Comments to the proposed legislation on subsidies and countervailing measures investigation proceedings pursuant to SECEX Ordinances no. 38/2021 and 50/2021

1. Articles 37, 118, and 311 Provisions for Fragmented Industry

Sole paragraph of Article 37 provides that for the representativeness of the petitioner, the degree of support/objection may be confirmed by means of a "**statistically valid sample**". However, it is unclear from the context that for petitioner from fragmented industry, whether it is required to explain such "statistically valid sample" methodology. It is also unclear that whether the Investigating Authority has the authority to take the initiative an independent review procedure for verifying the statistics.

Articles 118 and 311 provides for flexible requirement for performance indicators for fragmented industry in petition of original investigation and sunset review. However, since these information from secondary sources or estimated based on public information does not accurately reflect the condition of domestic industry, it shall not be adopted as the basis for preliminary or final determination.

2. Article 218-219 Upstream subsidies

Article 218 to 219 provides for methodology of determining upstream subsidies.

Article 218 sets out a parameter for determining the significance of effect of upstream subsidies, i.e., a 1% test. However, it is submitted that the 1% threshold would be unreasonably strict for the respondents, and an adjustment to 5% would be more appropriate. Furthermore, it is necessary to be clarified what the term "total costs of production" refers to. In general, the "cost of production" covers the costs of inputs, labor, energy, and overhead, while the SG&A shall not be included.

Article 219 provides that when the input supplier is not affiliated with the responding company, the investigating authority will evaluate whether the benefit of upstream subsidy was transferred, in whole or in part, to the investigated company by evaluating the sales price. However, the current ordinance does not provide clear guideline for evaluating transfer of subsidy. There is no clear indication of how to quantify the transfer of subsidy benefit to the respondents. It is thus suggested to amend this provision by establishing a more detailed and clear mechanism for evaluating the transfer of subsidy benefit.

In addition, for greater certainty, it is further suggested to add a sole paragraph, indicating that *"The determined amount of subsidy transferred shall not exceed the amount of subsidy that was actually received by the upstream producer."*

3. Article 222 Transnational Subsidies

Item II of Article 222 provides that the SDCOM will consider the "subsidy" granted by the government of a country other than the one in which the investigated company is located as actionable, when "government of the country of the enterprise being investigated clearly and explicitly endorses, recognizes, or adopts the other government's granting of subsidies as if such measures were part of its own policy on granting subsidies". This article seems not consistent with SCM Agreement and other provisions within this legislation.

First of all, Article 1.1(a) of the SCM Agreement, as referred by Article 124 of the legislation, clearly confines the definition of a subsidy to financial contribution granted "by a government or any public body **within the territory of a Member**". In other words, when the recipient of the benefit is not located within the territory of the subsidizing government, there cannot be a subsidy within the meaning of the SCM Agreement.

In this regard, it should be noted that the chapeau of Article 222 also contradicts with Article 129, which stated that "The term granting authority will be understood as the government or public agency ***in the territory of the exporting country*** that grants a given subsidy program, at all levels, national or subnational."

Second, the rules for specificity also precludes the possibility of treating any foreign financial contribution as actionable subsidy. Article 2 of the SCM Agreement clearly provides that to be specific a subsidy needs to be given to an enterprise or industry or group of enterprises or industries "*within the jurisdiction of the granting authority*". According to the Appellate Body in *US - Countervailing Measures (China)*, "the identification of the jurisdiction of the granting authority involves a holistic analysis of the relevant facts and evidence in each case. Indeed, the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority. Thus, a proper identification of the jurisdiction of the granting authority will require an analysis of both the "granting authority" and its "jurisdiction" in a conjunctive manner." [1]

Jurisdiction is commonly understood under international public law as "the power of the state under international law to regulate or otherwise impact upon people, property and circumstances". [2] This interpretation is in line with the French and Spanish versions of the SCM Agreement which respectively reads "relevant de la juridiction de l'autorité qui accorde cette subvention" and "dentro de la jurisdicción de la autoridad otorgante" which appears to indicate that the entity receiving the subsidy must fall under the power of the granting authority.

Similarly, as explained by the International Court of Justice in the *Lotus case*, this jurisdiction "is certainly territorial, it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international customs or from a convention". [3]

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[1] Appellate Body Report, *US — Countervailing Measures (China)*, para. 4.168.
[2] Shaw, M. (2008). Jurisdiction. In International Law (pp. 645-696). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511841637.013
[3] International Court of Justice, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para. 45.

