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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

REPORT OF THE PANEL

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China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
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China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
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Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	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, DSR 2014:V, p. 1727
US – Continued Zeroing	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
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
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US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	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

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US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	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
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title	Description/Long title
IDN-1	Anti-Dumping Duty Order	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Antidumping Duty Order, *United States Federal Register*, Vol. 75, No. 221, (17 November 2010)
IDN-2	Countervailing Duty Order	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Countervailing Duty Order, *United States Federal Register*, Vol. 75, No. 221 (17 November 2010)
IDN-3/US-66	Initiation of Anti-Dumping Investigations	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations, *United States Federal Register*, Vol. 74 No. 201 (20 October 2009)
IDN-4/US-65	Initiation of Countervailing Duty Investigation	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Initiation of Countervailing Duty Investigation, *United States Federal Register*, Vol. 74 No. 201 (20 October 2009)
IDN-5/US-48	Preliminary Countervailing Duty Determination	Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, *United States Federal Register*, Vol. 75, No. 45 (9 March 2010)
IDN-6/US-47	Final Countervailing Duty Determination	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010)
IDN-7/US-67	Final Anti-Dumping Determination	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less than Fair Value, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010)
IDN-8	USITC Notice of Preliminary Determination	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia: Determinations, *United States Federal Register*, Vol. 74, No. 224 (23 November 2009)
IDN-9/US-70	USITC Notice of Final Determination	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia: Determinations, *United States Federal Register*, Vol. 75, No. 221 (17 November 2010)
IDN-10	Excerpt from USDOC Issues and Decision Memorandum, pp. 1-20 and 48-56	Issues and Decision Memorandum for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination (20 September 2010), pp. 1-20 and 48-56
IDN-12	Excerpt from CFS USDOC Issues and Decision Memorandum, pp. 1, 27-28 and 40-46	Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (17 October 2007), pp. 1, 27-28 and 40-46
IDN-13	Regulation of Minister of Trade of the Republic of Indonesia, No. 20/M-DAG/PER/5/2008	Regulation of Minister of Trade of the Republic of Indonesia, No. 20/M-DAG/PER/5/2008, concerning provision for export of forestry industry products (29 May 2008)
IDN-14	Excerpt from Part Two of GOI First Supplemental Questionnaire Response, pp. 22-38	Part Two of the Government of Indonesia's First Supplemental Questionnaire Response (22 February 2010), questions 55-60, pp. 22-38
IDN-15	GOI Third Supplemental Questionnaire Response	Government of Indonesia's Third Supplemental Questionnaire Response (27 May 2010)
IDN-16	GOI Fourth and Fifth Supplemental Questionnaire Response	Government of Indonesia's Fourth and Fifth Supplemental Questionnaires Response (22 June 2010)
IDN-18	Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7	USITC, Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Final Determination, Publication 4192 (November 2010), pp. 3-39 and C-3-C-7

Exhibit	Short Title	Description/Long title
IDN-20	Other Members' Laws on Tie Voting	Canadian International Trade Tribunal Act (current to 21 June 2016), South African International Trade Administration Act (22 January 2003), Turkish Regulation on the Prevention of Unfair Competition in Imports (20 October 1999), and Argentinian Presidential Decree No. 766/94 (12 May 1994)
IDN-24	USITC Continuation Notice	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia: Determinations, *United States Federal Register*, Vol. 81, No. 250 (29 December 2016)
IDN-25 (BCI)	Excerpt from APP/SMG Initial Questionnaire Response, pp. 1, 25, 27, 29, and 30	PT. Pindo Deli Pulp and Paper Mills, PT. Pabrik Kertas Tjiwi Kimia, Tbk, and PT. Indah Kiat Pulp & Paper Tbk's Initial Questionnaire Response (29 December 2009), pp. 1, 25, 27, 29, and 30 (BCI)
IDN-27 (BCI)	Exhibit D-8 to APP/SMG Questionnaire Response in Anti-Dumping investigation	PT. Pabrik Kertas Tjiwi Kimia Tbk, PT. Pindo Deli Pulp, and Paper Mills, Supplemental Section D Response, exhibit D-8 (20 January 2010) (BCI)
IDN-28 (BCI)	Exhibit SD3-9 to APP/SMG Questionnaire Response in Anti-Dumping investigation	PT. Pabrik Kertas Tjiwi Kimia Tbk, PT. Indah Kiat Pulp and Paper Tbk, and PT. Pindo Deli Pulp and Paper Mills, Supplemental Section D Response, exhibit SD3-9 (5 April 2010) (BCI)
IDN-30	Log Export Ban	Joint Decree of the Minister of Forestry No. 1132/KPTS-II/2001 and the Minister of Industry and Trade No. 292/MPP/Kep/10/2001, Discontinuation of Log/Chip Raw Material Exports (8 October 2001)
IDN-36	Excerpt from APP Pre-hearing Brief to USITC, pp. 5 and 51	Pre-hearing Brief of APP-China and APP-Indonesia (13 September 2010), pp. 5 and 51
IDN-37	Safeguard Tie Vote	*United States Code*, Title 19, Section 1330
IDN-41 (BCI)	Exhibit 33 to Part Two of the GOI First Supplemental Questionnaire Response	Part Two of the Government of Indonesia's First Supplemental Questionnaire Response, exhibit 33 (22 February 2010) (BCI)
IDN-45	APP Pre-hearing Brief to USITC	Pre-hearing Brief of APP-China and APP-Indonesia (13 September 2010)
IDN-47	ICJ Statute	Statute of the International Court of Justice, Chapter XIV of the United Nations Charter, San Francisco (1945)
IDN-51	Excerpt from USITC Conference Transcript, pp. 181-182	USITC, Investigations Nos. 701-TA-470-471 and 731-TA-1169-1170 (Preliminary), Conference Transcript (14 October 2009), pp. 181-182
IDN-52	Exhibit 28 to APP Pre-hearing Brief to USITC on RISI Data	Respondents' Pre-hearing Brief, exhibit 28 (13 September 2010) (RISI Data)
US-1	USITC Final Determination	USITC, Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Final Determination, Publication 4192 (November 2010)
US-4	Excerpt from Petitioners Post-hearing Brief to USITC	Petitioners' Post-hearing Brief to USITC, Responses to Commissioner Questions, Commissioner Pinkert Question 3, exhibit 1, p. 21 (4 October 2010)
US-12	19 U.S.C., Section 1677	*United States Code*, Title 19, Section 1677
US-26	Group on Anti-Dumping Policies, Anti-Dumping Code draft (August 1966)	Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/13 (23 August 1966)
US-27	Anti-Dumping Code (July 1967)	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, L/2812 (12 July 1967)
US-29	South Korea, Act on the Investigation of Unfair International Trade Practices	South Korea, Act on the Investigation of Unfair International Trade Practices No. 6417 (3 February 2001)
US-30	Group on Anti-Dumping Policies, Anti-Dumping Code draft (December 1966)	Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/14 (9 December 1966)
US-31	USDOC Issues and Decision Memorandum	Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia (20 September 2010)
US-32	GOI Initial Questionnaire Response	Government of Indonesia's Initial Questionnaire Response (29 December 2009)
US-34 (BCI)	Part Two of GOI First Supplemental Questionnaire Response	Part Two of the Government of Indonesia's First Supplemental Questionnaire Response (22 February 2010) (BCI)
US-35 (BCI)	USDOC Verification of GOI Questionnaire Response	Verification of the Questionnaire Response Submitted by the Government of Indonesia: Countervailing Duty Investigation of Certain Coated Paper from Indonesia (3 August 2010) (BCI)

Exhibit	Short Title	Description/Long title
US-40	Petitioners' General Factual Information Submission	Petitioner General Factual Information Submission (21 June 2010)
US-41	GOI Third Supplemental Questionnaire	Third Supplemental Questionnaire to the Government of Indonesia (29 April 2010)
US-42	GOI Fifth Supplemental Questionnaire	Fifth Supplemental Questionnaire to the Government of Indonesia (11 June 2010)
US-43	CFS USDOC Issues and Decision Memorandum	Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (17 October 2007)
US-44	GOI and APP/SMG Case Brief to USDOC	Government of Indonesia and APP-Indonesia's Case Brief (17 August 2010)
US-56	19 U.S.C., Section 1671d	*United States Code*, Title 19, Section 1671d
US-60	19 U.S.C., Section 1673d	*United States Code*, Title 19, Section 1673d
US-68	Final Countervailing Duty Determination on Coated Paper from China	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010)
US-69	Final Anti-Dumping Determination on Coated Paper from China	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010)
US-74	CFS Final Countervailing Duty Determination	Certain Coated Paper from Indonesia: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 72, No. 206 (25 October 2007)
US-76	Letter to GOI regarding Verification	Letter dated 24 June 2010 from Barbara Tillman, USDOC, to the GOI
US-77	GOI Verification Outline	USDOC, Verification Outline (18 June 2010)
US-80	Petition	Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Coated Paper from Indonesia and the People's Republic of China (23 September 2009)
US-81	CFS Memorandum: Meeting with an Independent Expert	Countervailing Duty Investigation of Coated Free Sheet Paper from Indonesia: Memorandum to File Regarding Verification Meeting with an Independent Expert (24 August 2007)
US-83 (BCI)	Exhibit 5S-4 to GOI Fourth and Fifth Supplemental Questionnaires Response	Government of Indonesia's Fourth and Fifth Supplemental Questionnaires Response, exhibit 5S-4 (22 June 2010) (BCI)
US-84	Exhibit 1 to GOI Third Supplemental Questionnaire Response	Government of Indonesia's Third Supplemental Questionnaire Response, exhibit 1 (29 April 2010)
US-87	GOI Letter to USDOC Regarding IBRA	Letter dated 3 August 2010 from the Government of Indonesia to the USDOC Regarding IBRA
US-91 (BCI)	APP/SMG Initial Questionnaire Response	PT. Pindo Deli Pulp and Paper Mills, PT. Pabrik Kertas Tjiwi Kimia, Tbk, and PT. Indah Kiat Pulp & Paper, Tbk's Initial Questionnaire Response (29 December 2009) (BCI)
US-95	Excerpt from APP Pre-hearing Brief to USITC, pp. 24, 30, 36, 49-53, and 72	Pre-hearing Brief APP-China and APP-Indonesia (13 September 2010), pp. 24, 30, 36, 49-53, and 72
US-102	Monthly Import Statistics	Certain Coated Paper: Monthly Import Statistics
US-104	APP Post-hearing Brief to USITC	APP Post-hearing Brief to USITC (4 October 2010)
US-105	APP Final Comments to USITC	APP Final Comments to USITC (21 October 2010)
US-107	Redacted excerpts of USITC Final Determination and APP Final Comments to USITC	Previously-Redacted Discussion of the Unisource Affidavit (Exhibit US-2) in the Commission's Determination (Exhibit US-1) and APP's Final Comments (Exhibit US-105)
US-108	Excerpt from USITC Conference Transcript, pp. 45-48 and 179-180	USITC, Investigations Nos. 701-TA-470-471 and 731-TA-1169-1170 (Preliminary), Excerpt from Conference Transcript (14 October 2009), pp. 45-48 and 179-180
US-110	18 U.S.C., Section 208	Acts affecting a personal financial interest, *United States Code*, Title 18, Section 208
US-118	Section 771(5A) of Tariff Act of 1930	Tariff Act of 1930, Section 771(5A) (2 July 2015)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
APP	Asia Pulp and Paper, Ltd. (China) and Asia Pulp and Paper, Ltd. (Indonesia)
APP/SMG	Asia Pulp and Paper/Sinar Mas Group
BCI	Business Confidential Information
CCP	Certain coated paper
CFS	Coated free sheet paper
China	People's Republic of China
COGS	Cost of goods sold
DR	Dana Reboisasi (rehabilitation) fee
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Eagle Ridge	Eagle Ridge Paper Co.
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of Indonesia
HTI	Hutan Tanaman Industria
IBRA	Indonesia Bank Restructuring Agency
IDR	Indonesian Rupiah
Indah Kiat or IK	PT. Indah Kiat Pulp & Paper, Tbk
ILC	International Law Commission
Korea	Republic of Korea
Orleans	Orleans Offshore Investment Limited
POI	Period of investigation[1]
PPAS	Strategic Asset Sales Program
Pindo Deli or PD	PT. Pindo Deli Pulp and Paper Mills
PSDH	Provisi Sumberdaya Hutan
RISI	Resource Information Systems Inc.
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SOE	State-owned enterprise
Tjiwi Kimia or TK	PT. Pabrik Kertas Tjiwi Kimia Tbk
Unisource	Unisource Worldwide, Inc.
United States	United States of America
USD	United States dollar
USDOC	US Department of Commerce
USITC	US International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WKS	PT. Wirakarya Sakti
WTA	World Trade Atlas
WTO	World Trade Organization

[1] For the POI considered by the USDOC, see fn 57; for the POI considered by the USITC, see para. 7.197.

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 13 March 2015, Indonesia requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), with respect to:

a. the anti-dumping and countervailing duties imposed by the United States on imports of certain coated paper (CCP) from Indonesia; and

b. Section 771(11)(B) of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code, Section 1677(11)(B).[2]

1.2. Consultations were held on 25 June 2015 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 9 July 2015, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU, with standard terms of reference.[3] On 20 August 2015, Indonesia submitted a new request for the establishment of a panel.[4] At its meeting on 28 September 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS491/3, in accordance with Article 6 of the DSU.[5]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS491/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[6]

1.5. On 25 January 2016, Indonesia requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 4 February 2016, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Hanspeter Tschäni
Members:	Mr Martin Garcia Ms Enie Neri de Ross

1.6. Brazil, Canada, China, the European Union, India, Korea, and Turkey notified their interest in participating in the Panel proceedings as third parties.

[2] Request for consultations by Indonesia, WT/DS491/1.
[3] Request for the establishment of a panel by Indonesia, WT/DS491/2.
[4] Request for the establishment of a panel by Indonesia WT/DS491/3 (hereinafter Indonesia's panel request).
[5] DSB, Minutes of the meeting held on 28 September 2015, WT/DSB/M/368.
[6] Constitution of the Panel, WT/DS491/4.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[7] and timetable on 29 July 2016. The timetable was revised on 15 August 2016 and on 23 May 2017.

1.8. The Panel began its work on this dispute later than it would have wished due to staff constraints in the WTO Secretariat.[8] The Panel held a first substantive meeting with the parties on 6-7 December 2016. A session with the third parties took place on 7 December 2016. The Panel held a second substantive meeting with the parties on 28-29 March 2017. On 23 May 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 August 2017. The Panel issued its Final Report to the parties on 6 October 2017.

