	100	118	100	79
Closing stocks as a percentage of production	5,54 %	6,53 %	6,09 %	5,13 %
<i>Index</i>	100	118	110	93

Source: Sampled Union producers

(998) During the period considered the level of closing stocks decreased by 21 %. This trend followed the decrease in production volume. Most types of the like product are produced by the Union industry based on specific orders of the users. Therefore, stocks are not considered to be an important injury indicator for this industry. This is also confirmed by analysing the evolution of the closing stocks as a percentage of production. As can be seen above, this indicator fluctuated between 5 and 7 % of the production volume of the sampled Union producers over the period considered.

5.4.3.1. Profitability, cash flow, investments and return on investments, and ability to raise capital

Table 13

Profitability, cash flow, investments, return on investments

	2017	2018	2019	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	7,6 %	6,0 %	1,5 %	0,4 %

<i>Index</i>	100	79	19	6
Cash flow (EUR)	387 200 359	273 674 277	237 840 311	184 024 688
<i>Index</i>	100	71	61	48
Investments (EUR)	111 578 442	111 637 871	96 541 925	96 585 152
<i>Index</i>	100	100	87	87
Return on investments	20 %	15 %	6 %	4 %
<i>Index</i>	100	75	31	20

Source: Sampled Union producers

- (999) The Commission established the profitability of the sampled Union producers by expressing the pre-tax net profit of the sales of the like product to unrelated customers in the Union as a percentage of the turnover of those sales.
- (1000) Overall profitability fell from 7,6 % in 2017 to 0,4 % in the IP. As set out in section 5.3.3, this drop coincided with the increase of import volumes from the countries concerned and their market share at undercutting prices.
- (1001) All other financial indicators, i.e. cash flow, investments, and return on assets, clearly followed the same downward trend.
- (1002) The net cash flow is the ability of the Union producers to self-finance their activities. The cash flow showed a continuous decrease over the period considered, resulting in the IP at a level 52 % lower than the start of the investigation period.
- (1003) Investments are the net book value of assets. After staying stable from 2017 to 2018, a sharp drop of 13 percentage points can be seen from 2018 to 2019. The return on investments is the profit in percentage of the net book value of investments which reflects the level of depreciation of assets. It decreased continuously and significantly by 80 % over the period considered.
- (1004) The poor financial performance of the Union industry between 2017 and the investigation period limited its ability to raise capital. The Union industry is capital intensive and is characterised by substantial investments. The return on investment during the period considered is not sufficient to cover for such substantial investments.

5.5. Conclusion on injury

- (1005) The investigation indicated that the Union industry could only respond to the price pressure of the subsidised imports from India and Indonesia by lowering its sales prices to maintain (and even slightly increase) its market share in the period considered. The effect of the subsidised imports caused price suppression, within the meaning of Article 8(2) of the basic Regulation, on the Union market during the investigation period. Prices of the Union industry decreased by 3 % during the period considered, while, under conditions of fair competition, they would have been expected to increase at a ratio comparable to rise of the cost of production, which increased by 3 %.
- (1006) The Union consumption decreased significantly during the period considered and both sales volumes and production volumes on the Union industry followed this trend. Production capacity increased marginally, caused by a positive outlook for the Union industry following the imposition of anti-dumping measures against imports of the product under investigation originating in the PRC and Taiwan in 2015.
- (1007) However, Union producers experienced a sharp decrease in productivity and capacity utilisation in the period considered. These deteriorating figures can only be explained to a small degree by the small increase in employment and capacity and were mainly caused by the decrease in Union consumption and the simultaneous increase in imports from the countries concerned.
- (1008) However, it is the financial indicators of the Union producers which fully showed the injury suffered. The Union industry experienced an increase in its costs of production in the period considered which, accompanied by a decrease in sales prices, resulted in a profitability drop from 7,6 % in 2017 to 0,4 % in the IP. A similar negative development can be seen in relation to the other financial indicators: investments (-13 %), return on investments (-80 %) and cash flow (-52 %).
- (1009) On the basis of the above, the Commission concluded that the Union industry suffered material injury within the meaning of Article 8(5) of the basic Regulation.

- (1010) The post-IP information available to the Commission further confirmed the same conclusion. Based on the analysis of data spontaneously submitted by the Union industry and covering the last two quarters of 2020, the Commission noted the following trends: increases in production, capacity, capacity utilisation and sales were marginal; prices continued to decrease significantly without any corresponding drop in the cost of production; the profitability of the sampled Union producers went further down and became negative, and also the cash flow, net investments, and return on investment showed a further negative trend compared to the period considered, as did employment; the market share of the Union industry slightly increased, but so did the market shares of the imports from the countries concerned.
- (1011) After final disclosure, the consortium of importers and distributors and one unrelated importer argued that the complaining companies had an increase in profits after the investigation period. While post-IP developments are not directly relevant, as shown in Annex 1 to this Regulation, the sampled Union producers became loss-making in the second half of 2020, contrary to the claim of the consortium and the unrelated importer. Therefore, the Commission had to reject this claim.

