

## AS 660 - Anti-Dumping and Anti-Subsidy proceedings concerning imports of Stainless Steel Hot Rolled Sheets and Coils (SSHR) from Indonesia and PR China

### Annex - Response to the Commission's comments on Subsidies

#### Executive summary

- The Commission acknowledges the existence of distortions on nickel ore in Indonesia, including the one resulting from the export ban of this raw material.
- The Commission acknowledges that this export ban has significant impact on the cost of nickel in this country and a clear downward effect (beyond 30%) on the costs of production of domestic stainless steel producers.
- The EU General Court has validated in its judgment of 10 April 2019 in case T-300/16, that an export restraint can be assessed as a delegation to private body to act on behalf of a government and therefore constitute a countervailable subsidy.
- The Commission finds that the Government of Indonesia intended to support the development of the downstream processing industry through a general policy, including the export ban and other restrictive measures.
- The Commission finds that the Indonesian Government intended to support the NPI industry through better availability of nickel ore at reduced price. The Commission also knew or should have known (see below the lack of cooperation from Indonesia) that the Indonesian stainless steel producers are integrated with their own NPI smelting activities. Consequently, any benefit granted to these NPI producers are reputed to be passed through fully to their related stainless steel producers. The fact that some independent NPI producers might also benefit of the Indonesian policy support to the stainless steel industry does not affect that finding.
- This means that **the Indonesian Government's support to the stainless steel industry and its integrated NPI suppliers is effectively an objective of the Indonesian Government's policy** and certainly not merely a side-effect of the exercise of general regulatory powers.
- The Commission also found that domestic stainless steel producers failed to cooperate adequately with the Commission by refusing to respond to Commission's questions concerning their related suppliers of raw materials. The Commission also found that the domestic steel producers had refused to disclose their corporate structure therefore preventing the Commission to verify their relationship with upstream suppliers. **The Indonesian exporters therefore withheld documents and data from the Commission which were decisive for the Commission's analysis, especially regarding the existence and extent of the relationship between the domestic stainless steel producers and their suppliers.**
- The Commission admitted that due to the existence of a difference in legal standards, the lesser-duty-rule (LDR) assessment in the AD case is not necessarily binding for the AS case. In that sense, **the nickel ore distortion could be reflected in the AS duty without this duty being capped by the injury margin.**
- Assuming the Commission were to follow the Legal Service's excessively and unnecessarily cautious stance on "intent", it could nevertheless impose **temporary measures** based on the Indonesian exporters' selective cooperation or its COVID Regulation of March 2020, while at the same time setting a **"second chance" clause for Indonesia** through an interim or an ex-officio review by the Commission. It could also prefer to base its measures fully or partly on the "price or income support" concept, one of the legal basis also suggested by the Commission at the beginning of the investigation. What is certain is that it cannot choose a path which **neutralizes** the legitimate protection provided to the EU industry by the trade defence instruments.

**We therefore urge the Commission to immediately develop a reasonable, and in our view legally sound, proposal under the AS proceedings that can meet the industry's concerns.**

In support to its request to the Industry to withdraw its anti-subsidy SSHR complaint, the Commission argued that the following factors would explain the impossibility to adopt measures:

1/ The Commission refers to the un-adopted findings of the Panel in *US - Softwood lumber* case issued on 24 August 2020 to explain that the standards to reach the conclusion that a private body was entrusted to provide a financial contribution has been significantly heightened and would prevent any finding on nickel distortion in the case at hand.

That conclusion is however misplaced.

First, it must be noted that the report in question being unfavourable to the US, it is very unlikely that it would ever be adopted. The US will appeal the report, which in the absence of Appellate Body, as purposely sought by the US through their manoeuvres to paralyse the Appellate Body, will prevent any adoption of the report. That approach appears to be new standard of the WTO dispute resolution as the EU itself appealed on 28 August an unfavourable panel report, effectively blocking a dispute resolution against Russia on dumping calculation methodology. The conclusions of the Commission on a "change" of standard are therefore based on a report that will not have any tangible effect in the WTO legal order in the foreseeable future.