1.3.2 Additional working procedures concerning BCI

1.9. On 11 July 2016, Indonesia requested the Panel to adopt additional working procedures concerning Business Confidential Information (BCI). To that end, on 20 July 2016 the parties submitted to the Panel a joint proposal for additional BCI procedures. After considering the parties' proposal, the Panel adopted additional working procedures for the protection of BCI on 29 July 2016.[9]

1.3.3 Request for a preliminary ruling

1.10. In its first written submission dated 12 September 2016[10], the United States requested that the Panel make a preliminary ruling that certain arguments raised by Indonesia in its first written submission are not within the Panel's terms of reference.[11] Indonesia responded to the United States' request on 26 September 2016.[12] The parties further addressed each other's arguments concerning the United States' request in their subsequent submissions and statements to the Panel.[13] Third parties were also invited to comment on the United States' request in their third-party submissions but did not do so.[14] We address the United States' request in our findings below.

1.3.4 Requests of a procedural nature by certain third parties

1.11. On 8 July 2016, Canada requested that the Panel grant it certain additional "passive" third-party rights in these proceedings. The parties provided comments on Canada's request orally at the organizational meeting and the United States provided additional written comments on 20 July 2016. By communication dated 3 November 2016, the Panel informed the parties and the third parties that it had denied Canada's request for enhanced third-party rights. The Panel's decision is set out in Annex D-1.

1.12. In its third-party submission dated 26 September 2016, the European Union objected to the additional BCI procedures adopted by the Panel for failing to provide for third-party access to BCI submitted by the parties, and requested that third parties be given access to the exhibits containing BCI submitted by the parties with their first written submissions. The parties provided written comments on the European Union's request on 2 November 2016. On 4 November 2016,

[7] Panel's Working Procedures, Annex A-1.
[8] Communication from the Panel, WT/DS491/5.
[9] Additional Working Procedures of the Panel concerning Business Confidential Information, Annex A-2.
[10] On 16 September 2016, the United States submitted corrections to its first written submission. At the request of the Panel, on 6 October 2016 the United States submitted a corrected, consolidated version of its first written submission. In this Report, the Panel refers to the corrected, consolidated, version of the United States' first written submission dated 6 October 2016.
[11] United States' first written submission, paras. 33-40.
[12] Indonesia's response to the United States' preliminary ruling request.
[13] Indonesia's opening statement at the first meeting of the Panel, paras. 14-17; response to Panel question Nos. 4 and 6; second written submission, paras. 11-16; and opening statement at the second meeting of the Panel, paras. 4-7. United States' opening statement at the first meeting of the Panel, paras. 6-8; response to Panel question Nos. 3, 5, and 7; second written submission, paras. 10-18; and opening statement at the second meeting of the Panel, para. 3.
[14] Panel communication to the parties and third parties dated 16 September 2016.

the Panel informed the parties and the third parties that it considered it neither appropriate nor necessary to grant the European Union's request. The Panel's decision is set out in Annex D-2.

2 FACTUAL ASPECTS AND MEASURES AT ISSUE

2.1. This dispute concerns two sets of measures of the United States.

2.2. First, Indonesia challenges the imposition by the United States of anti-dumping and countervailing duties on imports of certain coated paper from Indonesia pursuant to anti-dumping and countervailing duty orders published on 17 November 2010.[15] Specifically, Indonesia's "as applied" claims concern certain aspects of the US Department of Commerce (USDOC)'s final determination in its countervailing duty investigation on certain coated paper from Indonesia, as well as the US International Trade Commission (USITC)'s final threat of injury determination concerning subsidized and dumped imports from Indonesia and China.

2.3. Second, Indonesia challenges "as such", i.e. independently of its application in specific instances, Section 771(11)(B) of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code, Section 1677(11)(B).[16] In particular, Indonesia challenges "as such" the use of this statutory provision in affirmative threat of injury determinations.

2.4. With respect to the first set of measures, on 23 September 2009, three companies and a labour union filed a petition on behalf of the domestic industry in the United States for the application of anti-dumping and countervailing duties on imports of certain coated paper from Indonesia and China.[17] On 20 October 2009, the USDOC initiated parallel anti-dumping and countervailing duty investigations on imports of certain coated paper from Indonesia and on imports of the same product from China.[18]

2.5. In the countervailing duty investigation on coated paper from Indonesia, the USDOC selected the Asia Pulp and Paper/Sinar Mas Group (APP/SMG) as the sole mandatory respondent in the investigation.[19] On 9 March 2010 the USDOC issued its preliminary countervailing duty determination, in which it calculated a subsidy rate of 17.48% for APP/SMG, and assigned the same rate to all other producers and exporters.[20] The USDOC issued its final determination on 27 September 2010.[21] In its final determination, the USDOC determined, *inter alia*, that three Government of Indonesia (GOI) measures − the provision of standing timber, the log export ban, and the debt forgiveness in favour of APP/SMG − constituted countervailable subsidies. The USDOC calculated an overall net subsidy rate of 17.94% for APP/SMG, and assigned the same rate to all other producers and exporters.[22]

2.6. The USITC published the notice of initiation of its preliminary injury investigation on 30 September 2009, and issued a preliminary affirmative determination on 23 November 2009.[23] It issued its final determination on 17 November 2010, finding that the US domestic industry was threatened with material injury by reason of imports of certain coated paper from China and

[15] Indonesia's first written submission, paras. 1, 15, and 16 (referring to Anti-Dumping Duty Order, (Exhibit IDN-1); and Countervailing Duty Order, (Exhibit IDN-2)).
[16] Indonesia's first written submission, para. 5.
[17] Petition, (Exhibit US-80).
[18] Initiation of Anti-Dumping Duty Investigations, (Exhibits IDN-3/US-66 (exhibited twice)); Initiation of Countervailing Duty Investigation, (Exhibits IDN-4/US-65 (exhibited twice)); and USITC Final Determination, (Exhibit US-1), p. I-1.
[19] The respondent APP/SMG companies were PT. Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia or TK), PT. Pindo Deli Pulp and Paper Mills (Pindo Deli or PD), and PT. Indah Kiat Pulp & Paper, Tbk (Indah Kiat or IK).
[20] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)).
[21] Final Countervailing Duty Determination, (Exhibits IDN-6/US-47 (exhibited twice)). The accompanying USDOC Issues and Decision Memorandum, (Exhibits IDN-10/US-31), is dated 20 September 2010. Indonesia's exhibit contains excerpts of the Issues and Decision Memorandum whereas Exhibit US-31 includes the entire document. For this reason, in our findings, we generally refer to the latter rather than to Exhibit IDN-10.
[22] Final Countervailing Duty Determination, (Exhibits IDN-6/US-47 (exhibited twice)), p. 59211; USDOC Issues and Decision Memorandum, (Exhibit US-31). On the same date, the USDOC issued its final determinations in the parallel countervailing duty investigation on coated paper from China and anti-dumping investigations on coated paper from Indonesia and from China. (Final Anti-Dumping Determination, (Exhibits IDN-7/US-67 (exhibited twice)); Final Anti-Dumping Determination on Coated Paper from China, (Exhibit US-69); and Final Countervailing Duty Determination on Coated Paper from China, (Exhibit US-68)).
[23] USITC Notice of Preliminary Determination, (Exhibit IDN-8).

Indonesia.[24] On the same date, the USDOC issued anti-dumping and countervailing duty orders imposing, *inter alia*, countervailing duties at a rate of 17.94% on imports from APP/SMG and "all other" Indonesian producers/exporters.[25]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. In the context of its "as applied" claims concerning the anti-dumping and countervailing measures at issue, Indonesia requests that the Panel find:

a. With respect to the USDOC's subsidy determination, that[26]:

   i. the USDOC's findings that the GOI provides standing timber for less than adequate remuneration and that the GOI log export ban confers a benefit are inconsistent with Article 14(d) of the SCM Agreement because the USDOC made a *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests;

   ii. the USDOC's finding, based on an adverse inference, that the GOI "knowingly allowed an affiliate of a debtor to buy back its own debt in contravention of Indonesian law" is inconsistent with Article 12.7 of the SCM Agreement;

   iii. the USDOC's findings of specificity are inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC did not determine that the collection of stumpage fees, the log export ban, or the alleged forgiveness of debt were part of a plan or scheme intended to confer a benefit;

   iv. the USDOC's finding of specificity in connection with the debt forgiveness is inconsistent with Article 2.1 of the SCM Agreement because the USDOC "did not identify the jurisdiction allegedly providing a benefit, thereby calling into question the specificity analysis"[27];

b. With respect to the USITC's threat of injury determination, that[28]:

   i. the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors;

   ii. the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement because the USITC based its threat findings on conjecture and remote possibility; and

   iii. the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise special care.

[24] USITC Notice of Final Determination, (Exhibits IDN-9/US-70 (exhibited twice)); USITC Final Determination, (Exhibits IDN-18/US-1). As indicated below, fn 357, Exhibit IDN-18 contains excerpts of the determination whereas Exhibit US-1 includes the entire determination. For this reason, in our findings, we generally refer to the latter.

[25] Anti-Dumping Duty Order, (Exhibit IDN-1), p. 70206; Countervailing Duty Order, (Exhibit IDN-2), p. 70207. The USITC instituted five-year ("sunset") reviews with respect to the anti-dumping and countervailing duties on imports of certain coated paper from Indonesia and China on 1 October 2015. On 29 December 2016, the USITC published its determination that revocation of the duties would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. (USITC Continuation Notice, (Exhibit IDN-24), p. 96044).

[26] Indonesia's first written submission, paras. 3 and 166; second written submission, paras. 2-5.

[27] Indonesia initially also challenged the USDOC's findings of specificity with respect to the provision of standing timber and the log export ban, arguing that they were inconsistent with Article 2.1 of the SCM Agreement because the USDOC did not identify the jurisdiction allegedly providing a benefit. (Indonesia's first written submission, para. 3). However, at the first meeting of the Panel, Indonesia informed the Panel that it had decided not to pursue those claims. (Indonesia's opening statement at the first meeting of the Panel, para. 56).

[28] Indonesia's first written submission, paras. 4 and 166; second written submission, paras. 6-9.

3.2. In the context of its "as such" claims, Indonesia requests that the Panel find that Section 771(11)(B) of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code, Section 1677(11)(B), which deems a tie vote on threat of injury to be an affirmative threat of injury determination, is "as such" inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because it precludes the exercise of special care.[29]

3.3. Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend the United States to bring its measures into conformity with the Anti-Dumping Agreement and the SCM 2Agreement.[30]

3.4. The United States requests that the Panel reject Indonesia's claims in this dispute in their entirety.[31] Moreover, as noted above, the United States requests that the Panel find that certain arguments raised by Indonesia are not within the Panel's terms of reference.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4). China submitted responses to questions from the Panel to the third parties but did not submit an executive summary of its arguments to the Panel. India and Korea did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 24 August 2017, the Panel issued its Interim Report to the parties. On 6 September 2017, the United States submitted a written request for the Panel to review specific aspects of the Interim Report. On the same date, Indonesia informed the Panel that it had no comments on the Interim Report. Neither party requested an interim review meeting. On 14 September 2017, Indonesia submitted comments on certain of the United States' requests for review.

6.2. Annex E-1 sets out the requests made by the United States at the interim review stage, Indonesia's comments on the United States' requests, as well as the Panel's discussion and disposition of those requests.

7 FINDINGS

7.1 Introduction

7.1. In addressing the complaint in this dispute, we first set out the relevant principles guiding our review, including the relevant principles concerning treaty interpretation, the standard of review, and the burden of proof in WTO dispute settlement proceedings. We then address the application of Article 12.11 of the DSU concerning special and differential treatment, after which we examine the request for a preliminary ruling submitted by the United States. Thereafter, we consider, in the following order: (a) Indonesia's "as applied" claims concerning the USDOC's subsidy determination on coated paper from Indonesia; (b) Indonesia's "as applied" claims concerning the USITC's threat of injury determination on coated paper from China and Indonesia; and (c) Indonesia's "as such" claims concerning US Section 771(11)(B) of the US Tariff Act of 1930 (the "tie vote" provision).

[29] Indonesia's first written submission, paras. 5 and 166; second written submission, para. 10.
[30] Indonesia's first written submission, para. 166; second written submission, para. 87. Although Indonesia refers to the United States' measures also being inconsistent with the "GATT 1994" (Indonesia's first written submission, para. 1) and requests that the Panel recommend that the United States bring its measures into conformity with, *inter alia*, the GATT 1994. (Indonesia's first written submission, para. 166; second written submission, para. 87). Indonesia does not make any specific claim under any provision of the GATT 1994.
[31] United States' first written submission, para. 355.

7.2 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

7.2.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law. It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[32]

7.2.2 Standard of review

7.3. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]

7.4. Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.5. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we are to apply with respect to both the factual and the legal aspects of the present dispute.

7.6. The "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the investigating authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported its overall determination.[33] Moreover, with respect to a "reasoned and adequate explanation", the Appellate Body observed:

> What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record

[32] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.
[33] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

> evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".[34]

7.7. Therefore, it is clear that a panel should neither undertake a *de novo* review of the evidence nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[35] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[36]

7.2.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[37] Therefore, as the complaining party, Indonesia bears the burden of demonstrating that the US measures it challenges are inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[38] It is generally for each party asserting a fact to provide proof thereof.[39]

7.3 Special and differential treatment

7.9. Article 12.11 of the DSU provides that:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.10. In the present dispute, Indonesia refers to Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement, which both provide special and differential treatment for developing countries. However, Indonesia makes no claims of inconsistency with those provisions, and, as indicated in our Report below, Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement are not relevant to the interpretation and application of the provisions invoked by Indonesia in its claims.[40]

7.4 Terms of reference – United States' request for a preliminary ruling

7.11. As indicated above[41], in its first written submission, the United States requested that the Panel find that certain arguments raised by Indonesia in its first written submission are not within the Panel's terms of reference.[42] The United States' objection concerns two series of arguments advanced by Indonesia before the Panel.

7.12. First, the United States argues that in the context of its Article 14(d) claim concerning the benefit calculation with respect to the log export ban, and its Article 2.1(c) claim regarding the

[34] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)
[35] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[36] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[37] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[38] Appellate Body Report, *EC – Hormones*, para. 104.
[39] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[40] See below, paras. 7.120 and 7.346.
[41] See above, para. 1.10.
[42] United States' first written submission, paras. 33-40.

"subsidy programme" aspect of the specificity determination concerning that ban, Indonesia advances arguments that are "tantamount" to claims under Article 1.1(a) of the SCM Agreement, concerning the issue of financial contribution.[43] The United States refers, in particular, to Indonesia's arguments, in support of its claims under Article 2.1(c) and Article 14(d), that the log export ban is a type of export restraint that cannot constitute a subsidy and that the log export ban does not constitute government-entrusted or -directed provision of goods. The United States submits that these arguments pertain to whether an export ban constitutes a financial contribution within the meaning of Article 1.1(a), and therefore Indonesia's arguments are equivalent to claims under that provision.

