



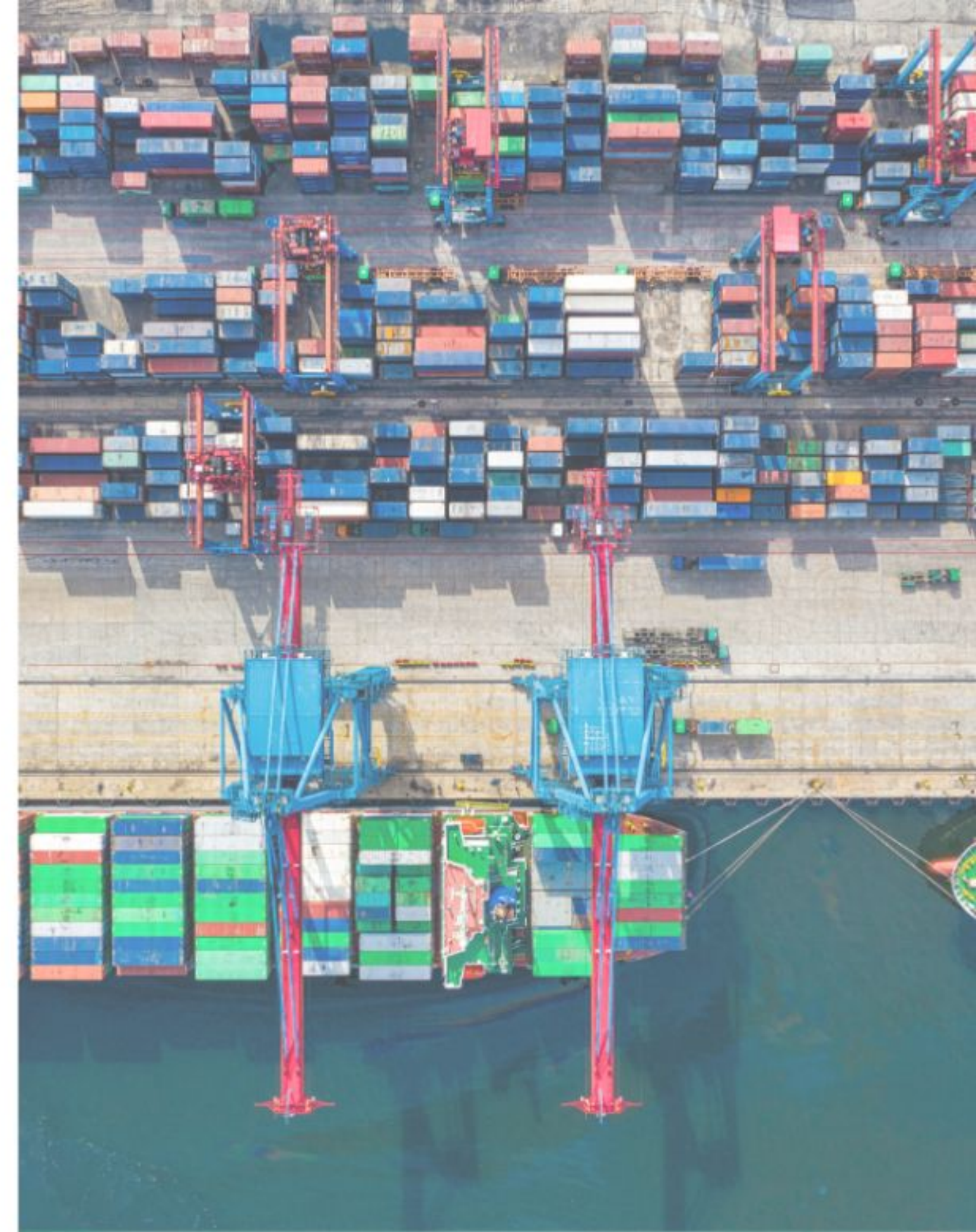
DISCUSSION ON

WTO PANEL RULING ON TRANSNATIONAL SUBSIDIES: EUROPEAN UNION COUNTERVAILING AND ANTI DUMPING DUTIES ON STAINLESS STEEL GOLD-ROLLED FLAT PRODUCTS FROM INDONESIA (DS 616)