6. CAUSATION

- (1012) In accordance with Article 8(5) of the basic Regulation, the Commission examined whether the subsidised imports from the countries concerned caused material injury to the Union industry. In accordance with Article 8(6) of the basic Regulation, the Commission also examined whether other known factors could, at the same time, have injured the Union industry. The Commission ensured that any possible injury caused by factors other than the subsidised imports from the countries concerned was not attributed to the subsidised imports. These factors are: imports from third countries, a decrease in consumption, the export performance of the Union industry, an increase in the cost of raw materials, and the competitive price behaviour of the Union industry.

6.1. Effects of the subsidised imports

- (1013) 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.
- (1014) 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.
- (1015) There is thus a strong causal link between the subsidised imports from India and Indonesia and the injury suffered by the Union industry.

6.2. Effects of other factors

(1016) Following final disclosure, the consortium of importers and distributors and one unrelated importer claimed that the financial indicators of the Union industry were not worsening due to dumped imports but due to the impact of the COVID-19 pandemic.

(1017) The Commission found that the prices of imports from the countries concerned greatly influenced the prices of the Union industry and its financial indicators. As established in recital (965), the average import prices from both countries concerned were consistently lower than Union producers' prices throughout the whole period considered, before the COVID-19 pandemic. The pandemic could potentially have affected the consumption on the Union market but such an impact could have only materialised in the last quarter of the IP (April-June 2020), while a substantial decline in consumption was already noted in 2019.

(1018) Moreover, the Commission analysed the decrease in consumption (whether partially related to COVID-19 or not) as a potential other factor that could have caused injury in recitals (1028) to (1029) below and concluded that it did not attenuate the causal link between the subsidised imports from the countries concerned and the material injury suffered by the Union industry.

6.2.1. Non-subsidised imports from Indonesia

(1019) As set out in recital (933) above, subsidisation for one of the sampled Indonesian exporting producers, Jindal Indonesia, was found to be *de minimis*.

(1020) The volume and price of these imports from Indonesia developed over the period considered as follows:

Table 14

		2017	2018	2019	IP
Indonesia	Volume (tonnes)	[20 000 – 21 000]	[22 000 – 23 000]	[21 000 – 22 000]	[19 000 – 20 000]
	<i>Index</i>	100	[109 – 111]	[107 – 109]	[97 – 98]
	Market share	[0,5 – 0,55] %	[0,6 – 0,63] %	[0,63 – 0,66] %	[0,6 – 0,63] %
	<i>Index</i>	100	[113 – 118]	[118 – 123]	[113 – 118]
	Average price (EUR/tonne)	[2 200 – 2 300]	[2 100 – 2 200]	[2 000 – 2 100]	[2 000 – 2 100]
	<i>Index</i>	100	[95 – 99]	[90 – 94]	[90 – 94]

(1021) In the period considered, non-subsidised imports from Indonesia showed an increase in 2018 and 2019, but were in the IP at a slightly lower level than in 2017. The market share of these imports was very limited throughout the period considered at not more than 0,65 %. The sales price of these imports was at a higher level than the subsidised imports from Indonesia.

(1022) Even though the imports from Jindal Indonesia were undercutting the prices of the Union industry, the company's sales to the Union were slightly decreasing over the period considered and remained low. Therefore, the injury caused by these imports did not attenuate the causal link between the subsidised imports and the material injury suffered by the Union industry.

6.2.2. Imports from third countries

(1023) The volume and prices of imports from other third countries developed over the period considered as follows:

Table 15

Country		2017	2018	2019	IP
Taiwan	Volume (tonnes)	199 553	223 110	185 618	165 540
	<i>Index</i>	100	112	93	83
	Market share	5,2 %	6,0 %	5,4 %	5,2 %
	<i>Index</i>	100	116	105	100
	Average price (EUR/tonne)	1 668	1 749	1 684	1 655
	<i>Index</i>	100	105	101	99
Republic of Korea	Volume (tonnes)	147 696	165 812	160 947	164 882
	<i>Index</i>	100	112	109	112
	Market share	3,8 %	4,5 %	4,7 %	5,1 %
	<i>Index</i>	100	117	123	135
	Average price (EUR/tonne)	1 859	1 944	1 860	1 853
	<i>Index</i>	100	105	100	100
South Africa	Volume (tonnes)	98 063	88 913	94 567	81 537
	<i>Index</i>	100	91	96	83
	Market share	2,5 %	2,4 %	2,7 %	2,5 %
	<i>Index</i>	100	94	108	100
	Average price (EUR/tonne)	2 004	2 013	1 831	1 785
	<i>Index</i>	100	100	91	89
Other third countries	Volume (tonnes)	563 637	372 858	293 052	266 255
	<i>Index</i>	100	66	52	47
	Market share	14,6 %	10,0 %	8,5 %	8,3 %
	<i>Index</i>	100	69	58	57
	Average price (EUR/tonne)	2 051	2 345	2 319	2 407
	<i>Index</i>	100	114	113	117

Total of all third countries except the countries concerned	Volume (tonnes)	1 008 949	850 693	734 184	678 213
	<i>Index</i>	100	84	73	67
	Market share	26,1 %	22,9 %	21,3 %	21,1 %
	<i>Index</i>	100	88	82	81
	Average price (EUR/tonne)	1 942	2 076	1 995	2 014
	<i>Index</i>	100	107	103	104

Source: Eurostat

(1024) In the period considered, imports from third countries decreased significantly in terms of absolute volumes (by 33 %) and market share (from 26 % in 2017 to 21 % in the IP).