7.13. Second, the United States objects to certain arguments that Indonesia makes in support of its claims under Article 14(d), Article 2.1(c), and the chapeau of Article 2.1, which in the United States' view in fact concern whether the USDOC's determination set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material", a matter governed by Article 22.3 of the SCM Agreement.[44] The United States submits that, while the relevant standard of review under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement requires a reviewing panel to examine whether an investigating authority has provided reasoned and adequate explanations of how the evidence supported its factual findings and how those findings in turn supported its determination, the question of the level of detail memorialized in the public notice of an investigating authority's determination is a separate, substantive, inquiry that properly falls under Article 22.3 of the SCM Agreement. In this case, the United States argues, Indonesia's concern with the USDOC's use of certain words, phrases, or elements in its explanations and the amount of space taken by them belongs properly to a claim under Article 22.3 rather than under the provisions cited by Indonesia.[45]

7.14. The United States notes that Indonesia's panel request does not include claims under Articles 1.1(a) or 22.3 of the SCM Agreement. Thus, citing Articles 6.2 and 7 of the DSU, the United States submits that there is no jurisdictional basis for the Panel to address the merits of the Indonesian arguments described above, and that these arguments are outside the Panel's terms of reference.[46]

7.15. Initially, the United States requested a preliminary ruling, to the effect that the arguments of Indonesia described above are not within the Panel's terms of reference. The United States subsequently revised its request for a preliminary ruling.[47] With respect to its objection that certain arguments concerning the log export ban are tantamount to claims under Article 1.1(a), the United States ultimately asks the Panel to issue a preliminary ruling in which it either: (a) finds that Indonesia's "putative" Article 1.1(a) claims are outside the Panel's terms of reference; (b) finds that Indonesia's Article 14(d) and Article 2.1(c) claims are in fact "financial contribution claims", and therefore, outside the Panel's terms of reference; or (c) rejects Indonesia's financial contribution arguments because there is no legal basis for the Panel to address the merits of arguments on matters that are outside the Panel's terms of reference.[48]

[43] United States' first written submission, paras. 37-38 and fns 43 and 47; opening statement at the first meeting of the Panel, para. 7; response to Panel question Nos. 3, 5(a), and 5(c); and second written submission, para. 10. The United States identifies the arguments at issue as those set forth in Indonesia's first written submission, paras. 44-45 in support of its Article 14(d) claim, and para. 79 in support of its Article 2.1(c) claim.

[44] The United States refers, in particular, to Indonesia's arguments that the USDOC did not adequately explain its decisions with respect to Article 14(d), did not make findings of specificity in accordance with Article 2.1(c), and did not identify the relevant jurisdiction in accordance with the chapeau of Article 2.1. The United States indicates that these arguments are set forth in Indonesia's first written submission, paras. 33-34 and 41-42 (concerning Indonesia's claim under Article 14(d) with respect to the provision of standing timber); 74, 78, 79, and 81 (concerning Indonesia's claims under Article 2.1(c) with respect to the three subsidies), and 95 (concerning Indonesia's claim under the chapeau of Article 2.1 with respect to the debt forgiveness). (United States' first written submission, para. 39 and fn 51; response to Panel question No. 7(d)).

[45] United States' first written submission, para. 40; response to Panel question No. 7(c).

[46] United States' first written submission, paras. 35-36; response to Panel question No. 5(a).

[47] United States' opening statement at the first meeting of the Panel, para. 6; response to Panel question Nos. 3 and 5; and opening statement at the second meeting of the Panel, para. 3.

[48] United States' second written submission, para. 18.

7.16. With respect to its objection that certain arguments concerning the sufficiency of explanations are tantamount to claims under Article 22.3, the United States asks the Panel to rule that Indonesia's arguments are outside its terms of reference.[49]

7.17. Indonesia submits that the Panel should reject the United States' request. Indonesia argues that it is not seeking findings under Articles 1.1(a) or 22.3 of the SCM Agreement. According to Indonesia, the arguments to which the United States objects regarding the log export ban support its claim of violation under Article 14(d) concerning the issue of "benefit" and its claim under Article 2.1(c) concerning the existence of a "subsidy programme". With respect to the second set of arguments, Indonesia argues that the fact that the United States may also have violated Article 22.3 does not preclude that the United States may have violated Articles 14(d) and 2.1(c), and the chapeau of Article 2.1.[50]

7.18. We did not consider it necessary to address the United States' objections in the form of a preliminary ruling. For the following reasons, we also consider it neither necessary nor appropriate[51], for the purpose of resolving this dispute, to make the specific findings requested by the United States.

7.19. First, Article 6.2 of the DSU provides that a panel request "shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Consequently, as the United States correctly notes, where a panel request fails to specify a particular claim under a specific provision, such claim does not form part of the matter covered by the panel's terms of reference.[52] In this case, however, Indonesia has made it clear that it is not making any claims under Articles 1.1(a) and Article 22.3 of the SCM Agreement. Second, arguments, as opposed to claims, are in principle not circumscribed by a panel's terms of reference. The United States has not convinced us that that it would be appropriate for us to issue a ruling that Indonesia's arguments referring to those two provisions, as opposed to claims, which Indonesia has not made, are outside our terms of reference.

7.20. We do agree, however, that in some of its arguments, Indonesia effectively seeks to challenge aspects of the USDOC's determination of the existence of a financial contribution despite having made no claim of violation under Article 1.1(a). In our findings below, we consider whether Indonesia has established a violation of the provisions it has invoked in light of the legal requirements of these provisions and of the arguments and evidence it presented in support of its claims. Where Indonesia's arguments do not pertain to a claim that it has properly stated in its panel request and that it pursues before the Panel, but rather pertain to a claim which it has not properly stated, we disregard these arguments.

7.21. Finally, with respect to the United States' objection that Indonesia is effectively making claims under Article 22.3 by arguing that the USDOC was required to provide certain explanations for its determinations, we recall that an investigating authority's determination must provide a reasoned and adequate explanation as to how the evidence on the record supported the investigating authority's factual findings, and how those factual findings supported its overall determination.[53] The requirement for an investigating authority to explain the basis for its decision is an aspect of the substantive requirements of the provisions of the Anti-Dumping and SCM Agreements invoked by Indonesia. This is distinct from the public notice requirements of Article 22 of the SCM Agreement.[54] Indonesia has not, in our view, made any claims or arguments with respect to the latter requirements. Rather, Indonesia challenges the analysis and conclusions of the USDOC in its determinations under Article 14(d), Article 2.1(c), and the chapeau of

[49] United States' first written submission, para. 40.
[50] Indonesia's response to the United States' preliminary ruling request, paras. 4-7.
[51] We note that one of the rulings the United States seeks, in the alternative, is for the Panel to find that Indonesia's Article 14(d) and Article 2.1(c) claims with respect to the log export ban are in fact financial contribution claims that are outside the Panel's terms of reference, on the basis that Indonesia's arguments are limited to arguing that an export ban cannot constitute a financial contribution (see para. 7.15 above). In our view, Indonesia's arguments in support of its Article 14(d) and Article 2.1(c) claims are not limited to those objected to by the United States, and the United States' argument in this regard is without merit.
[52] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120.
[53] See above, para. 7.6.
[54] Article 22.3, in particular, requires that the public notice of a final determination (or separate report) set forth in sufficient detail the findings and conclusions reached on all issues of fact and law the investigating authority considered material.

Article 2.1.[55] For this reason, the United States' request, as it concerns arguments allegedly amounting to claims under Article 22.3, is unfounded, and we reject it.

7.5 "As applied" claims concerning the USDOC's subsidy determination

7.5.1 Introduction

7.22. In this section, we consider Indonesia's claims with respect to the USDOC's final determination in its countervailing duty investigation on certain coated paper from Indonesia. The USDOC issued its final determination on 27 September 2010.[56] In the determination, the USDOC determined that the GOI granted, *inter alia*, the following subsidies to APP/SMG: (a) provision of standing timber; (b) provision of logs and chipwood by forestry/harvesting companies entrusted and directed by the GOI through the log export ban imposed by Indonesia; and (c) debt forgiveness (or "buy-back") through the sale by the GOI of APP/SMG's debt to an affiliated entity, Orleans Offshore Investment Limited (Orleans).[57] Indonesia challenges several aspects of the USDOC's findings with respect to these three subsidies. Indonesia claims that the USDOC's final subsidy determination is inconsistent with:

a. Article 14(d) of the SCM Agreement because the USDOC's benefit determinations with respect to the provision of standing timber and the log export ban are based on a *per se* determination of price distortion based solely on the GOI's predominant market share of standing timber from public forests;

b. Article 12.7 of the SCM Agreement because the USDOC found, based on an adverse inference, that the GOI "knowingly allowed an affiliate of a debtor to buy back its own debt in contravention of Indonesian law"; and

c. Article 2.1(c) of the SCM Agreement because, in its findings of *de facto* specificity, the USDOC failed to determine that the collection of stumpage fees, the log export ban, and the debt forgiveness were each part of a plan or scheme intended to confer a benefit; and the chapeau of Article 2.1 of the SCM Agreement because, with respect to the debt forgiveness, the USDOC also failed to identify "the jurisdiction allegedly providing a benefit".

7.23. We note that, prior to the coated paper investigation, the USDOC conducted a countervailing duty investigation in relation to imports of coated free sheet paper from Indonesia (CFS investigation). In that investigation, APP/SMG was also the sole respondent and the programmes examined in the CFS investigation mirror the programmes at issue in the coated paper investigation.[58] On 25 October 2007, before the initiation of the investigation underlying the countervailing duties at issue in this dispute, the USDOC issued its final determination in the CFS investigation, finding *inter alia* that the provision of standing timber, the log export ban, and APP/SMG's debt buy-back constituted countervailable programmes.[59] In parallel to the USDOC's investigation, the USITC conducted an injury investigation with respect to imports of coated free sheet paper from China, Indonesia, and Korea. The USITC determined that the US industry was

[55] In the paragraphs of its first written submission that the United States objects to, Indonesia argues, *inter alia*, that: (a) the USDOC failed to make an evidentiary finding of price distortion in the market for standing timber and, instead, based its price distortion finding entirely on the fact that the GOI was the predominant supplier of standing timber, in violation of Article 14(d) (paras. 33, 34, 41, and 42); (b) that the USDOC acted inconsistently with Article 2.1(c) by failing to cite to evidence that the GOI had in place a plan, scheme, or systematic series of actions to confer a benefit (paras. 74, 78, and 81) and, in addition in the case of the log export ban, to cite any evidence that the law confers a benefit on paper producers (para. 79); and (c) that the USDOC was required to identify the government entity that allegedly forgave APP/SMG's debt (para. 95).

[56] Final Countervailing Duty Determination, (Exhibits IDN-6/US-47 (exhibited twice)), p. 59211; USDOC Issues and Decision Memorandum, (Exhibit US-31).

[57] As noted above, para. 2.5, APP/SMG was the sole Indonesian producer/exporter individually investigated by the USDOC. The period of investigation (POI) with respect to which the USDOC conducted its subsidy analysis was the period 1 January to 31 December 2008.

[58] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10764 and fn 7. The POI for the USDOC's CFS investigation was 1 January to 31 December 2005. (CFS Final Countervailing Duty Determination, (Exhibit US-74), p. 60643).

[59] CFS Final Countervailing Duty Determination, (Exhibit US-74), p. 60644.

not materially injured or threatened with material injury by reason of imports from these countries and, as a result, no measures were imposed.[60] While the USDOC's CFS investigation is not the subject of this dispute, several of the USDOC's findings in that investigation are relevant to our analysis of Indonesia's claims in the present dispute, particularly as the USDOC, in its determination in the coated paper investigation, frequently referred to its findings in the CFS investigation. Consequently, where appropriate, in our findings below we also refer to relevant aspects of the USDOC's final determination in the CFS investigation (as contained, in particular, in the Issues and Decision Memorandum accompanying that determination), and to the record evidence before the USDOC in that investigation that has been submitted to the Panel.

7.5.2 Claims under Article 14(d) of the SCM Agreement (rejection of in-country prices as benchmarks to calculate benefit)

7.5.2.1 Introduction

7.24. As indicated above, in the coated paper investigation the USDOC conducted a countervailing duty investigation into whether the GOI's provision of standing timber and the ban on exports of logs and chipwood (hereinafter "log export ban") maintained by Indonesia constituted countervailable subsidies. The USDOC determined that both the provision of standing timber and the log export ban constituted financial contributions in the form of provision of goods by the government and that a benefit was conferred in both cases.[61]

7.25. With respect to the provision of standing timber, the USDOC, relying on its findings in the CFS investigation, found that the GOI allowed timber to be harvested from government-owned land under two main types of licences: Hutan Tanaman Industria (HTI) licences to establish, and harvest timber from, plantations, and HPH licences to harvest timber from the natural forest.[62] The USDOC observed that, as it had found in the CFS investigation, HTI licence holders paid "cash stumpage fees"[63] known as "PSDH" (Provisi Sumberdaya Hutan) royalty fees, paid per unit of timber harvested. The USDOC noted that, in addition to paying PSDH fees, HPH licence holders paid per-unit rehabilitation fee ("Dana Reboisasi" or DR) for timber harvested from natural forests, and licence holders in Jambi province also paid a "PSDA" fee for harvesting from plantations. In addition, the USDOC noted that in the CFS investigation it had found that all of the stumpage fees were administratively set by the GOI.[64] Because the GOI did not provide in the investigation at issue here new information that materially altered the information concerning the procedures through which the GOI provided standing timber or how it priced standing timber, the USDOC determined that the provision of standing timber constituted a financial contribution in the form of provision of goods by the government.[65]

7.26. The USDOC also found that the log export ban constituted a financial contribution. Relying on its findings in the CFS investigation, the USDOC found that the GOI, through the log export ban, entrusted and directed forestry/harvesting companies to provide goods (i.e. logs and chipwood) to pulp and paper producers.[66] Of relevance to Indonesia's claims, in the CFS investigation, the USDOC had found that Article 1(1) of the Joint Decree of the Ministry of Forestry and the Ministry of Industry and Trade of Indonesia concerning the Discontinuation of Log/Chip Raw Material Exports[67] "provide[d] for an outright ban on the export of logs and chipwood from Indonesia", and that the ban was implemented by preventing the issuance of the export permits required for all products to be exported.[68] The log export ban was administered and operated in

[60] USITC Final Determination, (Exhibit US-1), p. I-5.
[61] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 7 and 11-14.
[62] According to Indonesia, the type of logs used in pulp production differs based on whether they are harvested from plantations or natural forests. (Indonesia's first written submission, para. 12).
[63] The USDOC used the term "stumpage fees" to refer to fees paid for harvesting standing timber.
[64] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6 (referring to CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 69).
[65] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7.
[66] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[67] Joint Decree of the Ministry of Forestry and the Ministry of Industry and Trade No. 1132/Kpts-II/2001 and No. 292/MPP/Kep/10/2001. (Log Export Ban, (Exhibit IDN-30)).
[68] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 27. In the CFS investigation, the USDOC had also found that the GOI had imposed export bans on eight categories of products that included "Forestry Products," under which logs and chipwood were listed. (Ibid.). See also Log Export Ban, (Exhibit IDN-30), Article 1(1).

accordance with the Joint Decree of the Ministry of Forestry and the Ministry of Industry and Trade, who were responsible for enforcing the ban.[69] In the investigation at issue here, the USDOC found that neither the GOI nor APP/SMG had placed any additional information on the record that caused it to reconsider its prior finding, and determined that the ban constituted a financial contribution.[70]

7.27. The USDOC found that both the provision of standing timber and the export ban on logs and chipwood conferred a benefit because the GOI provided standing timber and logs and chipwood to producers of coated paper in Indonesia for less than adequate remuneration when measured against a market benchmark. The USDOC declined to use in-country prices for standing timber and logs as the basis for determining the appropriate market benchmark, and instead relied on out-of-country benchmarks. In both cases, as the basis for determining the benchmark, the USDOC used Malaysian export prices for acacia pulpwood and mixed tropical hardwood as reported in the World Trade Atlas (WTA) trade statistics, exclusive of shipments to Indonesia.[71]

7.28. Indonesia challenges the USDOC's conclusion that there were no market-determined stumpage fees or market prices for logs in Indonesia that could have been used as a benchmark and, as a consequence, the USDOC's decision to resort to out-of-country benchmarks.[72] Indonesia claims that the USDOC's findings that the GOI provided standing timber for less than adequate remuneration and that the log export ban conferred a benefit are inconsistent with Article 14(d) of the SCM Agreement because the USDOC improperly made a *per se* determination of price distortion based solely on the GOI's predominant share of the Indonesian market for standing timber and, as a consequence, failed to determine the adequacy of remuneration in relation to prevailing market conditions in Indonesia.[73] According to Indonesia, instead of using Indonesian prices, the USDOC resorted to "aberrationally high" out-of-country benchmarks.[74]

7.29. The United States requests that the Panel reject Indonesia's claims.[75]

7.30. We first address the legal standard under Article 14(d) of the SCM Agreement before examining Indonesia's claims under that provision with respect to the provision of standing timber and the log export ban.