Second, the report itself, contrary to the Commission explanation, does not bring any new condition or standard with regard to the entrustment assessment, in particular the question of direction of a private body as it is only a recollection of previously existing case law of which the Commission was already aware at the time of the lodging of the Complaint. It solely repeats that entrustment or direction of a private body by a government to provide goods cannot be a mere by-product of government regulation and that in this sense, it is necessary for a trade investigating authority to demonstrate a link between the government and the conduct of the private body which shows that the government gives responsibility to, or the government exercises authority over, a private body to provide goods.

That necessity to prove the intent of the government and not to rely simply on the effect of a governmental measure is the staple of any entrustment demonstration as commonly applied by the Commission in several previous cases and validated by the General Court in April 2019 (case T-300/16). That judgment also confirmed that export restraints - such as the Indonesian export ban - can be found to constitute entrustments.

Moreover, the Commission's concern that the panel report would significantly increase the risk of a successful legal challenge by Indonesian in front of the EU Courts if measure were adopted by the Commission are groundless: the Court does not consider that the WTO case law directly apply in the EU legal order, even less when that case law is in fact an un-adopted report.

2/ The Commission explains that in view of that allegedly increased standard it would not be able to establish the intent of the Indonesian government. If it would be able to establish the effects of the measures, it would not be able to find in the Indonesian legislation any declaration that the purpose of the export ban on nickel ore would aim at providing the input to domestic providers at reduced prices.

Here again the conclusion of the Commission are erroneous.

The Commission seems to assume that existence of the intent can only be established in case of express declaration of the intent. It would therefore be necessary in order to demonstrate an entrustment that a government very publicly explain and detail its intent, ideally in the legislations that it adopts. A contrario, it means that if a government does not state its intent in a legislation, it cannot be considered to entrust a private body.

The facts here are however adamant on the intent of the Indonesian government: the purpose of the export ban is to increase the value added of downstream nickel products through a prohibition of the export of unprocessed

products. The goal of the Indonesian export restraint is therefore to force private actors to move nickel ore downward the nickel value chain, ie. toward stainless steel.

The Complaint and investigation files include several clear illustrations of that intent of the Indonesian government. The OECD industrial raw material restriction assessment itself states that the Indonesian measures aim at "promoting further processing/value added" and "protect[ing the] local downstream industry".

Contrary to export tax where the goal of the government might be to collect fiscal revenues, the Indonesian export ban, which causes a significant loss in revenues in royalties for the Indonesian government, has no other objective than to support the development and operation of the downstream industry which allow increasing the local added value to the material.

3/ The Commission finally states that even if the intent of the Indonesian government was to be established, it would not be able to link the ban on nickel ore to the stainless steel industry as a result of the fact that the Indonesian policy favour smelters and not stainless steel producers.

That distinction is completely artificial.

As the Commission should be aware, the smelting of nickel ore in Indonesia result in the production of low-nickel ferro-nickel known as Nickel Pig Iron ("NPI"). The exclusive use of that NPI whose content include a lot of iron and a limited share of nickel is the production of stainless steel. Its reduced nickel share combined with the high share of iron prevents its use in any other type of application require higher content of nickel as it would require significant effort to eliminate the excess iron. Therefore, the addition of value on nickel ore through smelting is directed toward the production of stainless steel, the following stage in that value added stage as shown in the illustration below extracted from a 2016 presentation of the Indonesian government on the purpose of their export restriction policies:



If the above was not sufficient, the declaration of the Commission seems to ignore the fact that Indonesian stainless steel producers are highly integrated and that consequently they undertake themselves for a significant part the transformation of nickel ore in NPI, before using that NPI in their own production. This is the purpose of the numerous "Rotary Kiln Electric Furnaces" (RKEF) installed on the Morowali industrial park and operated either directly or by related companies. Any support granted to the smelting industry is therefore a support granted to the stainless steel industry itself as smelters and stainless steel producers are the same actors and support granted to NPI is therefore fully passed through to the SSHR production.