CENTRE FOR TRADE AND
INVESTMENT LAW

Indian Society of International Law,
New Delhi

16th April, 2026 | 04:30 PM onwards





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WTO Panel Ruling on Transnational Subsidies: European Union Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia (DS 616)

organised by

Centre for Trade and Investment Law, Indian Institute of Foreign Trade

in collaboration with

South Asian International Economic Law Network

and

Indian Society of International Law

16 April 2026

Hall No. 204, Indian Society of International Law

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New Delhi



Concept Note

Background

As industrial strategies increasingly enmesh with transnational state financing, the applicability of WTO subsidy disciplines to transnational subsidies. In a recent WTO dispute (DS616), Indonesia challenged the European Union's application of trade remedies to stainless steel imports from Indonesia. Indonesia's challenge in this dispute arises from the EU's imposition of countervailing and anti-dumping duties targeting stainless-steel cold-rolled flat products (SSCRFP) originating in Indonesia. At the heart of the dispute was the question whether the preferential financing or other supports by the Chinese grantors to Indonesian SSCRFP producers/exporters was "financial contribution by a government" within the meaning of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The EU commission relied on various agreements between the Chinese and the Indonesian government to expand and deepen bilateral trade and economic relations, including terms such as preferential financing from China. This dispute tests the scope of the SCM Agreement, the application of WTO rules to cross-border state support for industrial policies, and whether state-to-state inducement can fall within the definitional limits of a 'subsidy' under the SCM Agreement.

The definition of 'subsidy' in the present SCM Agreement was a significant achievement post the Tokyo Round Subsidies Code, 1979. Therefore, any change in its interpretation necessitates a careful and balanced approach. The rapidly evolving nature of transnational collaboration, particularly in the realm of cross-border industrial financing and cooperation, presents a crucial policy question that leaves policymakers grappling with legal complexities.

Contested Measures

The dispute primarily concerns the European Commission's methodology and approach in relation to the domestic instruments, namely, Anti-dumping as well as Subsidy Regulations to the imposition of countervailing and anti-dumping duties on Stainless Steel Cold-Rolled Flat Products ("SSCRFP") from Indonesia. The following issues in particular are noteworthy.

- **Attribution of Foreign Financial Contributions:** The EU Commission attributed financial support provided by Chinese grantors, including state entities, under the MOUs or other instruments to Indonesian SSCRFP producers/exporters, and treated these contributions as countervailable subsidies under Article 1.1(a)(1) of the SCM Agreement. Indonesia contested both the Commission's reliance on an expansive attribution methodology inspired by Article 11 of the International Law Commission's Articles on State Responsibility, as well as its interpretation of 'financial contribution by a government'. Indonesia argued that government-to-government inducement falls outside the scope of the SCM Agreement's definition of a subsidy.
- **Domestic Subsidy Findings:** The Commission also determined that the GOID provided key inputs, notably nickel ore, to domestic steel producers at less than adequate remuneration. Fiscal incentives, including import duty exemptions, income tax holidays, and investment-related allowances, were classified as actionable subsidies under WTO disciplines.



Key Panel Findings

A. Attribution of Financial Contributions: The Panel focused on interpretation of the term "by a government" and concluded that this may be interpreted in the immediate context within Article 1.1(a)(1). The "*language and structure*" of Article 1.1(a)(1) was interpreted to describe the conduct that may constitute a financial contribution "by a government". The Panel emphasised that the provision defines a closed list of governmental conduct that constitutes a financial contribution, and thus government-to-government inducement does not constitute a financial contribution for purposes of the SCM Agreement. Reliance on international law, including Article 11 of the ILC Articles on State Responsibility, could not broaden the scope of obligations under the SCM Agreement. Consequently, government-to-government inducement does not constitute a financial contribution and cannot be treated as a subsidy. The relevant related extracts are reproduced below:

7.67. We note that: (a) the words "*i.e. where*" both follow the phrase "*a financial contribution by a government*" and immediately precede subparagraphs (i) to (iv); and that (b) the chapeau of Article 1.1(a)(1) of the SCM Agreement does not appear to contain additional language that might otherwise qualify or introduce a degree of ambiguity regarding the specific conduct that will be considered to be "*a financial contribution by a government*". Given this, the text of Article 1.1(a)(1) suggests that government conduct that falls outside the conduct listed in subparagraphs (i) to (iv) does not constitute a "*financial contribution by a government*". This in turn suggests that government conduct other than that captured in subparagraphs (i) to (iv) falls outside of the scope of Article 1.1(a)(1) and so is not considered to be a subsidy for the purposes of the SCM Agreement.

7.68. This understanding comports with the Appellate Body's finding in *US – Large Civil Aircraft (2nd complaint)* that "*Article 1.1(a)(1) defines and identifies the government conduct that constitutes a financial contribution for purposes of the SCM Agreement. Subparagraphs (i)-(iv) exhaust the types of government conduct deemed to constitute a financial contribution. This is because the introductory chapeau to the subparagraphs states that 'there is a financial contribution by a government ..., i.e. where:'*"¹⁴⁰

¹⁴⁰ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 613. (emphasis original)

B. Public Body Determination: The Commission's classification of all Indonesian nickel ore mining companies as public bodies lacked evidentiary support. Determination of a 'public body' requires a focused assessment of an entity's core characteristics and its relationship with the government, rather than reliance on policy influence or inducement.

In the above backdrop, this discussion will examine the issue of transnational subsidy generally, and assess the legal intricacies of the recent panel report on countervailability of transnational subsidy by the EU. This discussion also aims to explore the implication of this panel report for future regulation of transnational subsidies.