7.5.2.2 Legal standard under Article 14(d) of the SCM Agreement

7.31. Article 14 of the SCM Agreement sets forth guidelines for an investigating authority's calculation of the amount of the benefit to the recipient of a subsidy. It provides, in relevant part:

> *Article 14*
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> ...

[69] Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), appendix 1, pp. 1-2.
[70] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[71] The USDOC made certain adjustments to this data to arrive at the benchmarks it used; to establish the benchmark for the provision of standing timber, the USDOC adjusted the WTA prices for logs to remove the Indonesian costs of harvesting the standing timber and to add an amount for profit for harvesting. (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 11).
[72] Indonesia's first written submission, paras. 41-42 and 45.
[73] Indonesia's first written submission, paras. 3 and 29.
[74] Indonesia's first written submission, para. 29.
[75] United States' first written submission, para. 355; opening statement at the first meeting of the Panel, para. 2; and second written submission, para. 186.

> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

7.32. The first sentence of Article 14(d) establishes that the provision of goods by a government shall not be considered as conferring a benefit unless the goods are provided for "less than adequate remuneration". How to determine whether adequate remuneration was paid is dealt with in the second sentence of Article 14(d), which provides that the adequacy of remuneration shall be determined in relation to prevailing *market conditions in the country of origin*. The second sentence of Article 14(d) thus makes clear that a benchmark for adequate remuneration must be determined "in relation to prevailing market conditions", and that the relevant conditions are those existing "in the country of provision".[76] Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration.[77]

7.33. The Appellate Body has found[78], and the parties agree[79], that the *primary* benchmark and, therefore, the *starting point* of the analysis under Article 14(d) is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision. They also agree that, while the analysis begins with a consideration of these in-country prices, it would not be appropriate to rely on private domestic prices as the benchmark in certain situations where those prices are not market-determined. This would be the case, for instance, where the government is the only supplier of the particular goods in the country, or where the government administratively controls all the prices for those goods in the country. In these situations, it would not be possible to use in-country prices as the benchmark.[80]

7.34. In addition, whenever the government is the predominant provider of the investigated goods, even if not the sole provider, an investigating authority may reject in-country private prices as a benchmark if it concludes that these prices are distorted due to the predominant participation of the government as a provider in the market, thus rendering the comparison required under Article 14(d) circular.[81]

7.35. Having said that, the possibility under Article 14(d) for an investigating authority to use a benchmark other than private market prices in the country of provision is very limited and the mere fact that the government is a significant, or even the predominant supplier of the relevant good, cannot automatically lead to a finding of price distortion.[82] The Appellate Body has excluded the application of a *per se* rule, under which an investigating authority could conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier means that private prices in the country of provision are distorted and, for this reason, unusable as a benchmark.[83] Thus, the distortion of prices in the domestic market for the good in question must be established on a case-by-case basis, based on the particular facts in the investigation.[84]

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[76] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.45.
[77] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.149.
[78] Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.154; *US – Softwood Lumber IV*, para. 90.
[79] Indonesia's first written submission, para. 31; United States' first written submission, para. 48.
[80] The panel in *US – Softwood Lumber IV* considered that, "in these situations, the only remaining possibility would appear to be the construction of some sort of a proxy for, or estimate of, the market price for the good in that country". (Panel Report, *US – Softwood Lumber IV*, para. 7.57 (quoted in Appellate Body Report, *US – Softwood Lumber IV*, para. 98)).
[81] Appellate Body Reports, *US – Softwood Lumber IV*, paras. 100-101; *US – Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446; *US – Carbon Steel (India)*, para. 4.155; and *US – Countervailing Measures (China)*, para. 4.50.
[82] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 439 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).
[83] Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.156; *US – Anti-Dumping and Countervailing Duties (China)*, para. 443; and *US – Softwood Lumber IV*, para. 100.
[84] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.59; *US – Carbon Steel (India)*, para. 4.156.

7.36. What an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending on the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including any additional information the investigating authority seeks so that it may base its determination on positive evidence on the record. In its analysis of whether in-country prices are distorted, an investigating authority may be called upon to examine various aspects of the relevant market, such as its structure, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It may also have to assess the behaviour of the entities operating in that market in order to determine whether the government itself, directly or acting through government-related entities, exerts market power so as to distort private in-country prices.[85]

7.37. That said, the Appellate Body has also observed that the fact that the government is the predominant supplier of the good in question makes it likely that private prices for that good in the country of provision will be distorted. The more predominant a government's role in the market is, the more likely this role will result in the distortion of private prices.[86] However, there is no threshold above which the government's significance as a supplier in the market alone becomes sufficient to establish price distortion.[87] An investigating authority thus cannot refuse to consider evidence pertaining to factors other than the government's predominance simply because the government is a significant, or even predominant, supplier of the relevant good.[88] Evidence regarding other factors on the record must always be considered, but the weight accorded to such evidence will vary depending on how predominant the government's role is and on how relevant these other factors are.[89] While a finding of price distortion may not be based merely on government predominance, "the extent to which [evidence other than government predominance] carries weight depends on how predominant the government's role is and on the relevance of other factors" and "there may be cases … where the government's role as a provider of goods is so predominant that price distortion is likely and other evidence carries only *limited weight*".[90]

7.38. Finally, the investigating authority must explain the basis for its conclusions in arriving at a proper benchmark.[91] Moreover, the authority must ensure that the benchmark it determines − including an out-of-country benchmark − relates or refers to, or is connected with, prevailing market conditions in the country of provision, and reflects price, quality, availability, marketability, transportation, and other conditions of purchase or sale.[92]

7.5.2.3 The USDOC's finding that there were no market-determined prices for standing timber in Indonesia upon which to base the benchmark

7.39. Indonesia argues that the USDOC acted inconsistently with Article 14(d) because it improperly concluded that Indonesian prices for standing timber paid to private owners were distorted or not market-determined and, therefore, unusable for benchmarking purposes, based solely on the fact that the GOI was the predominant supplier of standing timber.[93] In Indonesia's view, the USDOC failed to analyse whether such prices were actually distorted and applied a "*per*

[85] Appellate Body Reports, *US − Countervailing Measures (China)*, paras. 4.51-4.52 and 4.86; *US − Carbon Steel (India)*, paras. 4.153 and 4.157 and fn 754.
[86] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.52 (quoting Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 444).
[87] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.156.
[88] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446.
[89] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 453.
[90] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, paras. 446 and 453 (emphasis added). In that dispute the Appellate Body considered that in a situation where the government has a 96.1% market share, the position of the government in the market is much closer to a situation where the government is the sole supplier of the goods than to a situation where it is merely a significant supplier of the goods. The Appellate Body was of the view that this makes it likely that the government, as the predominant supplier, has the market power to affect through its own pricing the pricing by private providers for the same goods, and induce them to align with government prices. The Appellate Body further considered that, in such a situation, evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a "significant" presence in the market. (Ibid. para. 455).
[91] Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.153 and 4.157.
[92] Appellate Body Report, *US − Softwood Lumber IV*, para. 106.
[93] Indonesia's first written submission, paras. 3, 27, 29, and 42; opening statement at the first meeting of the Panel, para. 30.

se rule of price distortion". In this regard, Indonesia faults the USDOC for not having made an evidentiary finding of price distortion in the private market in Indonesia, and for not having explained whether and how the market share held by the GOI actually resulted in the government's possession and exercise of market power such that price distortion occurred through private suppliers aligning their prices with those of the government-provided goods.[94] Indonesia, in addition, submits that APP/SMG reported actual price data for stumpage paid to a private supplier, but the USDOC decided, without providing a reason, not to use this data.[95]

7.40. The United States disagrees that the USDOC applied "a *per se* rule of price distortion". The United States submits that the GOI's market share in the market for standing timber (over 93%) and ownership of harvestable land in Indonesia (approximately 99.5%) were the key bases for the USDOC's finding that there were no market-determined prices for stumpage in Indonesia. However, the United States submits, the USDOC also looked to other features of the Indonesian market that rendered it distorted.[96] Notwithstanding the above, the United States submits that the facts of the present case − the GOI's overwhelming share of the harvest of standing timber and near total control of the supply of standing timber − in themselves properly supported the USDOC's conclusion that there were no in-country prices that were not influenced by the GOI's market predominance. According to the United States, private transactions in the relevant market were nominal and, therefore, this is not a situation in which an investigating authority could be expected to find and cite to significant market-determined activity or other factors that undercut the likelihood of price distortion. For the United States, this is a situation in which the government is overwhelmingly predominant, and, for all intents and purposes, the sole provider of the input.[97] In addition, the United States submits that there was no evidence in the record concerning private prices for standing timber, because although the USDOC requested the GOI and APP/SMG to report stumpage fees paid for timber on private land, neither responded with information on such fees. The United States disagrees that certain information submitted by the APP/SMG in the investigation and referred to by Indonesia constituted evidence of in-country prices for stumpage.[98]

7.41. Before we address Indonesia's claim regarding the benchmark, we address certain allegations presented by Indonesia pertaining to the USDOC's finding that the GOI provided standing timber to producers of coated paper.

7.42. Indonesia alleges that the entirety of the USDOC's benefit determination is affected by a fundamental misconception of the nature of the purported subsidy. According to Indonesia, the GOI does not sell, provide or supply "stumpage", or timber, to concession holders; rather, it only grants land-use concessions. Indonesia submits that the GOI does not "own" standing timber; the standing timber is planted, grown and harvested by plantation owners on timber plantations that they (or others) have established at their own cost on government land pursuant to land-use concessions. Indonesia submits that the fees payable to the GOI are simply fees for the right to use land, in the nature of royalties, and therefore do not constitute "remuneration" for the supply of timber.[99] On this basis, Indonesia submits that the USDOC improperly determined that the GOI was the predominant supplier of standing timber in the market. Indonesia further argues that, because the GOI was not providing standing timber, it made no sense for the USDOC to calculate the adequacy of remuneration based on purported third-country benchmarks for standing timber. Instead, USDOC should have solicited information to examine benchmarks relating to the per hectare cost of a lease for degraded forest land.

[94] Indonesia's first written submission, para. 42 (referring to Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.101).
[95] Indonesia's response to Panel question Nos. 11, 15, and 17.
[96] United States' first written submission, paras. 43, 59, 61, and 67; response to Panel question No. 23.
[97] United States' first written submission, paras. 52 and 65.
[98] United States' second written submission, paras. 30-34.
[99] Indonesia's opening statement at the first meeting of the Panel, paras. 18-22; response to Panel question No. 8; and second written submission, paras. 17-18. Indonesia argues that 93% of the timber at issue during the POI was planted, grown, and harvested from a plantation and was not pre-standing, and that concession holders must perform a number of services at their own expense. These include forest management planning, seed and seedling procurement and planting, maintenance, fire and forest protection, social and environmental obligations, and infrastructure development. Indonesia also argues that the GOI does not control or influence the price at which concession holders sell timber harvested from the plantations they operate.

7.43. The United States argues that the issues Indonesia raises are not relevant to the adequacy of remuneration under Article 14(d). For the United States, these allegations go to the issue of financial contribution, and Indonesia has no basis for asking the Panel to examine them as it has not made any claims under Article 1.1(a) of the SCM Agreement. The United States submits that, in any event, Indonesia's argument is contradicted by record evidence and by the GOI's representations in the investigation. In particular, the United States contends that the evidence shows that independently of whether timber is pre-existing or cultivated, the harvesting company must pay species-specific PSDH cash stumpage fees as a royalty for harvesting the timber. Thus, the United States asserts, the concessionaire pays stumpage fees on the *volume of wood* harvested from the land, rather than paying to lease a given *acreage*; hence, the royalties are tied to stumpage, not land use.[100]

7.44. In our view, Indonesia alleges that the USDOC misread the relevant characteristics of the GOI's concession or stumpage programme and, as a consequence, improperly found that measure to be a financial contribution, consisting of the provision of standing timber by the GOI. However, whether the USDOC properly found that the GOI provided a good, standing timber, pertains to its finding of the existence of a financial contribution, a question that falls under Article 1.1(a) of the SCM Agreement. While we agree that the nature of the alleged financial contribution will affect what methodology is appropriate to determine the adequacy of the remuneration, "financial contribution" and "benefit" are two separate elements of the existence of a subsidy.[101] Only the latter is at issue in this dispute.

7.45. Indonesia has not made any claims under Article 1.1(a) of the SCM Agreement challenging the USDOC's determination that the GOI measure constituted a financial contribution in the form of provision of goods – standing timber.[102] In the absence of a claim by Indonesia challenging this finding, for purposes of considering Indonesia's benefit claim under Article 14(d), we must assume that the USDOC properly found that there was a financial contribution. Thus, the only question before us is Indonesia's claim under Article 14(d), which concerns solely whether the USDOC improperly determined that the GOI's provision of standing timber conferred a benefit because it concluded that there were no market-based prices in Indonesia for stumpage and as a result resorted to an out-of-country benchmark.[103]

7.46. Turning to Indonesia's claims regarding the USDOC's benchmark determination, in the investigation at issue here the USDOC explained that, under its Regulations, the preferred benchmark was an observed market price for the good in the country under investigation, from a private supplier located either within the country or outside the country (the latter transaction, in the form of an import). The USDOC explained that this was because "such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation".[104]

7.47. In examining whether there were such prices for stumpage in Indonesia, the USDOC noted that private forests in Indonesia accounted for only 6.27% of the total harvest during the period of investigation (POI) and that, in the CFS investigation, it had found that private land accounted for only 233,811 hectares of private forest land out of 57 million hectares in Indonesia (approximately 0.5%). The GOI did not provide any updated information on the percentage of government ownership of forest land in the coated paper investigation. Based on this evidence, the USDOC concluded that:

[100] United States' second written submission, para. 24 (referring to USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6).