It is noted that there exist a notion to considering a government as a "private body" entrusted by another government under certain circumstances. However, such notion is not consistent with the basic principle of public international law and WTO jurisprudence. The term "private body" does not aim at designating any actor which is not the government or a public body of the country where the subsidy is granted. A private body is an entity which is "neither a government nor a public body". [4]

Thus, the fact that there may be agreements between countries/regions cannot alter the nature that one government has no jurisdiction over the territory of another government, as its regulatory power is only limited to the territory of itself.

4. Article 230 Double remedy under non-market economy methodology

Article 230 does not provide a clear instruction on how to evaluate the amount of production subsidies passed to the export price, so as to avoid double remedy under non-market economy methodology in dumping proceeding.

Especially, there is no clear guideline for the Investigating Authority to determine: (1) whether the subject goods received countervailable subsidy; (2) how and to what extent such subsidy influence the export price and the dumping margin.

Therefore, it is suggested that this article be amended to provide more clear guidelines.

5. Article 335 Condition for requesting accelerated review

The requirement that the petition for accelerated review should contain "the express support of the government of the exporting country in relation to the conduct of the accelerated review" seems not consistent with the SCM Agreement and impose unfair burden for exporters.

Whether the government will actually cooperate with the accelerated review is beyond the control of the exporters. Article 19.3 of the SCM Agreement provides that, any exporter "not actually investigated for reasons other than a refusal to cooperate" "shall be entitled to an expedited review". Thus, according to the SCM Agreement, the express support from the government of exporting country is not a threshold condition for requesting for accelerated review.

Compared to the legislation of other major countries/regions of countervailing duty investigation and measures, there is also no requirement for express support from the government of exporting country.

The legislation of the U.S. requires the petitioner to provide "a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire" [5]. Thus, it is the petitioner's obligation to **inform**

[4] Panel Report, *US – Export Restraints*, para. 8.49.
[5] 19 CFR § 351.214(b)(v).

the government, while the consent from the government is ***not*** a mandatory requirement.

For legislation of European Union, Canada, Australia, etc., the mandatory constituent parts of the petition do not include express consent from the government.[6]

For example, Article 20 of EU's *Basic Anti-subsidy Regulation* only briefly stipulated that for exporters "not individually investigated during the original investigation for reasons other than a refusal to cooperate with the Commission", "shall be entitled […] to an accelerated review".[7]

Section 13.2 of *SIMA* of Canada provides for the quality requirement for petitioner: (1) not associated with any known exporters to the current duty order; and (2) has not been notified or requested to provide information (i.e., has not been uncooperative); Section 55(1) of SIMR further stipulate the necessary parts for petition, while the focus for these requirement are all for identification of petition and demonstration of sale or consignment of the goods to an importer in Canada. There is *no* requirement for obtaining consent form the government.[8]

Division 6 oft Part XVB, Volume 3 of Australian *Customs Act 1901* stipulates, in detail, the condition and consideration for applying for an accelerated review. While there is no requirement for obtaining consent from the government in advance in applying for an accelerated review for countervailing duty.

Thus, the requirement in Article 335 of the new ordinance has imposed the strictest burden for exporters wishing to applying for accelerated review.[9]

It is suggested to delete the requirement for obtaining consent from the government in advance as a threshold, or modify the term "express support" into "certificate of informing" or other equivalent context.

6. Article 364 Undertaking

Chapeau of Article 364 provides that the proposal for undertaking from a producer/exporter shall only be known if: (1) it has cooperated with the investigation and responded to the questionnaire; and (2) the individual amount of subsidies is calculated based on the information provided by itself.

This article leaves ambiguity that whether the condition (2) means that the subsidy amount shall be calculated *completely* based on the individual information. In practice, it's common that due to the uncooperative of the government regarding certain programs, etc., the subsidy margin for

[6] See Chapter 15B of Australia's 1901 Customs Act; Article 20 of European Union's Basic Anti-subsidy Regulation.
[7] Article 20 of 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;
[8] Section 13.2 of Canada's Special Import Measures Act (SIMA) and Section 55(1) of Special Import Measures Regulations (SIMR);
[9] Division 6 oft Part XVB, Volume 3 of Customs Act 1901 of Australia.

cooperative producer/exporter may still be based on *partial* facts available for certain programs. Under such circumstance, the partial application of facts available does not affect the determination of subsidy amount.

Thus, it is suggested that the chapeau of this article be amended, to address the partial facts available issue.

Subsection 2 of Article provides that the proposal shall not be acknowledged if the government of the exporting country has not cooperated with the Investigation. However, this would impose additional condition for undertaking proposal. It is likely that this provision violates Article 18.2 of the SCM Agreement, as the cooperation from the government is not a reason for rejecting proposal of undertaking.