(1025) As far as individual countries are concerned, only imports from Korea increased in the period considered, resulting in a slight increase in its market share (from 3,8 % to 5,1 %). Although prices of Korean imports are below those of the countries concerned, they are likely to be affected by the existence of transfer prices, as a result of the relationship between the Korean stainless steel manufacturer Samsung STS and the EU cold roller Otelinor in Romania. No conclusion can be drawn as to whether these imports also undercut the Union industry prices, also in view of the unknown product mix of these imports.

(1026) As set out in recital (991) above, the imports from Taiwan are currently subject to an anti-dumping duty of 6,8 % ⁽²²⁶⁾ and imports from the PRC to a duty of 24,4 to 25,3 %.

(1027) Imports from the PRC were very low throughout the period considered. Imports from Taiwan showed an increase of 12 % from 2017 to 2018, but decreased from 2018 to the IP with 26 %, keeping a market share of around 5 % during the period considered. The average price of imports from Taiwan were below the average prices of imports from the countries concerned. As the Commission did not receive any cooperation from the producers in Taiwan in the expiry review that was concluded in September 2021, it did not have any further details on Taiwanese import prices. Therefore, it cannot be excluded that these imports caused additional injury to the Union industry. However, even if imports from Taiwan contributed to injury caused to the Union industry, the imports from Taiwan decreased by 17 % over the period considered and could therefore not have been the cause of the increasing negative trends found in the injury analysis.

(1028) The Commission therefore concluded that imports from other countries do not attenuate the causal link between subsidised Indian and Indonesian imports and material injury suffered by Union producers.

6.2.3. Decrease in consumption

(1029) A significant decrease in consumption during the period considered has had an adverse effect on some of the injury indicators, especially on sales and production volumes. However, as explained in recital (1004), the Union industry was suffering price injury rather than volume injury. Despite a shrinking market, the Union producers managed to slightly increase their market share through severe price competition with unfairly priced subsidised imports which resulted in the deterioration of the profitability and other financial indicators of the Union industry such as cash flow, investments, and return on investments.

⁽²²⁶⁾ Commission Implementing Regulation (EU) 2021/1483 of 13 September 2021 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ L 327, 16.9.2021, p. 1). One company, Cia Far Industrial Factory Co., Ltd, got a 0 % anti-dumping duty imposed.

(1030) Therefore, the Commission concluded that the decrease in consumption did not attenuate the causal link between the subsidised imports from countries concerned and the material injury suffered by the Union industry.

6.2.4. *Export performance of the Union industry*

(1031) The volumes and prices of exports of the Union industry developed over the period considered as follows:

Table 16

	2017	2018	2019	IP
Export volume (tonnes)	450 587	450 687	410 840	374 378
<i>Index</i>	100	100	91	83
Average price (EUR/tonne)	2 369	2 524	2 428	2 394
<i>Index</i>	100	107	102	101

Source: Sampled Union producers, Eurofer

(1032) Export sales of the Union producers decreased by 17 % in the period considered, mainly caused by measures imposed by the United States on the product under investigation and increased competition on third markets with Chinese sales and sales from the countries concerned. However, the volumes exported were limited as compared to the total Union sales volumes, representing around 13 % of its total sales volume, and average price of export sales was in the period considered constantly higher than prices on the Union market.

(1033) On that basis, the Commission concluded that the impact of the export performance of the Union industry on the injury suffered was, if any, marginal.

6.2.5. *Impact of raw material prices*

(1034) One unrelated importer pointed at the issue of increasing costs of raw materials (nickel, ferrochrome) as a reason of the injurious situation of the Union industry.

(1035) An increase in raw material prices is not per se a source of injury because it is generally accompanied by a subsequent price increase in selling prices. However, the decrease in the Union producers' profitability and all their financial indicators is more than just a reflection of the increasing costs of production. Low-priced imports suppressed prices in the Union market and not only did not allow Union producers to increase prices to cover the increase in costs, but forced them to even lower their prices, to avoid an imminent loss of market share. This resulted in a steep decrease in their profitability figures, declining to break even during the investigation period.

(1036) On that basis, it is concluded that the increase in prices of certain raw materials as such did not cause injury to the Union industry.

6.2.6. *Price behaviour of the Union producers*

(1037) The unrelated importer claimed that internal competition and price behaviour of the Union producers caused their deteriorating financial situation.