[101] Appellate Body Report, *Brazil – Aircraft*, para. 157.

[102] Indonesia's panel request, para. 1; response to Panel question No. 2. See also para. 3.1 of this Panel Report.

[103] The parties differ on whether, under the stumpage programme, the GOI retains title to the standing timber cultivated by the private companies until the applicable stumpage fees are paid. (Indonesia's opening statement at the second meeting of the Panel, para. 14; United States' second written submission, para. 25). In the circumstances of this case, we need not decide this question.

[104] The USDOC explained that its Regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying benchmarks to determine whether a government good or service is provided for less than adequate remuneration. These potential benchmarks, the USDOC continued, are listed in hierarchical order of preference: (a) market prices from actual transactions within the country under investigation; (b) world market prices that would be available to purchasers in the country under investigation; or (c) an assessment of whether the government price is consistent with market principles. (USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 7-8).

> [T]he GOI clearly plays a predominant role in the market for standing timber. As such, we determine that there are no market-determined stumpage fees in Indonesia upon which to base a "first tier" benchmark. Furthermore, because standing timber cannot be imported, there are no actual stumpage import prices to consider.[105]

7.48. The USDOC then considered whether there were world market prices for standing timber and concluded that there were none given that standing timber cannot be traded across borders.[106] The USDOC next examined whether the GOI's stumpage fees were established in accordance with market principles. It also reached a negative conclusion in this regard.[107] The USDOC then looked for an appropriate proxy to determine a market-based stumpage benchmark. The USDOC relied on Malaysian log export price data from the WTA exclusive of shipments to Indonesia.[108] In the CFS investigation, the USDOC had used these same prices as the basis for the stumpage benchmark.[109]

7.49. Other than its allegations that the GOI does not provide standing timber discussed in paragraph 7.42 above, Indonesia does not disagree with the factual findings underlying the USDOC's conclusion that the GOI played a predominant role in the market for standing timber, i.e. Indonesia does not dispute that over 93% of timber harvested in the POI was from GOI land and that almost all of the forest land in Indonesia was owned by the GOI. Rather, Indonesia submits that the USDOC's conclusion of price distortion was improperly based solely on these factual findings. Given the undisputed evidence that the GOI was the predominant supplier of standing timber, the question before us is whether, considered as a whole, the USDOC's conclusion − which was primarily based on this predominant role of the GOI − is consistent with Article 14(d), in light of the circumstances of the case.

7.50. As we have noted above, the more predominant a government's role in the market, the more likely this role will result in the distortion of private prices.[110] In a situation where, as in the present case, the government's market share is 93.73%, the government's position in the market approaches that of a sole supplier of the goods.[111] Even in such a situation, an investigating authority should consider evidence regarding other factors that is on the record, e.g. evidence of private prices of the good at issue. However, the extent to which other evidence carries weight depends on how predominant the government's role is and on how relevant these other factors are.[112]

7.51. The United States submits that the USDOC considered, in addition to the GOI's market share, certain features of the market for standing timber that rendered it distorted, namely the fact that the GOI administratively set the stumpage fees, the Indonesian ban on log exports, the negligible level of log imports and the "aberrationally low" prices of log imports into Indonesia relative to the surrounding region.[113] For the United States, the USDOC's consideration of these factors, in addition to the GOI's predominant market share and control of virtually all harvestable land, established that the GOI actually possessed and exercised near-complete control over the domestic supply of timber, which depressed and distorted domestic market prices.

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[105] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 8. Indonesia does not take issue with the USDOC's finding that there were no actual stumpage import prices to consider.

[106] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 8.

[107] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.

[108] In explaining the use of log prices as the basis to determine a market-based stumpage benchmark, the USDOC observed that it was generally accepted that the market value of timber is derivative of the value of the downstream products. The USDOC explained that "[t]he species, dimension, and growing condition of a tree largely determine the downstream products that can be produced from a tree; the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is, in turn, derived from the demand for the products produced from those logs". (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9). Because the GOI dominated the Indonesian stumpage market and because the stumpage and pulpwood markets were inextricably intertwined, the USDOC considered it inappropriate to use import prices for pulpwood as a starting point to determine whether Indonesian stumpage prices reflect market prices. (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 10).

[109] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 8-10.

[110] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.52 (referring to Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 444).

[111] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 455.

[112] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 453.

[113] United States' first written submission, paras. 43 and 58; response to Panel question Nos. 9, 12, and 23.

7.52. Indonesia responds that the additional features of the market cited by the United States all pertain to the issue of market predominance or do not show price distortion, in particular because the USDOC's conclusion that the prices of log imports in Indonesia were "aberrationally low" was not based on a comparison of comparable products.[114]

7.53. We find it relevant that in the context of its benchmark analysis in the present investigation, the USDOC examined whether the stumpage fees charged by the GOI were set in accordance with market principles. The USDOC observed that the GOI established the stumpage fees as a percentage of the so-called "reference price of logs", which in turn was determined solely on the basis of domestic prices for logs during the POI. The USDOC concluded that the reference price for logs could not be considered to be market-based because, through its ownership of virtually all of Indonesia's harvestable forests, the GOI had almost complete control over access to the timber supply and because "the ban on the export of logs ban affect[ed] the price for logs". In addition, the percentage applied to the reference price to calculate the stumpage fees was administratively set by the GOI. Consequently, the USDOC concluded that the stumpage fees charged by the GOI, determined as a percentage of a non-market-determined reference price, were not based on market principles.[115]

7.54. While the USDOC did not explicitly link these considerations to its conclusion that there were no market-determined stumpage fees in Indonesia, in our view, this consideration of features of the market for standing timber in Indonesia went beyond merely the GOI's predominant role in the supply of standing timber. We consider that the USDOC's examination in a different part of its benefit analysis of the fact that the price at which over 93% of the standing timber in Indonesia was commercialized during the POI was not market-determined, informed the USDOC's analysis of whether in-country prices for stumpage could be used as the benchmark.[116]

7.55. Regarding evidence of private prices, unlike in the CFS investigation[117], in this case the USDOC did not refer in its determination to the fact that the GOI and APP/SMG supplied no information on private stumpage prices before reaching its determination that private prices for stumpage were not market-determined. However, there is no indication in the record that the GOI and APP/SMG presented arguments to the USDOC suggesting that it use private prices for stumpage in Indonesia as the benchmark, nor that they connected any evidence on the record to such arguments.

7.56. Nevertheless, Indonesia in this dispute argues that suitable data on private prices for standing timber paid to private owners in Indonesia during the POI was before the USDOC. Indonesia argues that APP/SMG reported fees it paid to private land owners for the use of their private forest land to plant, grow and harvest acacia, and that the USDOC gave no weight to this evidence. Indonesia submits that the USDOC did not pose further questions about this arrangement with private parties, suggesting it was satisfied with APP/SMG's response.[118] In addition, in reaction to the United States' arguments in this respect, Indonesia submits that the information provided by APP/SMG regarding this private arrangement, "answered all of the remaining questions USDOC asked" and that the USDOC was required to make its own determination irrespective of how APP/SMG had characterized the price paid to individuals owning private land. Indonesia also submits that the fact that the arrangement concerned small quantities does not mean that prices could be disregarded.[119]

7.57. The United States submits that neither the GOI nor APP/SMG placed on the record any data concerning private prices for stumpage in Indonesia. Moreover, the United States submits that the

[114] Indonesia's opening statement at the first meeting of the Panel, paras. 30-33.
[115] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.
[116] Indonesia submits that since the stumpage fees were determined with reference to domestic market prices for logs, they were market-driven. (Indonesia's opening statement, para. 22). Indonesia, however, has not persuaded us that the USDOC erred in concluding that the stumpage fees were not market-determined in light of undisputed evidence that the government set the percentage to be applied to the reference price, which was also based on the domestic prices for logs subject to the log export ban.
[117] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 19.
[118] Indonesia's opening statement at the second meeting of the Panel, para. 16. Indonesia maintains that this evidence showed that APP/SMG paid higher fees for acacia harvested from a GOI concession than from the private forest. (Indonesia's response to Panel question No. 11, fn 13 (referring to Excerpt from APP/SMG Initial Questionnaire Response, pp. 1, 25, 27, 29, and 30, (Exhibit IDN-25 (BCI)), pp. 27 and 29)).
[119] Indonesia's response to Panel question No. 78.

GOI provided information only on the volume of timber harvested from private forests during the POI, and APP/SMG reported only payments to the GOI (PSDH, DR, and PSDA fees).[120] The United States acknowledges that APP/SMG submitted certain information, but contends that the USDOC could not have used it for establishing the benchmark. According to the United States, APP/SMG identified only a single arrangement, concerning small quantities, under which one of its cross-owned companies rented land from private owners, on which the affiliate paid the expenses by growing and maintaining timber.[121]

7.58. During the investigation, the USDOC asked the GOI to report the value and volume of timber harvested on private land, to which the GOI responded that the only information it collected with respect to such timber was the total volume of timber harvested, i.e. it did not collect price information on timber harvested from private land.[122] The USDOC also asked APP/SMG to report fees and charges paid to private owners. Specifically, the USDOC initially requested APP/SMG to "provide a description of each type of arrangement for *private* timber harvested during the [POI]".[123] The initial questionnaire to APP/SMG also contains questions concerning public and private concession arrangements to harvest timber, including total quantity harvested, value of fees and charges paid to the GOI or the owner. These questions, in our view, seem to seek information concerning, as applicable, harvest of both public timber and private timber.[124] In response to the first question, APP/SMG submitted certain information concerning a private arrangement with individuals owning private land around the perimeter of its plantations, in the context of which one of its cross-owned forestry companies – PT. Wirakarya Sakti (WKS) – "pa[id] the private owners a fee of 20,000 IDR per ton of acacia harvested".[125] In response to the subsequent questions, APP/SMG reported information concerning the stumpage fees it paid to the GOI during the POI, and did not mention or report any fees paid by WKS for private timber harvested during the POI.[126]

7.59. In light of these answers, we agree that there was some information regarding prices for timber harvested on land owned by individuals not related to the GOI before the USDOC. However, APP/SMG's own description of the data concerning these payments suggests that APP/SMG itself

[120] United States' response to Panel question Nos. 10-11.

[121] The United States questions the value of that information because it: (a) was based on "a small quantity"; (b) was not reflected in the stumpage payment records APP/SMG provided to the USDOC; (c) was not substantiated by any contract or other documentation; (d) was not confirmed to be arm's-length; and (e) was based on an atypical type of commercial activity that was arranged merely because the private individual's land abutted the cross-owned company's plantation. The United States adds that APP/SMG did not characterize the payment as a "stumpage fee", but instead stated that it was a "pure rental payment" and provided conflicting information regarding whether it was the private individuals or the APP/SMG affiliate involved (WKS) that grew the timber. (United States' second written submission, paras. 30-34).

[122] GOI Initial Questionnaire Response, (Exhibit US-32), pp. 17-18.

[123] APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), p. 27, appendix 2, question (c). (emphasis added)

[124] Question (d) at pp. 27 and 28 asked APP/SMG the following:

> For each concession arrangement for public timber held by your company or a cross-owned company, and each arrangement to harvest private timber, please provide the following information for the POI:
>
> 1. For each species, the stumpage fee and the total quantity harvested and the value of fees and charges paid to the administering authority or owner.

(APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), pp. 27-28)
See also question 2 at p. 30: "For each species harvested under the concession arrangements or private arrangements, please provide a breakdown of the volume and the value of fees and charges paid to the administering authority or owner for logs that went to: a. pulp and paper mills". (APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), p. 30).

[125] Specifically, APP/SMG responded:

> TK, IK, PD, and the cross-owned forestry companies generally did not harvest timber from private lands during the POI. WKS purchased a small quantity of logs from private individuals in villages from the Jambi region, who individually grow trees on their private land. These individuals own private land around the perimeter of the WKS plantations. During 2008, these purchases represented [[***]] of total AA and WKS sales of [[***]]. The arrangement with these private owners is that WKS plants the acacia, incurs all the expenses to maintain the trees, and then incurs all the costs to harvest the trees. WKS pays the private owners a fee of 20,000 IDR per ton of acacia harvested. Since WKS incurs all the expense, this fee is a pure rental payment for the use of the land to grow the trees.

(APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), p. 27, cited in Indonesia's response to Panel question 78(a))

[126] APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), pp. 28-34.

did not consider that they were representative of the private stumpage market − APP/SMG indicated that "generally [it] did not harvest timber from private lands during the POI" and that the payments corresponded to a small quantity of logs − and did not refer to these payments when subsequently asked to report all the stumpage fees it had paid during the POI. This being the case, we consider that there was no meaningful information concerning private prices for standing timber before the USDOC.

7.60. Indonesia suggests that the USDOC should have sought more evidence from other sources, e.g. other companies, in order to assess whether the GOI possessed and exercised market power so as to distort private stumpage prices. Indonesia submits that the USDOC structured its entire investigation around the mistaken premise that the GOI was a provider of standing timber because the USDOC was blinded by the GOI's ownership of the forests. Indonesia argues that had the USDOC undertaken a good faith analysis based on the facts before it, the USDOC's investigative path should have been altogether different.[127] The United States submits that the SCM Agreement does not obligate investigating authorities to collect data from non-interested parties, and that the USDOC complied with its obligations by asking parties participating in the investigation to provide such information.[128] We are not convinced that Article 14(d) requires the types of investigative actions Indonesia proposes. In our view, given the near absence of a private market for standing timber in Indonesia, and the fact that APP/SMG was the main producer, and the company selected for examination, it was reasonable for the USDOC to limit its requests for information on private prices to the GOI and APP/SMG, and not to seek to obtain such information from sources not participating in the investigation.

7.61. In the circumstances of this case, in particular the characteristics of the market for standing timber in Indonesia and the evidence before the USDOC and which has been placed before the Panel, in our view, an unbiased and objective investigating authority could have reached the conclusion − as the USDOC did − that there were no market-determined in-country private prices for stumpage that could be used for benchmarking purposes. In particular, the fact that the GOI was the predominant supplier of timber harvested during the POI − with over 93% of the market − made it likely that private prices would be distorted and that owners of private land would align their prices for the harvesting of standing timber to those established by the GOI, particularly in light of the USDOC's conclusion that the GOI fees were not market-determined. In this respect, we consider that the position of the government in the market of standing timber was much closer to that of a sole supplier than to that of a significant supplier of this good. In our view, in such a situation, other evidence would carry limited weight. In addition, we have concluded that there was not meaningful evidence on the record of private prices for stumpage in Indonesia. Moreover, as noted above[129], the record does not indicate that the parties presented arguments to the USDOC suggesting that it use private stumpage prices as the benchmark, or that they submitted evidence to that effect. In light of the foregoing, we consider that the USDOC did not err in concluding that the GOI's involvement in the market for standing timber resulted in an absence of market-determined private stumpage fees in Indonesia upon which to base the benchmark.[130]

7.62. For the foregoing reasons, we conclude that Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using domestic prices for standing timber in Indonesia as the basis for calculating the benchmark.