In addition, as stated by the Commission in its antidumping findings, the Indonesian SSHR producers have refused to disclose the existence of relations with providers of raw materials. Consequently, even for NPI provided from outside the Morowali Park, the Commission has full discretion under Article 28 of the basic AS Regulation to consider that the price of these inputs carry over the price reduction resulting from the government intervention.

4/ On lesser-duty rule ("LDR"), existence of different legal standards under the anti-dumping and anti-subsidy regulation allow for non-application in the anti-subsidy investigation even if the Commission chose to apply the LDR in the AD case.

In the modernisation of TDI Regulation, the EU legislator chose to considerably strengthen its response to countervailable subsidies in third countries which were deemed to be "*particularly distortive of trade*". It stated that "*when determining the level of countervailing measures, it is, in general, no longer possible to apply the lesser duty rule.*" That particular focus on the subsidies explains that two different legal standards exist when the Commission assess the application of the LDR in the anti-dumping and anti-subsidy proceedings allowing to reach opposite findings based on the same factual elements.

Under Article 7(2b) of the anti-dumping basic Regulation, the Commission should apply the LDR unless it can clearly conclude that it is in the interest of the Union to apply duties at the level of the dumping margin. This means that if the Commission has any doubt with regard to Union interest it should apply the LDR.

In the anti-subsidy basic Regulation, under Article 31, the Commission has to follow a reversed approach: the Commission must clearly conclude that it is in the interest of the Union not to apply duties at the level of subsidy margin. If the Commission has any doubt on the Union interest it should therefore not apply the LDR.

In summary, if any doubt exists on the Union Interest, on the same factual basis, the Commission will apply the LDR in the anti-dumping investigation but will not apply it in the anti-subsidy investigation.

In the case at hand, the Commission's investigation has shown that several factual elements such as the ability for user to source the product concerned in third countries would prevent it to clearly conclude that it would be in the interest of the Union not to apply measures at the level of the subsidy margin in the anti-subsidy investigation.

## Comments on the Commission's allegations

### on insufficiency of evidence regarding the raw material distortions

On the grounds of the precedent case law, the Panel in *US - Softwood lumber* case issued on 24 August 2020 found that entrustment or direction of a private body by a government to provide goods cannot be a mere by-product of government regulation. In this sense, it is necessary for a trade investigating authority to demonstrate a link between the government and the conduct of the private body which shows that the government gives responsibility to, or the government exercises authority over, a private body to provide goods.

The SSHR anti-subsidy complaint provides number of elements, as listed below, which demonstrate that the government of Indonesia gave responsibility to the nickel producers to provide nickel to the domestic stainless steel producers at a lower price.

In light of the fact that the Commission was not able to verify elements provided by the interested parties (in particular government of Indonesia and China) during a verification visit, and in application of the Notice on the consequences of the COVID-19 outbreak on AD and AS investigations,<sup>1</sup> these elements included in the SSHR anti-subsidy complaint should be used as best fact available evidencing the intention of government of Indonesia to develop its nickel downstream industry of stainless steel through the implementation of an export restriction on this raw material.