(1038) However, the investigation did not confirm this claim. The imports from the countries concerned were consistently sold at prices undercutting the Union industry and thus the main reason why the Union producers are not able to raise their prices and cover their increasing costs is the price pressure from subsidised imports. Therefore, this claim was rejected.

6.3. Conclusion on causation

- (1039) A causal link was established between the subsidised imports from India and Indonesia on the one hand and the injury suffered by the Union industry on the other hand. There was a coincidence in time between the increase in the volume of the subsidised imports from the countries concerned and the worsening of the Union's performance during the period considered. The Union industry had no other choice but to follow the price level set by the subsidised imports in order to avoid losing market share. This resulted in a situation where the Union industry made an unsustainable level of profit.
- (1040) The Commission has found that other factors that may have had an impact on the situation of the Union industry were: non-subsidised imports from Indonesia, imports from third countries, the decrease in consumption, and the export performance of the Union industry.
- (1041) The Commission distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the subsidised imports. The effect of non-subsidised imports from Indonesia and from third countries, the decrease in consumption, and the export performance of the Union industry, on the Union industry's negative developments in terms of especially profitability and financial indicators was only limited.
- (1042) In light of the above considerations, the Commission established a causal link between the injury suffered by the Union industry and the subsidised imports from the countries concerned. The subsidised imports from the countries concerned have had a major determining impact on the material injury suffered by the Union industry. Other factors, individually or collectively, did not attenuate the causal link.
- (1043) As depicted in the Annex 1, trends in the second half of 2020 confirmed this analysis. Imports from the countries concerned continued to gain market shares, helped by prices which further dropped significantly, continuously undercutting the Union industry and suppressing the prices on the Union market. On the other hand, no other factors attenuate the causal link. While consumption continued to drop, price injury persisted. Imports from other third countries continued to drop, further losing market shares, and there were no indications that the situation of imports from Jindal (Indonesia) has changed. Exports by the Union industry increased only marginally. In sum, other factors, individually or collectively, did not attenuate the causal link in the second half of 2020.

7. UNION INTEREST

- (1044) In accordance with Article 31 of the basic Regulation, the Commission examined whether it could clearly conclude that it was not in the Union interest to adopt measures in this case, despite the determination of injurious subsidisation. The determination of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users.

7.1. Interest of the Union industry

- (1045) The Union industry consists of 13 producers located in several Member States and it employs directly 13 660 employees in relation to the product under investigation. None of the Union producers opposed the initiation of the investigation. As shown in section 5 above when analysing the injury indicators, the whole Union industry experienced a deterioration of its situation and was negatively affected by the subsidised imports.
- (1046) It is expected that the imposition of anti-subsidy duties will restore fair trading conditions on the Union market, end the price suppression and enable the Union industry to cover their increasing costs of production and improve their financial situation despite lost sales due to a shrinking market. This would result in an improvement of the Union industry's profitability towards levels considered necessary for this capital intensive industry. The Union industry has suffered material injury caused by subsidised imports from the countries concerned. It is recalled that a number of key injury indicators showed a negative trend during the period considered. In particular, indicators pertaining to the financial performance of Union producers were seriously affected. It is therefore important to restore prices to a non-subsidised level in order to allow all producers to operate on the Union market under fair trading conditions.

- (1047) It is therefore concluded that the imposition of anti-subsidy duties would be in the interest of the Union industry as it would allow it to recover from the effects of the injurious subsidisation found.

7.2. Interest of unrelated importers and users

- (1048) One unrelated importer came forward. Furthermore, one Union producer that acted also as unrelated importer and end user submitted a questionnaire reply.
- (1049) The unrelated importer pointed out potential negative impacts of the anti-subsidy measures on competition on the Union market which in turn would result in lack of supply, worse service, increasing prices and a worse quality of material.
- (1050) Notwithstanding potential anti-subsidy measures, the Commission concluded that there will remain a healthy level of competition in the Union given that there are 13 Union producers of the product under investigation, some of them not taking part in the complaint. Furthermore, imports from third countries still account for more than 20 % of the market. Therefore, the potential negative impacts indicated by the importer are not likely to occur.
- (1051) Measures would also allow importers to pass-on prices to their customers and therefore the profitability of importers is not expected to be adversely affected. The product range and service quality is not expected to be reduced – to the contrary, protection against subsidised imports allows the Union industry to have new investments and improve its quality.
- (1052) Following final disclosure, the consortium of distributors and importers and one unrelated importer argued that the Commission did not take into account the situation of the steel market after the investigation period and claimed that the pandemic-related measures have resulted in a slowdown in scrap extraction, refining and collection activities, an increase in the prices of raw materials, and a shortage of raw materials. This has resulted in Europe being the highest priced market in the world for stainless steel products.
- (1053) They further stated that the imports from third countries are necessary for the Union market as the Union producers cannot meet actual demand on the Union market, causing significant problems in the steel supply.
- (1054) The increase in the prices of raw materials has affected production worldwide, and did affect both the Union industry and the imports. Furthermore, there are sources of supply of SSCR from other third countries, the biggest of them being Taiwan and Korea. Imports from Taiwan have still been entering the Union, having relatively low anti-dumping duties. Korea managed in the period considered to increase its export to the Union both in absolute and relative terms. South Africa also remains present on the Union market despite the alleged control of the European companies over its SSCR production. Moreover, the countervailing duties imposed on the countries concerned are not aimed at closing the Union market for the countries concerned, but are aimed at raising prices to a fair level. Therefore, the claims had to be rejected.