[127] Indonesia's response to Panel question Nos. 10-11.
[128] United States' response to Panel question No. 11.
[129] Para. 7.55.
[130] Indonesia relies on the Appellate Body Report, *US − Countervailing Measures (China)*, for the proposition that the USDOC erred by not having explained "whether and how the mentioned market shares held by … [the GOI] actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers [of standing timber] aligned their prices with those of the government-provided goods". (Indonesia's first written submission, para. 42 (quoting Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.101)). The *US − Countervailing Measures (China)* dispute involved the provision of inputs by state-owned enterprises (SOEs). In this context, the Appellate Body found that the USDOC failed to explain "whether and how the mentioned market shares held by SOEs actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods". Thus, the Appellate Body dealt with a particular situation in which goods were provided by SOEs, requiring a demonstration that "market shares held by *SOEs* actually resulted in the government's possession and exercise of market power" (emphasis added). We do not understand the Appellate Body to have concluded that a similar demonstration is required in other circumstances such as where the government itself is a supplier of the goods at issue.

7.5.2.4 The USDOC's finding that there were no market prices for logs in Indonesia upon which to base the benchmark

7.63. Indonesia claims that the USDOC's determination of benefit with respect to the log export ban suffers from the same WTO-inconsistency as the benefit determination for the provision of standing timber: the USDOC refused to use market prices in Indonesia as a result of a *per se* determination of price distortion based solely on the GOI's predominant market share of timber harvested from public forests.[131] Indonesia submits that the USDOC had information on in-country prices for logs which it chose not to examine. In this regard, Indonesia argues that APP/SMG placed on the record prices of some of its affiliates' purchases and sales of timber from affiliated and unaffiliated parties, and the names and addresses of APP/SMG's unaffiliated log suppliers.[132]

7.64. In addition, Indonesia takes issue with the USDOC's findings regarding the purpose and effects of the log export ban. Indonesia submits that the USDOC improperly found that the purpose of the log export ban was to develop downstream industries and that this meant that forestry/harvesting companies were directed to provide inputs to pulp and paper companies at low or supressed prices.[133] Indonesia submits that the ban does not create oversupply or result in low prices for inputs used by Indonesian paper producers.[134] Indonesia submits that the ban was created to confront the growing problem of deforestation and illegal logging in Indonesia.[135] Indonesia adds that the export of the downstream products used to make paper − pulp, chipwood, and wood chips − was not prohibited.[136] Therefore, if the purpose of the ban was to benefit paper producers, it made no sense to allow these downstream products to be exported.[137] Indonesia, in addition, challenges the relevance of the evidence the USDOC, in the CFS investigation, relied upon in its findings of the purpose and effects of the ban.[138] Indonesia submits that, even if the effects of the ban were an increased domestic supply of logs, potentially benefitting downstream industries in Indonesia, the panel in *US − Export Restraints* and subsequent panels found that export restraints, including export bans, do not constitute countervailable subsidies within the meaning of the SCM Agreement.[139] In response to the United States' arguments in this respect, Indonesia argues that the USDOC's discussion of the purpose of the log export ban was not limited

[131] Indonesia's first written submission, para. 45 (referring to Excerpt from USDOC Issues and Decision Memorandum, pp. 1-20 and 48-56, (Exhibit IDN-10), p. 13); opening statement at the first meeting of the Panel, para. 4.

[132] Indonesia's response to Panel question Nos. 11, 15 and 17 (referring to Exhibit D-8 to APP/SMG Questionnaire Response in Anti-Dumping investigation, (Exhibit IDN-27 (BCI)); and Exhibit SD3-9 to APP/SMG Questionnaire Response in Anti-Dumping investigation, (Exhibit IDN-28 (BCI))); closing statement at the first meeting of the Panel, para. 3.

[133] Indonesia's first written submission, para. 44 (referring to Excerpt from USDOC Issues and Decision Memorandum, pp. 1-20 and 48-56, (Exhibit IDN-10), p. 13; and Excerpt from CFS USDOC Issues and Decision Memorandum, pp. 1, 27-28, and 40-46, (Exhibit IDN-12), p. 27. Indonesia also takes issue with the fact that the USDOC's discussion of the purpose of the ban in the CFS investigation refers to a WTO trade policy review, which Indonesia considers cannot properly serve as a statement of policy.

[134] Indonesia's opening statement at the first meeting of the Panel, para. 25.

[135] Indonesia's first written submission, para. 44 (referring to Regulation of Minister of Trade of the Republic of Indonesia, No. 20/M-DAG/PER/5/2008, (Exhibit IDN-13), Article 3).

[136] Indonesia indicates that the logs that a forestry company harvests to sell to a pulp mill are called "chip wood" (or "chipwood"), and that the 2001 Joint Decree imposing the ban was amended in 2003 to allow chipwood to be exported. Indonesia also submits that the ban never applied to wood chips or pulp, which together with chipwood, constitute the inputs for making paper. (Indonesia's first written submission, paras. 11, 13, 44, and 79; opening statement at the first meeting of the Panel, paras. 25, 38-39, and 52; response to Panel question Nos. 21(a), 73(a), and 80; second written submission, paras. 22, 28-29, and 47; and opening statement at the second meeting of the Panel, paras. 2, 21, and 33).

[137] Indonesia submits that if the log export ban had distorted the price of wood used as an input to make paper, sellers of logs were free to turn that wood into chips (or pulp) and export that product. (Indonesia's opening statement at the second meeting of the Panel, para. 23).

[138] Indonesia's opening statement at the first meeting of the Panel, paras. 38-40. Indonesia takes issue with the fact that, in its view, the USDOC relied on studies that concerned another industry, pertained to a period preceding the POI, and/or emanated from the domestic industry and are not on the record of this proceeding.

[139] Indonesia's first written submission, para. 44 (quoting Panel Reports, *US − Export Restraints*, para. 8.75; *China − GOES*, para. 7.90; and *US − Countervailing Measures (China)*, para. 7.401); response to Panel question No. 6.

to the financial contribution issue but extended to its benefit analysis because the USDOC concluded that, due to the ban, APP/SMG purchased inputs at below-market prices.[140]

7.65. The United States submits that the USDOC's decision to resort to an out-of-country benchmark was based on record evidence of the GOI's predominance as a supplier of logs and owner of harvestable forests. In addition, the United States submits that the empirical evidence on the record, in particular Malaysian export prices to Indonesia and the surrounding region, confirmed that Indonesian domestic log prices were, in fact, distorted because shipments of logs to Indonesia were at prices lower than shipments to other destinations in the region. The United States submits that the information referred to by Indonesia regarding prices for logs in Indonesia was submitted by APP/SMG in the context of the parallel anti-dumping investigation and, therefore was not on the record of the countervailing duty investigation. In addition, the United States requests that the Panel find that Indonesia's arguments concerning the purpose and the effects of the export ban are outside its term of reference, as they do not relate to issues under Article 14(d), but rather refer to issues concerning the existence of a financial contribution under Article 1.1(a) − and Indonesia's panel request sets out no claim under Article 1.1(a).[141] The United States nevertheless responds to Indonesia's arguments that the log export ban does not constitute a "financial contribution" and submits that the USDOC correctly determined that the export ban constituted a countervailable subsidy.[142]

7.66. As indicated above[143], in its final determination, the USDOC relied on its findings in the CFS investigation and found as it had in the earlier case, that the prohibition on log exports "constituted a financial contribution … through the GOI's entrustment and direction of forest/harvesting companies to provide goods (i.e. logs and chipwood)" to companies in the pulp and paper producing industries. The USDOC indicated that it would assess whether the log export ban conferred a benefit by comparing the price paid by APP/SMG for the logs it purchased during the POI from unaffiliated logging companies to a benchmark price based on world market prices. The USDOC used, as the basis for its benchmark, the same data that it had used in determining the benefit conferred by the stumpage programme − that is, Malaysian export prices for acacia pulpwood and mixed tropical hardwood from the WTA, exclusive of shipments to Indonesia.[144] While the final determination does not lay out the USDOC's reasons for not using in-country prices for logs, the preliminary determination sets forth the reasons for its decision in this respect.[145] In the preliminary determination, the USDOC explained its conclusion that there were no meaningful or usable private domestic prices for logs or actual import prices to evaluate for purposes of establishing the benchmark:

> In the instant case, there are no meaningful or usable private domestic prices for logs or actual import prices to evaluate for purposes of identifying a "first tier" benchmark (*i.e.*, market prices from actual transactions within the country under investigation). As discussed above, the GOI did not place any updated information on the record concerning the fact that the GOI owns 99 percent of the harvestable forest land in Indonesia. … Furthermore, the GOI reported that the harvest from privately owned forest lands is 2,007,156 m3 out of a total of 31,984,443 m^3 (or only 6.27 percent) of the total harvest. … We also note that all logs, including logs harvested from private land, are subject to the export ban. Therefore, because of the GOI's predominant role in the Indonesian market for logs, we find that it is not possible to determine a private domestic log benchmark price in Indonesia … for the GOI's log export ban. Accordingly, Indonesian import prices likewise would not reflect market prices.[146]

[140] Indonesia's response to Panel question No. 6 (referring to Excerpt from USDOC Issues and Decision Memorandum, pp. 1-20 and 48-56, (Exhibit IDN-10), p. 12).

[141] See also para. 7.12 above, concerning the United States' request for a preliminary ruling in this respect.

[142] United States' first written submission, paras. 84-91.

[143] Para. 7.26.

[144] USDOC, Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[145] In response to a question from the Panel, the United States indicated that the basis for using world market prices rather than an in-country benchmark is contained in the preliminary determination. (United States' response to Panel question No. 70). We do not understand Indonesia to dispute that the preliminary determination provided the rationale for the USDOC's decision not to resort to in-country prices in the final determination. (Indonesia's comments to United States' response to Panel question No. 70).

[146] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10769.

7.67. With respect to Indonesia's allegation that the USDOC based its conclusion that there were no market-based prices for logs in Indonesia solely on the GOI's market share and ownership of harvestable lands in Indonesia, we note that, in addition to these considerations, the USDOC observed that "all logs, including logs harvested from private land, [were] subject to the export ban". This consideration clearly forms part of the basis for the USDOC's conclusion that it was not possible to determine a private domestic log benchmark price in Indonesia.

7.68. It is undisputed that the scope of the log export ban covered all logs produced within Indonesia, i.e. those harvested from private land and those harvested from public land.[147] As we have noted before, the USDOC determined that the log export ban constituted a financial contribution because, by means of the ban, the GOI entrusted and directed domestic log suppliers to provide logs and chipwood.[148] In the CFS investigation, the USDOC based this conclusion on the provision of logs and chipwood at "lower" or "suppressed" prices to pulp and paper producing industries.[149] Contrary to Indonesia's suggestion[150], the USDOC did not, either in the CFS or in the coated paper investigation, establish that a benefit was conferred on the basis that the prices of the logs and chipwood provided were "lower" or "suppressed". As we have noted above, the USDOC established that a benefit was conferred by comparing the price paid by APP/SMG for the logs and chipwood it purchased during the POI from unaffiliated logging companies to an (out-of-country) benchmark.

7.69. In our view, it logically followed from the manner in which the USDOC defined the measure at issue that all log sales in Indonesia constituted the financial contribution (government provision of goods) that needed to be tested against a market-based benchmark. In other words, given the financial contribution at issue, there logically remained no Indonesian "private" log market unaffected by the financial contribution. We recall that in cases where the government is the sole supplier of the good at issue or where it administratively sets all the prices, in-country prices would not provide an appropriate benchmark and therefore Article 14(d) does not require an investigating authority to rely on in-country prices in such situations.[151] Logically, a similar reasoning applies in the case of an export ban which affects all domestic transactions. Consequently, the nature of the financial contribution defined by the USDOC implied that there were no domestic private transactions that could be used as the benchmark.

7.70. This meant that there were no log prices in Indonesia outside of the scope of the log export ban that could have been used for benchmarking purposes. While Indonesia considers that the USDOC was required to determine whether domestic price for logs were actually distorted as a consequence of the export ban[152], accepting Indonesia's position would lead to an assessment whether the price charged by the government − that is, the remuneration itself − was distorted. We do not see how that assessment could be meaningful for determining the adequacy of that remuneration, which requires a comparison of the government price, i.e. the level of remuneration in question, with a market-based price.

7.71. Moreover, we understand Indonesia to argue that the USDOC acted inconsistently with Article 14(d) by improperly determining that a benefit was conferred because prices were "lower" or "suppressed" and that these conclusions were not sufficient to establish that domestic prices were distorted. It is in this context that Indonesia makes arguments related to the purpose and effects of the log export ban, the fact that it did not extend to downstream products, and the fact

[147] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10769; Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), appendix 1, pp. 2 and 5. We note that in the CFS investigation, the USDOC considered that the complete ban on the export of logs had been in place since 1985, with the exception of a short period of time from 1998 to 2001. (CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 29).

[148] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[149] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 12-13 (referring to CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 27). See also CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 32.

[150] Indonesia's response to Panel question No. 6; opening statement at the second meeting of the Panel, para. 23.

[151] Panel Report, *US − Softwood Lumber IV*, para. 7.57 (quoted in Appellate Body Report, *US − Softwood Lumber IV*, para. 98).

[152] Indonesia submits that the mere existence of a ban does not necessarily affect prices; whether a measure distorts prices for all sales of the good concerned (i.e. impacts them) is precisely what must be determined based on an examination of the evidence rather than a *per se* determination. (Indonesia's response to Panel question No. 73(a)).

that, in its view, prior disputes established that export restraints cannot constitute countervailable subsidies within the meaning of the SCM Agreement.