- **Indonesian stainless steel producers are integrated with the upstream nickel producers where nickel activity including further transformation of nickel into NPI is exclusively used for the stainless steel production**
  - **SSHR AS complaint, Annex 103 IMIP 2017 Annual Report, page 1:** *"IMIP has become an area with the longest industry chain in the world which is the basis for large stainless steel production, with nickel ore, chrome ore, coal and other materials, producing with a shipping method in liquid conditions, producing stainless steel in the form of stainless steel hot rolled coil amounting to 3 million tons per year."*
  - **SSHR AS complaint, Annex 103 IMIP 2017 Annual Report, page 15:** *"Between 2016 and 2017, more and more factories and power plants were constructed and added to the operational list. Together, they form a chain of steel manufacture line with PT GCNS's stainless steel factory, that starts at nickel ore and ends as hot rolled coil and cold rolled coil stainless steel products."*
  - **SSHR AS complaint, § 573:** *"Beside the official endorsement of that objective by the government, its actions must be considered in light of the fact that stainless steel is overwhelmingly the primary user of nickel worldwide. Similarly, it is shown by the fact that the GoI policies tie the regime applicable to nickel ore to the construction and operation of the NPI smelters, an intermediate input that is solely used to produce stainless steel."*
- **The government of Indonesia provides for a parallel development of nickel and steel industry**
  - **SSHR AS complaint, Annex 131 - Explanatory document, pages 2-4 :** *"In 2011, Indonesia unveiled its Masterplan for Acceleration and Expansion of Indonesia's Economic Development ('MP3EI').<sup>1</sup> MP3EI is an integral part of the national development planning system and does not aim at substituting the existing Long Term Development Plan 2005 – 2025 (Law No. 17 Year 2007) and the Medium-Term Development Plan 2004 – 2009 (Presidential Decree No. 7 Year*

<sup>1</sup> "In the case where an investigation has been concluded and definitive measures were imposed on the basis of the facts available, the Commission may, as soon as certain areas where the exporting producers are located are no longer considered unsafe for travelling, initiate ex officio a review pursuant to Article 11(3) or Article 19(1) of the basic Regulations."

2009) (...)The government has identified eight main programmes – agriculture, mining, energy, industrial, marine, tourism, telecommunications and strategic regional development – as critical to the Indonesian economy. Those eight main programmes are further expanded into 22 main economic activities, including nickel and steel. (...) Given the crucial role of the nickel industry, MP3EI outlines the need to (...) strengthening downstream nickel industries with the facilitation of strong partnerships and synergies between Ferro Nickel industry with its upstream and downstream industries; government support in the form of investment incentives for investors. With regard to the Indonesian strategy on steel industry, MP3EI confirms that this sector has a strategic role in economic development (...) the regulatory and policy improvement includes the following forms of support (...) Improve the competitiveness of national steel products through development of new industries that have not been developed in Indonesia, increase production capacity, and build national upstream and downstream business partnerships”.

- **SSHR AS complaint, Annex 131 - Explanatory document, page 4:** “In accordance with Article 4 of Law No. 25/2004 on National Development Planning, the National Long Term Development Plan (RPJPN 2005-2025) of Indonesia was drawn up as a continuation and renewal of earlier stages of development planning in Indonesia. The RPJPN, a development plan that covers 20 years, aims to achieve the development goals as mandated in the Preamble to the Constitution of 1945. This long term plan involves the establishment of a solid structure in which the agricultural economy (in the broad sense) and mining form the basis of an economy that produces products in both an efficient and modern manner, in which the manufacturing industry contains global competitiveness and becomes the motor of the economy.”
- **SSHR AS complaint, § 575:** “Presidential Regulation 2/2018, setting out the policy of national industry (“the national industry plan”) for 2015-2019, is the last available global action plan of the GoI’s action with regard to the development of the downstream stainless steel industry. The national industry plan provides that with regard to the nickel industry, the focus should be the following:
  - 1) export restriction on nickel ore with priority to fulfil domestic needs;
  - 2) export restriction on nickel pig iron, ferronickel and nickel mate;
  - 3) restriction on capacity exploitation of nickel ore in accordance with the current processing capacity of the factory;
  - 4) guarantee on absorption of ferronickel, nickel pig iron or nickel mate produced domestically by domestic steel and stainless steel industry;
  - 5) facilitation on development of stainless steel industry that is integrated with downstream industry and nickel user industry.”
- **SSHR AS complaint, § 577:** “The national industry plan also indicates the objective to support the establishment of a stainless steel industry, defined as a “priority industry”, which should be encouraged “to grow and develop into [a] main drivers of national industrial growth” over the 2017-2019 period under point 1 l (b) of section VII of the plan. The plan further mentions the need to support the development and use of industrial technologies in regard notably to stainless steel and notably, the Argon Oxygen Decarburizer (AOD) and RKEF used for the production of stainless steel in Indonesia”.