7.3. Conclusion on Union interest

- (1055) On the basis of the above, the Commission concluded that there were no compelling reasons to conclude that the countervailing duties were of such magnitude as to lead to the conclusion that it was not in the Union interest to impose measures on imports of the product under investigation originating in the countries concerned.

8. DEFINITIVE COUNTERVAILING MEASURES

- (1056) In view of the conclusions reached with regard to subsidisation, injury, causation, and Union interest, and in accordance with Article 15 of the basic Regulation, a definitive countervailing duty should be imposed.

8.1. Level of the definitive countervailing measures

- (1057) Article 15(1), third subparagraph of the basic Regulation provides that the amount of the definitive countervailing duty shall not exceed the amount of countervailable subsidies established.
- (1058) Article 15(1), fourth subparagraph states that 'where the Commission, on the basis of all the information submitted, can clearly conclude that it is not in the Union's interest to determine the amount of measures in accordance with the third subparagraph, the amount of the countervailing duty shall be less if such lesser duty would be adequate to remove the injury to the Union industry'.
- (1059) No such information has been submitted to the Commission, and therefore the level of the countervailing measures will be set with reference to Article 15(1), third subparagraph.
- (1060) On the basis of the above, the definitive countervailing duty rates, expressed on the CIF Union border price, customs duty unpaid, should be as follows:

Country	Company	Definitive countervailing duty
India	Jindal Stainless Limited	4,3 %
	Jindal Stainless Hisar Limited	4,3 %
	Chromeni Steels Private Limited	7,5 %
	All other Indian companies	7,5 %
Indonesia	PT. Indonesia Ruipu Nickel and Chrome Alloy	21,4 %
	PT. Jindal Stainless Indonesia	0 %
	Non-sampled cooperating company	13,5 %
	All other Indonesian companies	21,4 %

- (1061) The anti-subsidy investigation was carried out in parallel with a separate anti-dumping investigation concerning the same product concerned originating from India and Indonesia, in which the Commission imposed anti-dumping measures at the level of the dumping margin for the exporting producers in Indonesia and for one of the exporting producers in India. Only for Chromeni, was the dumping duty based on the lower injury margin. The Commission made sure that the imposition of a cumulated duty reflecting the level of subsidisation and the full level of dumping would not result in offsetting the effects of subsidisation twice ('double-counting') in accordance with Article 24(1) of the basic Regulation.
- (1062) In the case of both countries, the Commission considered whether some of the subsidy schemes are export contingent subsidies, which have the effect of reducing export prices and thus increase accordingly the dumping margins, in order to decide whether it needs to reduce the dumping margin by the subsidy amounts found in relation to export contingent subsidies in accordance with Article 24(1) of the basic Regulation.
- (1063) Since the Commission did countervail some export contingent subsidy schemes, in accordance with Article 24(1) of the basic Regulation and in order to avoid double counting, the Commission first imposed the definitive countervailing duty at the level of the established definitive amount of subsidisation. Then the Commission imposed the remaining definitive anti-dumping duty, which corresponds to the relevant dumping margin reduced by the amount of the export contingent subsidies and up to the relevant injury elimination level established in the separate anti-dumping investigation. Since the Commission reduced the dumping margin found with the entire amount of subsidisation related to export subsidies, there was no double counting issue within the meaning of Article 24(1) of the basic Regulation.

- (1064) Where the amount resulting from deducting the amount of export subsidisation from the dumping margin is higher than the injury margin, the Commission capped the anti-dumping duty at the injury margin. Where the amount resulting from deducting the amount of export subsidisation from the dumping margin is lower than the injury margin, the Commission set the level of the anti-dumping duty on the basis of the lower amount.
- (1065) A subsidy amount also had to be established for the sole cooperating non-sampled exporting producer in Indonesia. 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 in recitals (941) et seq. 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 it. 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.
- (1066) For India, given the high rate of cooperation of exporting producers in the countries concerned, the Commission found that the level of the highest duty imposed on the sampled companies would be representative as the 'all other companies' rate. The 'all other companies' duty will be applied to those companies, which did not cooperate in this investigation. For Indonesia, given the fact that the Commission only calculated a duty rate for one exporting producer, and in view of the fact that cooperating non-sampled exporting producers benefit from a lower rate, as explained in recital (1064) above, the Commission exceptionally decided to set the level of the duty for 'all other companies' at the level of the IRNC Group.
- (1067) On the basis of the above, the rates at which such duties will be imposed are set as follows:

Company	Dumping margin	Subsidy rate	Injury elimination level	Countervailing duty rate	Anti-dumping duty rate
India					
Jindal Stainless Limited	13,9 %	4,3 %	25,2 %	4,3 %	10,0 %
Jindal Stainless Hisar Limited	13,9 %	4,3 %	25,2 %	4,3 %	10,0 %
Chromeni Steels Private Limited	45,1 %	7,5 %	35,3 %	7,5 %	35,3 %
All other Indian companies	45,1 %	7,5 %	35,3 %	7,5 %	35,3 %
Indonesia					
PT. Indonesia Ruipu Nickel and Chrome Alloy	10,2 %	21,4 %	32,4 %	21,4 %	9,3 %
PT. Jindal Stainless Indonesia	20,2 %	0 %	33,1 %	0 %	20,2 %
Non-sampled cooperating company	20,2 %	13,5 %	33,1 %	13,5 %	19,3 %
All other Indonesian companies	20,2 %	21,4 %	33,1 %	21,4 %	19,3 %

- (1068) The individual company countervailing duty rate specified in this Regulation was established on the basis of the findings of the present investigation. Therefore, it reflects the situation found during the investigation with respect to the company concerned. This duty rate (as opposed to the countrywide duty applicable to 'all other companies') is thus exclusively applicable to imports of products originating in the country concerned and produced by the company mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

- (1069) A company may request the application of these individual duty rates if it changes subsequently the name of its entity. The request must be addressed to the Commission. The request must contain all the relevant information enabling to demonstrate that the change does not affect the right of the company to benefit from the duty rate, which applies to it. If the change of name of the company does not affect its right to benefit from the duty rate, which applies to it, a regulation informing about the change of name will be published in the *Official Journal of the European Union*.

8.2. Special monitoring clause

- (1070) To minimise the risks of circumvention due to the difference in duty rates, special measures are needed to ensure the application of the individual countervailing duties. The companies with individual countervailing duties must present a valid commercial invoice to the customs authorities of the Member States. The invoice must conform to the requirements set out in Article 1(3) of this Regulation. Imports not accompanied by that invoice should be subject to the countervailing duty applicable to 'all other companies'.
- (1071) While presentation of this invoice is necessary for the customs authorities of the Member States to apply the individual rates of countervailing duty to imports, it is not the only element to be taken into account by the customs authorities. Indeed, even if presented with an invoice meeting all the requirements set out in Article 1(3) of this Regulation, the customs authorities of Member States should carry out their usual checks and should, like in all other cases, require additional documents (shipping documents, etc.) for the purpose of verifying the accuracy of the particulars contained in the declaration and ensure that the subsequent application of the lower rate of duty is justified, in compliance with customs law.
- (1072) Should the exports by one of the companies benefiting from lower individual duty rates increase significantly in volume after the imposition of the measures concerned, such an increase in volume could be considered as constituting in itself a change in the pattern of trade due to the imposition of measures within the meaning of Article 23(1) of the basic Regulation. In such circumstances and provided the conditions are met an anti-circumvention investigation may be initiated. This investigation may, *inter alia*, examine the need for the removal of individual duty rate(s) and the consequent imposition of a countrywide duty.
- (1073) In order to ensure a proper enforcement of the countervailing duty, the duty level for all other companies should not only apply to the non-cooperating exporting producers, but also to those producers, which did not have any exports to the Union during the investigation period.
- (1074) The complainant, in its comments to the final disclosure, claimed that there is a risk of circumvention arising from the fact that the exporting producers are large corporate groups which rely on intra-group transactions and with presence in several third countries. Therefore, the complainant encouraged the Commission to be vigilant of the increase in exports of upstream materials and to be ready to initiate *ex officio* an anti-circumvention investigation. The intent to do so, according to the complainant, should be mentioned in this regulation.
- (1075) Jindal Group and Jindal Indonesia responded that there is no risk of circumvention because it will involve customs fraud, which is a crime. In addition, they clarified that the only processing of SSCR done outside of India and Indonesia occurs in Spain (at Iberjindal S.L.) and that, in any event, the product under investigation is subject to safeguard measures that apply to all imports.
- (1076) The Commission takes note of the parties' comments and will, as always, be vigilant to act in line with its monitoring practice on measures in force.