7.72. We recall that the issue of the effects of the log export ban was briefly discussed by the USDOC in the investigation at issue here, in the context of its financial contribution analysis. The USDOC referred to its prior findings in the CFS investigation that one purpose of the log export ban was to develop downstream industries, which was why it had determined that the GOI entrusted and directed domestic log suppliers to sell logs and chipwood at suppressed prices to domestic consumers.[153] In the CFS investigation, the USDOC had found that:

> [T]he totality of the record evidence refutes the GOI's claim that the log export ban is used to protect forest resources and prevent illegal logging, and that it is not "entrusting or directing" (or inducing) log suppliers to provide a financial contribution to the wood processing industries. To the contrary, these studies show that the GOI imposed or maintained the log export ban in order to provide lower priced inputs (i.e., logs and chipwood) to the industries that consume those inputs, which actually led to increased deforestation and greater illegal logging. Furthermore, these studies show that the pulp and paper industries are among the few beneficiaries of this indirect subsidy. Accordingly, we find that the GOI used its authority to impose a log export ban that directed these logs suppliers, under threat of criminal sanctions, to provide logs and chipwood for less than adequate remuneration to downstream wood processing industries. These industries include the pulp and paper industry that produces subject merchandise. As such, the log export ban provides a financial contribution in accordance with section 771(5)(D)(iii) of the Act.[154]

7.73. In our view, Indonesia's allegations that the USDOC erred in finding that the log export ban had an impact on domestic prices for logs by suppressing them effectively challenges the USDOC's finding that, by banning the export of logs, the GOI entrusted and directed domestic log suppliers to sell lower-priced logs and chipwood to paper producers. We recognize that, because the benefit conferred by a financial contribution is determined based on the nature of the financial contribution, an improper determination of the financial contribution would impact the methodology used to calculate the benefit. However, in the present dispute, Indonesia has not advanced any claims against the USDOC's financial contribution determination in respect to the log export ban under Article 1.1(a) of the SCM Agreement. As a consequence, we decline to address Indonesia's arguments in this respect as they relate to an issue that is not properly before us. In sum, we find that Indonesia's arguments regarding the purpose and effects of the log export ban are not relevant to its claim under Article 14(d) concerning the determination of the benchmark. We are required to consider Indonesia's challenge to the USDOC's benefit determination on the premise that the USDOC properly found that the GOI's log export ban constituted a financial contribution in the form of entrustment and direction. Consequently, we express no views on the USDOC's finding that the log export ban constituted a financial contribution in the form of entrustment or direction of domestic log suppliers to sell logs to domestic consumers.

7.74. In addition, Indonesia argues that if the log export ban does not constitute a financial contribution neither can it bestow or "confer" a benefit under Article 14(d) of the SCM Agreement. For Indonesia, there must be a "causal link "between the "provision of goods … by a government" and any "benefit" or, otherwise, no benefit is "conferred by" a financial contribution by the GOI. While we agree that there is a connection between the financial contribution and the manner the investigating authority determines the benefit, without a claim challenging the financial contribution, it is not within our jurisdiction to address this aspect of the USDOC's determination.[155] There is no support in WTO jurisprudence for the proposition that a "causal link" between the financial contribution and the benefit must be found, such that, even in the absence of a specific claim under Article 1.1(a) of the SCM Agreement, a claim challenging a benefit determination allows a panel to also resolve issues related to the existence of a financial contribution.

7.75. Similarly, we consider that Indonesia's arguments regarding the product scope of the ban during the POI, i.e. whether the export of certain downstream products was also prohibited, are

[153] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[154] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 32. (emphasis original)
[155] Indonesia's response to Panel question No. 6.

not relevant to our assessment. As indicated above, Indonesia submits that during the POI the log export ban did not apply to certain "downstream products" − namely, chipwood, wood chips and pulp − which in Indonesia's view means that the log export ban did not distort domestic prices for logs. Indonesia submits that the 2001 GOI Joint Decree of the Ministry of Forestry and the Ministry of Industry and Trade of Indonesia was amended in 2003 to exclude the export of chipwood, and that the log export ban never prohibited exports of wood chips and pulp.[156]

7.76. We understand Indonesia to argue that, because the export of certain downstream products was allowed during the POI, the log export ban could not have had the distortive effects on domestic prices that the USDOC found it had. We recall that the USDOC found that by means of the export ban, the GOI supplied logs *and chipwood* through government-entrusted or -directed companies. Therefore, Indonesia's allegation that the ban did not apply to chipwood effectively challenges the USDOC's financial contribution determination − particularly the USDOC's determination of the goods that were provided by the GOI − which is matter regulated by Article 1.1 of the SCM Agreement. We recall that Indonesia has not challenged the USDOC's financial contribution determination with respect to the log export ban. Moreover, in our view, even if the export of wood chips and pulp had been allowed during the POI, this would not have made the use of domestic log prices appropriate as this would not change the fact that the export ban applied to all logs produced in Indonesia and, for this reason, the use of domestic log prices would have rendered the comparison required under Article 14(d) circular. In other words, we consider that, even if the export ban had had a lesser impact on domestic log prices given the absence of a prohibition to export certain downstream products, domestic log prices could not have been used as the benchmark, as they constitute the prices at which the GOI, through government-entrusted or -directed entities, provided the goods at issue.

7.77. Moreover, Indonesia's arguments regarding the findings of the panel in *US − Export Restraints* are not relevant to the issue of the determination of the benchmark because those findings were limited to the question of whether an export restraint (as defined by the complainant in that case) constituted the provision of a good by entrustment or direction within the meaning of Article 1.1(a)(iv) of the SCM Agreement and, thus, a financial contribution. Likewise, the findings of the panels in *China − GOES* and *US − Countervailing Measures (China)* cited by Indonesia pertain to the issue of financial contribution.[157] As Indonesia has not advanced any claim under Article 1.1(a), the decisions of these previous panels are not relevant to the issues before us in the present dispute. We recall that since the issue is not before us, we express no views as to whether the USDOC's finding that the export ban constituted a financial contribution was consistent with Article 1.1(a) of the SCM Agreement. Thus, as discussed above, we must, in our analysis of Indonesia's claims under Article 14(d), assume that the export ban constitutes a financial contribution in the form of the provision of goods, and must therefore analyse the consistency of the USDOC's determination on that basis.

7.78. The parties disagree as to whether the USDOC had information on private prices of logs that it should have used for determining the benchmark. It is clear to us that there was ample evidence of private domestic and import log prices on the record. Indeed, the USDOC determined the benefit conferred by the log export ban by comparing the price of private log transactions between APP/SMG and unaffiliated private entities to the WTA data concerning Malaysian export prices. Moreover, the record before the Panel suggests that most, if not all, log sales in Indonesia were between private entities. However, as indicated above, the fact that all logs in Indonesia were subject to the export ban rendered these domestic log prices unsuitable for benchmarking purposes.

7.79. Indonesia also faults the USDOC for having rejected log import prices in its benefit analysis. Indonesia submits that absent evidence that the import price data does not reflect an arm's length transaction, the transaction reflects the price at which an out-of-country supplier is willing to sell the good in question to a purchaser in the country. In Indonesia's view, the very fact that imports took place, even in small volumes, confirms that the Indonesian prices were not distorted.[158] According to the United States, where government intervention has distorted the prices in a

[156] See para. 7.64 and fn 136.

[157] Panel Reports, *US − Export Restraints*, para. 8.21; *China − GOES*, para. 7.90; and *US − Countervailing Measures (China)*, para. 7.401.

[158] Indonesia's opening statement at the first meeting of the Panel, para. 35; opening statement at the second meeting of the Panel, para. 19; and response to Panel question No. 73.

domestic market, the distortion will affect any private sales, that is, both private sales of domestically-produced logs and imported logs.[159]

7.80. In our view, import prices could also be used as the basis for establishing an in-country benchmark under Article 14(d). The USDOC assessed whether import prices into Indonesia could be used as the basis for the benchmark calculation. In its consideration of whether in-country prices could be used as the benchmark, the USDOC concluded that Indonesian import prices would not reflect market prices given the GOI's predominant role in the market, i.e. the fact that nearly all timber was harvested on public lands, that the GOI owned almost the totality of the harvestable forest land in Indonesia, and the fact that all logs, harvested from private and public lands, were subject to the export ban.[160] In the same vein, in its assessment of the benchmarks based on Malaysian export prices, the USDOC considered that shipments to Indonesia were an inappropriate source for a benchmark as they were distorted.[161] It therefore excluded such shipments from the Malaysian export data that it used as benchmark.[162] The USDOC explained that, in the case at issue, only two undisputed factors were necessary to demonstrate overwhelmingly the predominance of the GOI in the Indonesia timber market: that over 93% of the harvest volume during the POI was from government-owned land, and imports were less than 1% of the timber produced domestically. The USDOC considered that foreign shippers would have to match the prices of the overwhelming majority of transactions distorted through government action. The USDOC added that this conclusion was "borne out by the data on the record, demonstrating a significant price difference between Malaysian exports of acacia to Indonesia and Malaysian exports of acacia to other countries in the surrounding region".[163] In this respect, the USDOC took the view that export data before it revealed a significant difference between import prices into Indonesia and the prices of exports from Malaysia to other countries in the surrounding region.[164] In particular, the USDOC considered that "Indonesian domestic prices [were] in fact distorted, and … trading [took] place at prices significantly lower than those found in the surrounding region for the identical timber."[165]

7.81. As just noted, the USDOC based its decision not to use import prices on the fact that the GOI dominated the market for logs and the fact that the log export ban applied to all logs in Indonesia. We consider that the fact that the log export ban applied to all logs in Indonesia and the fact that, as noted by the USDOC, import quantities were minimal (less than 1%) relative to domestic production made it likely that import prices would have to match the government prices and consequently, would not be usable as benchmark. This therefore provided a reasonable basis for the USDOC's decision.[166] Consequently, in our view, the analysis conducted by the USDOC as described above was sufficient to conclude that import prices of logs were also distorted.

7.82. Finally, we note that Indonesia asserts that the WTA data does not reflect sales of logs that would be used to make pulp, that is, the logs and log prices relevant to the underlying investigation, but rather refers to a different type of product (furniture wood with a very high price

[159] United States' response to Panel question No. 70(a).
[160] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10769 (emphasis added). See para. 7.66 above.
[161] As indicated above, para. 7.27 and 7.66, the USDOC relied on an out-of-country benchmark to determine the benefit conferred by the log export ban. The USDOC used as the basis for determining the benchmark Malaysian export prices for acacia pulpwood and mixed tropical hardwood, exclusive of shipments to Indonesia (i.e. log imports to Indonesia were excluded).
[162] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 28, 32, 34, 36, and 40.
[163] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 31-32.
[164] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 27 and 32. The USDOC considered that, given the distortion in import prices into Indonesia, "it should not be surprising that figures based on shipments to Indonesia are obviously lower than prices for goods shipped elsewhere, such as the WTA data, based on Malaysian shipments to all destinations besides Indonesia, indicates". (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 40).
[165] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 27.
[166] We note that in the *US – Anti-Dumping and Countervailing Duties (China)* dispute, in which the government's market share amounted to 96.1%, the Appellate Body, in its assessment whether the USDOC acted inconsistently with Article 14(d), appears to have given some positive consideration to the fact the USDOC had considered the role of imports in the market, noting that the USDOC had concluded that import quantities (3% of the market) were small relative to domestic production. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455).

instead of pulp wood).[167] The United States rejects Indonesia's assertion that the out-of-country benchmark selected by the USDOC based on WTA data referred to a different type of product.[168] Given that the USDOC used evidence regarding actual price difference between shipments into Indonesia and other markets merely to corroborate its conclusion that import prices did not constitute an appropriate benchmark, we need not address Indonesia's arguments that the products were not comparable.

7.83. In light of the foregoing, we find that an unbiased and objective investigating authority could have concluded, as the USDOC did, that import prices of logs did not constitute an appropriate benchmark.

7.84. For the foregoing reasons, we conclude that Indonesia failed to establish that the USDOC acted inconsistently with Article 14(d) by declining to use private prices for logs in Indonesia as the basis for calculating the benchmark.

7.5.2.5 Overall conclusion concerning Indonesia's claims under Article 14(d) of the SCM Agreement

7.85. In light of the foregoing, we find that Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for standing timber in Indonesia as the basis for establishing the benchmark for the provision of standing timber.

7.86. In addition, we find that Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for logs in Indonesia as the basis for establishing the benchmark for the log export ban.

7.5.3 Claim under Article 12.7 of the SCM Agreement ("facts available") with respect to the debt buy-back

7.5.3.1 Introduction

7.87. Indonesia challenges as inconsistent with Article 12.7 of the SCM Agreement the USDOC's finding that the GOI provided a subsidy to APP/SMG in the form of a debt buy-back. In particular, Indonesia challenges the USDOC's finding that Orleans was affiliated with APP/SMG, which the USDOC made on the basis of an adverse inference after concluding that the GOI had failed to cooperate in providing necessary information requested by the USDOC.[169]

7.88. Indonesia's claim pertains to the USDOC's determination that the sale of APP/SMG's debt to Orleans in 2004 by the Indonesia Bank Restructuring Agency (IBRA) constituted a subsidy in the form of debt forgiveness. Of relevance to Indonesia's claim, in the aftermath of the late 1990s financial crisis, the GOI took ownership of various banks, including their non-performing assets (loans and equity).[170] In 1998, to manage the restructuring of the Indonesian financial sector, the GOI created IBRA. IBRA managed several programmes to dispose of the assets that had been acquired by the GOI.[171] One of those programmes was the Strategic Asset Sales Program (PPAS), a special programme created in 2003 to sell assets of mixed packages of loans and/or equity that involved particularly large debt amounts, or that the GOI had identified as having particular social or economic significance. The assets of five companies were offered for sale through a bidding process in various phases of the PPAS programme. The initial PPAS programme involved the sale of the assets of four companies but did not result in any successful bids, and the assets were offered again in a new phase, referred to as "PPAS 2", which resulted in the sale of the assets of

[167] Indonesia's opening statement at the first meeting of the Panel, paras. 27 and 36; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 24 and 27.
[168] United States' opening statement at the first meeting of the Panel, paras. 17-20.
[169] Indonesia's first written submission, paras. 3 and 28.
[170] Excerpt from Part Two of GOI First Supplemental Questionnaire Response, pp. 22-38, (Exhibit IDN-14), p. 25; Indonesia's first written submission, para. 47; and United States' first written submission, para. 120.
[171] According to the GOI, IBRA sold 300,000 non-performing loans. (CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 44).

three of the four companies involved.[172] As explained in more detail below, the USDOC's decision to apply an adverse inference rested on the fact that, in the investigation at issue, the GOI failed to provide documentation that had been requested by the USDOC with respect to these three PPAS 2 sales.