- **The government of Indonesia aims at development of nickel downstream industry**
  - **SSHR AS complaint, § 578:** *"Law 4/2009, which states in its introductory recitals that "the management of mineral and coal must be controlled by the government to give real added value to the national economy."*
  - **SSHR complaint, § 579:** *"Government Regulation 1/2017 also provides in its recitals that "in order to increase the added value of minerals, as written in Law No. 4/2009 about Mineral and coal mining, the government will maintain its effort to achieve domestic mineral refinement and processing facilities", an objective that, as provided in the Government Regulation 23/2010, is implemented through a "Preference for domestic minerals and coal supply in order to guarantee the availability of minerals and coal as raw materials and/or as energy sources for domestic needs."*
  - **SSHR AS complaint, § 576:** *"The national industry plan also sets out the policy for the development of industry resources covering the preparation of legislation guaranteeing the supply and distribution of natural resources for fulfilling the needs of materials, supporting materials, energy and intake water for the national industry. In that context it provides an estimate of the natural resources needed for, among other things, the ferronickel industry – NPI smelters essentially"*
  - **SSHR AS complaint, § 580:** *"Ministry of Trade Regulation 1/2017 specifies that "in order to increase the added value of minerals, as written in Law No. 4/2009 about Mineral and coal mining, the government will maintain its effort to achieve the domestic mineral refinement and processing facilities."*
- **The only and internationally acknowledged goal of the nickel export restriction is development of nickel downstream industry, i.e. stainless steel**
  - **SSHR AS complaint, §582:** *"Beside the Indonesian Regulations, international institutions widely acknowledge the facts that the Indonesian measures on nickel and coal products are aimed at developing the downstream industry. In that regard, in its Trade Policy Review on Indonesia of 2013, the WTO secretariat indicated that "mining firms operating in Indonesia will face new restrictions in exporting unprocessed ore. The legislation will require them to process the ore in Indonesia before shipping it abroad. The policy is intended to support the expansion of value-added activities, including the smelting industry."*
  - **SSHR AS complaint, §583:** *"Similarly, according to the OECD, the aim of the Indonesian measures is "to force companies to add value domestically before exporting, thereby stimulating activity and employment in the ore processing and smelting sector."<sup>362</sup> The OECD also indicates, in the database used as a reference for existing distortions of raw material costs in the "TDI modernisation regulation" that the Indonesian export restrictions on nickel aim at "promoting further processing/value added" and "protect[ing the] local downstream industry"."*
  - **SSHR AS complaint, § 573:** *"Beside the official endorsement of that objective by the government, its actions must be considered in light of the fact that stainless steel is overwhelmingly the primary user of nickel worldwide. Similarly, it is shown by the fact that the GoI policies tie the regime applicable to nickel ore to the construction and operation of the NPI smelters, an intermediate input that is solely used to produce stainless steel.<sup>353</sup> In addition, it*

*must be noted that the schemes effectively reduced the revenues collected by the GoI through export taxes and royalties.*

- **SSHR AS complaint, § 581:** *“That approach to developing the local downstream industry is further confirmed by effective policy implementation, even at the expense of governmental revenues. A clear example of that policy is Indonesia’s decision to reduce is royalties on processed and refined nickel products to half the level of the royalties on unprocessed nickel ore, from four per cent to two per cent, “to encourage more miners to develop smelters”.*
- **SSHR AS complaint, § 585:** *“It is acknowledged that the imposition of the export restraint and other supporting programmes did not result in an increase in revenue for the GoI, as the World Bank assessed that the imposition of the nickel ore export ban would lead to a reduction in trade of about USD 12.5 billion and a loss of revenue in royalties and export tax of about USD 6.5 billion between 2014 and 2017.<sup>363</sup> This confirms that the GoI is willing to suffer a loss of revenue in order to support the development of its stainless steel industry, and that this support is not a by-product but the very core of its action.”*