9. FINAL PROVISIONS

- (1077) In view of Article 109 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council ⁽²²⁷⁾, when an amount is to be reimbursed following a judgment of the Court of Justice of the European Union, the interest to be paid should be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union* on the first calendar day of each month.
- (1078) As explained in recitals (1060) and (1066), the Commission deducted from the dumping margin part of the subsidy amount in order to avoid double counting. Thus, should any modification or removal of the definitive countervailing duties occur, the level of anti-dumping duties should be automatically increased by the same proportion in order to reflect the actual extent of double counting as a result of this modification or removal. This change of the anti-dumping duties should take place as from the entry into force of this regulation.
- (1079) By Commission Implementing Regulation (EU) 2019/159 ⁽²²⁸⁾, the Commission imposed a safeguard measure with respect to certain steel products for a period of three years. By Commission Implementing Regulation (EU) 2021/1029 ⁽²²⁹⁾, the safeguard measure was prolonged until 30 June 2024. The product concerned is one of the product categories covered by the safeguard measure. Consequently, once the tariff quotas established under the safeguard measure are exceeded, the above-quota tariff duty, the anti-dumping duty and the countervailing duty would become payable on the same imports. As such cumulation of anti-dumping and countervailing measures with safeguard measures may lead to an effect on trade greater than desirable, the Commission decided to prevent the concurrent application of the anti-dumping and countervailing duty with the above-quota tariff duty for the product concerned for the duration of the imposition of the safeguard duty.
- (1080) This means that where the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 becomes applicable to the product concerned and exceeds the level of the anti-dumping and countervailing duties pursuant to this Regulation, only the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 shall be collected. During the period of concurrent application of the safeguard and anti-dumping and countervailing duties, the collection of the duties imposed pursuant to this Regulation shall be suspended. Where the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 becomes applicable to the product concerned and is set at a level lower than the level of the anti-dumping and countervailing duties in this Regulation, the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 shall be collected in addition to the difference between that duty and the higher of the level of the anti-dumping and countervailing duties imposed pursuant to this Regulation. The part of the amount of anti-dumping and countervailing duties not collected shall be suspended.
- (1081) The measures provided for in this Regulation are in accordance with the opinion of the Committee, established by Article 15(1) of Regulation (EU) 2016/1036 ⁽²³⁰⁾,

⁽²²⁷⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

⁽²²⁸⁾ Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (OJ L 31, 1.2.2019, p. 27).

⁽²²⁹⁾ Commission Implementing Regulation (EU) 2021/1029 of 24 June 2021 amending Commission Implementing Regulation (EU) 2019/159 to prolong the safeguard measure on imports of certain steel products (OJ L 225 I, 25.6.2021, p. 1).

⁽²³⁰⁾ OJ L 176, 30.6.2016, p. 21, as last amended by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ L 143, 7.6.2018, p. 1).

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is imposed on imports of flat-rolled products of stainless steel, not further worked than cold-rolled (cold-reduced), currently falling under CN codes 7219 31 00, 7219 32 10, 7219 32 90, 7219 33 10, 7219 33 90, 7219 34 10, 7219 34 90, 7219 35 10, 7219 35 90, 7219 90 20, 7219 90 80, 7220 20 21, 7220 20 29, 7220 20 41, 7220 20 49, 7220 20 81, 7220 20 89, 7220 90 20 and 7220 90 80 and originating in India and Indonesia.
2. The definitive countervailing duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and produced by the companies listed below, shall be as follows:

Country	Company	Definitive countervailing duty	TARIC additional code
India	Jindal Stainless Limited	4,3 %	C654
	Jindal Stainless Hisar Limited	4,3 %	C655
	Chromeni Steels Private Limited	7,5 %	C656
	All other Indian companies	7,5 %	C999
Indonesia	PT. Indonesia Ruipu Nickel and Chrome Alloy	21,4 %	C657
	PT. Jindal Stainless Indonesia	0 %	C658
	Non-sampled cooperating company	13,5 %	See Annex 2
	All other Indonesian companies	20,5 %	C999

3. The application of the individual countervailing duty rates specified for the companies mentioned in paragraph 2 shall be conditional upon presentation to the Member States' customs authorities of a valid commercial invoice, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function, drafted as follows: 'I, the undersigned, certify that the (volume) of (product concerned) sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in [country concerned]. I declare that the information provided in this invoice is complete and correct'. If no such invoice is presented, the duty applicable to all other companies shall apply.
4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.
5. In cases where the countervailing duty has been subtracted from the anti-dumping duty for certain exporting producers, refund requests under Article 21 of Regulation (EU) 2016/1037 shall also trigger the assessment of the dumping margin for that exporting producer prevailing during the refund investigation period.

Article 2

Implementing Regulation (EU) 2021/2012 is amended as follows:

1. Article 1(2) is replaced by the following:
 - '2. The rates of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and produced by the companies listed below shall be as follows:

Country	Company	Definitive anti-dumping duty	TARIC additional code
India	Jindal Stainless Limited	10,0 %	C654
	Jindal Stainless Hisar Limited	10,0 %	C655
	Chromeni Steels Private Limited	35,3 %	C656
	All other Indian companies	35,3 %	C999
Indonesia	PT. Indonesia Ruipu Nickel and Chrome Alloy	9,3 %	C657
	PT. Jindal Stainless Indonesia	20,2 %	C658
	Other companies cooperating in the anti-subsidy case, but not in the anti-dumping case	19,3 %	See Annex 2
	All other Indonesian companies	19,3 %	C999'

2. A new Article 1(6) is inserted:

‘6. Should the definitive countervailing duties imposed by Article 1 of Commission Implementing Regulation (EU) 2022/433 be modified or removed, the duties specified in paragraph 2 shall be increased by the same proportion limited to the actual dumping margin found or the injury margin found as appropriate per company and from the entry into force of this Regulation.’

3. A new Article 1(7) is inserted:

‘7. In cases where the countervailing duty has been subtracted from the anti-dumping duty for certain exporting producers, refund requests under Article 21 of Regulation (EU) 2016/1037 shall also trigger the assessment of the dumping margin for that exporting producer prevailing during the refund investigation period.’

Article 3

1. Where the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 becomes applicable to flat-rolled products of stainless steel, not further worked than cold-rolled, referred to in Article 1(1), and exceeds the equivalent ad valorem level of the combined countervailing and anti-dumping duty set out in Articles 1(2) and 2(1) respectively, only the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 shall be collected.

2. During the period of application of paragraph 1, the collection of the duties imposed pursuant to this Regulation shall be suspended.

3. Where the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 becomes applicable to flat-rolled products of stainless steel, not further worked than cold-rolled, referred to in Article 1(1), and is set at a level lower than the equivalent ad valorem level of the combined countervailing and anti-dumping duty set out in Articles 1(2) and 2(1) respectively, the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159 shall be collected in addition to the difference between that duty and the higher of the equivalent ad valorem level of the anti-dumping duty set out in Article 1(2).

4. The part of the amount of countervailing and anti-dumping duties not collected pursuant to paragraph 3 shall be suspended.
5. The suspensions referred to in paragraphs 2 and 4 shall be limited in time to the period of application of the above-quota tariff duty referred to in Article 1(6) of Regulation (EU) 2019/159.

Article 4

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 March 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX 1

Information relating to the Second Half of 2020

(source and units are the same as in corresponding tables in the text unless stated otherwise; Indonesian data refers to all imports; indexes are extrapolated where needed and compared to 2017)

Consumption (tonnes)	Second Half 2020
Union consumption	1 536 525
<i>Index</i>	79

Import volumes (tonnes) and market share	Second Half 2020
India	45 541
<i>Index</i>	79
Market share	3,0 %
<i>Index</i>	100
Indonesia	49 425
<i>Index</i>	715
Market share	3,2 %
<i>Index</i>	901
Total countries concerned	94 966
<i>Index</i>	148
Market share	6,2 %
<i>Index</i>	208

Prices of the imports from the countries concerned (EUR/tonne)	Second Half 2020
India	1 886
<i>Index</i>	91
Indonesia	1 792
<i>Index</i>	99
Average of the countries concerned	1 846
<i>Index</i>	94

Production, production capacity and capacity utilisation	Second Half 2020
Total Union production (tonnes)	1 585 965
<i>Index</i>	86
Production capacity (tonnes)	2 308 350
<i>Index</i>	105
Capacity utilisation	69 %
<i>Index</i>	82

Sales volume and market share	Second Half 2020
Union industry sales volumes (tonnes)	1 241 088
<i>Index</i>	86
Market share	75 %
<i>Index</i>	106

Employment and productivity	Second Half 2020
Number of employees	10 018
<i>Index</i>	75
Productivity (tonnes per staff)	158
<i>Index</i>	115

Sales prices in the Union	Second Half 2020
Average unit sales price (EUR/tonne)	2 007
<i>Index</i>	89
Unit cost of production (EUR/tonne)	1 946
<i>Index</i>	99

Inventories	Second Half 2020
Closing stocks (tonnes)	93 392
<i>Index</i>	74

Profitability, cash flow, investments, return on investments	Second Half 2020
Profitability of sales in the Union to unrelated customers (% of sales turnover)	- 2,4 %
<i>Index</i>	- 31
Cash flow (EUR)	24 276 139
<i>Index</i>	13
Investments (EUR)	47 332 854
<i>Index</i>	100
Return on investments	- 2 %
<i>Index</i>	- 7

Imports from third countries		Second Half 2020
Taiwan	Volume (tonnes)	63 040
	Market share	4,1 %
	Average price (EUR/tonne)	1 399

Republic of Korea	Volume (tonnes)	74 131
	Market share	4,8 %
	Average price (EUR/tonne)	1 742
South Africa	Volume (tonnes)	98 063
	Market share	2,5 %
	Average price (EUR/tonne)	1 675
Other third countries	Volume (tonnes)	117 361
	Market share	7,6 %
	Average price (EUR/tonne)	2 217
Total of all third countries except India and Indonesia	Volume (tonnes)	293 037
	Market share	19,1 %
	Average price (EUR/tonne)	1 850

Export performance of the Union industry	Second Half 2020
Export volume (tonnes)	190 097
<i>Index</i>	84
Average price (EUR/tonne)	2 221
<i>Index</i>	90

ANNEX 2

Indonesian cooperating exporting producer not sampled

Country	Name	TARIC additional code
Indonesia	PT Bina Niaga Multiusaha	C765