7.89. The sale of APP/SMG's GOI-owned assets, which were composed only of debt, was managed subsequently and separately from the assets of the other companies because APP/SMG was in the process of restructuring its debt at the time of the initial PPAS and of the PPAS 2 biddings.[173] APP/SMG's asset portfolio consisted of a mix of loan instruments of various companies of the APP/SMG group, totalling approximately IDR 7.9 trillion.[174] Three companies submitted bids for this asset portfolio. Orleans, a company incorporated in the British Virgin Islands, won the bid and eventually purchased APP/SMG's debt for [[***]].[175]

7.90. According to the information before the USDOC, IBRA Regulation SK-7/BPPN/0101[176] prohibited IBRA from selling assets that were under its control back to the original owner, or to a company affiliated with the original owner. To ensure that this prohibition was not violated, IBRA relied on representations by the buyer and the buyer's outside counsel that the buyer was not affiliated with the debtor. In addition, the sales contracts[177] and (at least for some of the sales) [[***[178] ***[179]]] provided for penalties in case IBRA discovered that the buyer was, in fact, affiliated with the debtor; in that case, the buyer would have to pay the entire value of the assets sold, and not only the amount agreed with IBRA. Moreover, Regulation SK-7/BPPN/0101 contained a provision allowing IBRA to, if necessary, conduct due diligence on the potential affiliation of the purchaser with the debtor.[180]

7.91. In the earlier CFS investigation, the USDOC had determined that the GOI provided a subsidy to APP/SMG in the form of debt forgiveness. In reaching this determination, the USDOC relied on facts available and applied an adverse inference to conclude that Orleans was affiliated with APP/SMG, on the basis that the GOI had not acted to the best of its ability to cooperate in the investigation by failing to provide, *inter alia*, Orleans' bid package (which would have revealed Orleans' ownership) and information regarding IBRA's internal procedures for reviewing and evaluating bid documents.[181] The USDOC considered that, in light of certain other evidence − a World Bank Report and press articles that suggested that Orleans was affiliated with APP/SMG − the requested documents were crucial for the evaluation of whether Orleans was in fact affiliated with APP/SMG. The USDOC also concluded that it was unable to evaluate the procedures followed by IBRA in the APP/SMG sale in order to determine whether normal procedures had been followed, or whether company-specific exceptions had been made in the case of the Orleans sale. The USDOC concluded that information on the record supported its finding of affiliation. In particular, the USDOC noted that the World Bank Report mentioned above indicated that "some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules"; that court records included speculation that the Widjaja family (owners of APP/SMG)

[172] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), responses to question No. 4, pp. 5-6, and No. 22(c), p. 16.
[173] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 9, p. 9.
[174] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 3(a), p. 3. Unlike the other companies in the PPAS programme, APP/SMG's asset portfolio did not include any equity.
[175] Exhibit 33 to Part Two of the GOI First Supplemental Questionnaire Response, (Exhibit IDN-41 (BCI)), p. 6), Article 1.1(15). Petitioners alleged that the value of APP/SMG's asset portfolio, and of the price paid by Orleans amounted, respectively, to approximately USD 880 million and 214 million. (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 17). Before the USDOC, the GOI stated that Orleans had paid USD [[***]] for APP/SMG's debt, which totalled USD [[***]] at the time of the purchase. (Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), internal exhibit 21, Appendix 4, question (e)).
[176] Exhibit 1 to GOI Third Supplemental Questionnaire Response, (Exhibit US-84).
[177] Excerpt from Part Two of GOI First Supplemental Questionnaire Response, pp. 22-38, (Exhibit IDN-14)/ Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), pp. 28, and 33-35; and [[***]]
[178] [[***]]
[179] [[***]]
[180] Exhibit 1 to GOI Third Supplemental Questionnaire Response, (Exhibit US-84), Article 3. As discussed below, during the course of the investigation, the GOI indicated that to the best of its knowledge, IBRA did not exercise this provision with regard to either the sale of APP/SMG's debt to Orleans, or the other assets sales, and that it relied on the buyers' statements of non-affiliation.
[181] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), pp. 40-46.

was buying up its own debt through third parties; and that news articles suggested that APP/SMG was "surreptitiously buying back its debt". In addition, the USDOC stated that during verification, it had met with an independent expert knowledgeable about the debt and banking crisis in Indonesia and that in the expert's opinion, it was likely that Orleans was related to APP/SMG or the Widjaja family.[182]

7.92. In its initial questionnaire to the GOI in the coated paper investigation, i.e. the one at issue in the present dispute, the USDOC requested that if the GOI disagreed with its conclusions in the CFS investigation concerning the debt forgiveness subsidy, it submit any relevant documents in this respect. In response, the GOI responded that it believed the USDOC's finding in the CFS investigation to be factually and legally incorrect. The GOI also stated that it would continue to review archived documents and would provide any new information that might develop.[183] In a supplemental questionnaire issued to the GOI on 29 January 2010, and to APP/SMG the following day, the USDOC requested that if they disagreed with its determination in the CFS investigation, they provide complete information about the APP/SMG's debt sale and provide documentation demonstrating that Orleans had no affiliation with APP/SMG. The USDOC also requested that the GOI provide it with Orleans' registration and bid package, including Orleans' articles of association showing its shareholders. In its response, submitted on 22 February 2010, the GOI explained that IBRA structured its bidding policy to ensure that only qualified parties would be allowed to bid. Requirements for bidding included: (a) the submission of a Letter of Compliance as part of the bid package, confirming that the bidder was not affiliated with the original debtor; (b) a contractual representation that served as a self-certification from the bidder that it was not affiliated with the original debtor; and (c) an opinion letter from outside counsel confirming the eligibility of the bidder to bid on the assets; the GOI provided these documents, as they pertained to the APP/SMG debt sale, as well as Orleans' articles of association, to the USDOC.[184]

7.93. In its 9 March 2010 preliminary determination, the USDOC recalled its findings in the CFS investigation. It stated that the identification of Orleans' shareholders was pivotal to its ability to analyse the alleged affiliation between APP/SMG and Orleans, and that Orleans' articles of association, which it had understood would reveal Orleans' shareholders in fact did not contain ownership information, and did not constitute sufficient new factual information to warrant changing its determination in the CFS investigation.[185] The USDOC indicated that, in addition, there was other information on the record "to indicate that Orleans is affiliated with APP/SMG". In this respect, the USDOC referred to the above-mentioned meeting between USDOC officials and the independent expert.[186] The USDOC indicated that based on its initial review of the documents, there appeared to be some gaps in the documentation and they raised additional questions about

[182] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), pp. 40-45. The expert also opined that it was not uncommon for hedge funds to set up special purpose vehicles for the purpose of participating in one particular deal and that these special purpose vehicles could easily be established in a way that would make their ultimate ownership unknowable.

[183] GOI Initial Questionnaire Response, (Exhibit US-32), response to question No. E, pp. 29-30.

[184] Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), response to question No. 59, pp. 34-36. In addition, at verification in the CFS investigation, GOI officials had informed the USDOC that the purchaser would be required, through the documentation it submitted, to establish that it was not affiliated with the company whose debt it was purchasing. In its response to the first supplemental questionnaire in the coated paper investigation, the GOI stated that these GOI officials were probably giving explanations based on their experience in other transactions in which the articles of association did in fact identify the owners. The GOI stated that it now had identified officials involved in the sale of APP/SMG's debt to Orleans who had not been present at verification in the CFS investigation, and who would be made available to answer the USDOC's questions at verification in the coated paper investigation. (Ibid. pp. 25-34; Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice), p. 10772).

[185] The USDOC also noted that the GOI was discounting statements made at the CFS verification by former IBRA officials that ownership information would be part of a purchaser's file. The USDOC found that those statements were more probative at that point in the investigation, because the officials were discussing overall IBRA procedures with which they were familiar, even though they may have not been the officials responsible for the PPAS.

[186] Petitioners in the coated paper investigation included in the petition and in their submissions to the USDOC the World Bank Report and the press articles mentioned above. These documents were provided to the Panel in Exhibit US-40. Petitioners also attached the Issues and Decision Memorandum to the USDOC's Final Determination in the CFS investigation to their petition, thereby placing the USDOC's discussion of its meeting with the independent expert in the CFS investigation on the record of the coated paper investigation. APP/SMG later placed on the record, as exhibit 52 to its First Supplemental Questionnaire Response, Part Two, the public version of the USDOC Memorandum reporting on the same meeting. It was submitted to the Panel as CFS Memorandum: Meeting with an Independent Expert, (Exhibit US-81).

how IBRA handled the APP/SMG sale. On this basis, it found that the documentation submitted by the GOI was not sufficient to overcome its determination in the CFS investigation that Orleans was affiliated with APP/SMG. It therefore preliminarily determined that the GOI's sale of APP/SMG's debt to an affiliate constituted a financial contribution, in the form of debt forgiveness, and that a benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it.[187]

7.94. Subsequently, in its third supplemental questionnaire, dated 29 April 2010, the USDOC requested that the GOI provide it with IBRA's internal guidelines for reviewing and evaluating bids under the PPAS programme; the "bid protocols" and terms of reference for PPAS debt sales; IBRA's due diligence requirements, internal guidelines and procedures; as well as all relevant documents pertaining to the winning bids for each of the other three sales under the PPAS programme. With respect to the latter, the USDOC requested that the GOI provide, in each case, the winning bidder's: (a) articles of association; (b) certificate of incorporation; (c) Statement Letter confirming that it would comply with the rules of the bid/sale process; (d) the Asset Sale and Purchase Agreement, including a representation of non-affiliation; and (e) the letter from outside counsel confirming the purchaser's compliance with the conditions of the debt purchase.[188] After receiving an extension, the GOI responded on 27 May 2010 that the documents pertaining to other PPAS sales were not available at that time, in addition to questioning their relevance to the question of Orleans' affiliation with APP/SMG. The GOI also indicated that IBRA's due diligence procedures were the same under the various PPAS sales and that the GOI approached its due diligence of possible buyers in the same manner in each PPAS sale.[189] The GOI stated that while IBRA had the legal authority to exercise further due diligence, IBRA had relied primarily "upon the contractual obligations and the enforceability of those provisions".[190] The GOI further stated that to the best of its knowledge, IBRA did not have any written internal due diligence guidelines for evaluating the documentation and other information submitted by potential bidders and had not been able to locate any such documents, and that "[t]here were no specific threshold factors that would necessarily trigger more in-depth due diligence of bidders."[191]

7.95. The USDOC again sought the same documents in its Fifth Supplemental Questionnaire, issued on 11 June 2010 and, in addition, asked further questions pertaining to whether IBRA had conducted due diligence in other PPAS and non-PPAS sales and whether it maintained any form of internal due diligence guidelines.[192] Moreover, on 18 June 2010, the USDOC transmitted to the GOI an outline for the verification that was to take place from 28 June to 1 July 2010, in which it identified the APP/SMG's debt buy-back as a verification item. The verification outline indicated that the GOI had outstanding questionnaire responses due on 22 June 2010 and that, depending on the USDOC's analysis of these responses, the outline might be amended, and that in case the USDOC deemed the GOI's responses unresponsive on some issues, those issues may be deleted from the verification agenda.[193] In its response to the Fifth Supplemental Questionnaire, the GOI responded that the documents concerning the other PPAS winning bids were still not available, but that it would "continue making its best efforts to collect and organize these documents so they will be available during the verification". The GOI submitted the bid protocol and terms of reference for the PPAS 2 programme. The GOI also repeated that it was not aware of any due diligence conducted regarding winning PPAS bidders, including in the APP/SMG's debt sale, and of any specific documentation regarding due diligence. It also reiterated that the USDOC could discuss these issues further with former IBRA officials at verification.[194]

[187] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), pp. 10071-10773.

[188] GOI Third Supplemental Questionnaire, (Exhibit US-41), question Nos. 5, 6, 7, 12, 17, 18, and 22(c).

[189] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 5, pp. 6-7).

[190] The GOI added that if IBRA had had a specific reason to suspect affiliation between a bidder and the debtor, it would have had the authority to investigate further, and would have undertaken further investigation. (GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 7, p. 8).

[191] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), responses to question Nos. 6, p. 7, and 7, pp. 7-8.

[192] GOI Fifth Supplemental Questionnaire, (Exhibit US-42), question Nos. 3, 4, 5, and 8.

[193] GOI Verification Outline, (Exhibit US-77).

[194] The GOI also stated that it could not confirm whether formal or informal inquiries or follow-up may have been made at the time of the sales, particularly as these activities had taken place several years ago, and

7.96. The USDOC informed the GOI on 24 June 2010 that it was cancelling verification of the debt buy-back issue because the GOI had not provided the information and documentation concerning the other PPAS sales. The USDOC explained that "[g]iven that the GOI has not provided the requested information and documentation, it has deprived the Department and other interested parties of the opportunity to examine this information before verification", and that "neither the Department nor interested parties can conduct a meaningful analysis or verification of the GOI's claims that information on the bidders' ownership structure was not required to be submitted to IBRA, or of other aspects of IBRA's standard operating procedures under the PPAS program."[195] The GOI and APP/SMG later asserted, in a letter that the GOI sent to the USDOC on 3 August 2010 and in a 17 August 2010 submission by the GOI and APP/SMG, that the GOI had succeeded in locating at least some of the requested documents on 26 June 2010, two days before verification was set to begin.[196]

7.97. In its final determination and the accompanying Issues and Decision Memorandum, the USDOC found that, as a result of the GOI's failure to provide the requested information pertaining to the other PPAS sales by the required deadlines, there was a hole in its record pertaining to IBRA's procedures under the PPAS programme, and that without information pertaining to other transactions, it could not "test" the GOI's claims that Orleans and APP/SMG were not affiliated. The USDOC considered that this information was necessary to ensure that IBRA followed normal procedures in the Orleans transaction in not inquiring further into the ownership of Orleans and its possible affiliation with APP/SMG. The USDOC further considered that the GOI had failed to act to the best of its ability in responding to the questionnaires as "[o]n balance, the GOI did not put forth its maximum efforts, despite its many protests to the contrary" and that "it was reasonable to expect the GOI to be more forthcoming with this information". On this basis, the USDOC drew an adverse inference to the effect that Orleans was affiliated with APP/SMG.[197] Consequently, the USDOC determined that the sale of APP/SMG's debt to Orleans constituted a financial contribution to APP/SMG in the form of debt forgiveness. The USDOC considered that APP/SMG's overall debt obligation was reduced by the difference between the amount of APP/SMG's debt held by IBRA and the amount that APP/SMG (through Orleans) paid for this debt because, through this sale, APP/SMG was effectively relieved of the liability of repaying its debt to an outside party; the USDOC determined that the transaction provided a benefit in the same amount. On this basis, the USDOC determined that the debt sale to Orleans provided a subsidy to APP/SMG, and that this subsidy was company-specific.[198]

7.98. Indonesia makes two principal arguments in its challenge of the USDOC's determination that Orleans was affiliated with APP/SMG: (a) the conditions for resorting to facts available under Article 12.7 of the SCM Agreement were not met; and (b) the "facts available" relied upon by the USDOC in its determination did not "reasonably replace" the information that the GOI allegedly failed to provide, as required by Article 12.7.

7.99. The United States requests that the Panel reject Indonesia's claim. The United States argues that the USDOC acted consistently with Article 12.7 in its determination that Orleans was affiliated with APP/SMG. The United States submits that the requirements for resorting to facts available under this provision were met and that the "facts available" that the USDOC used "reasonably replaced" the missing information.

7.5.3.2 Legal standard under Article 12.7 of the SCM Agreement

7.100. Article 12.7 of the SCM Agreement allows an investigating authority to make determinations on the basis of the facts available under certain conditions. It provides as follows:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or

that the underlying documents had already been archived. (GOI Fourth and Fifth Supplemental Questionnaire Response, (Exhibit IDN-16), responses to question No. 3, pp. 4-5, No. 4, p. 4, No. 5, pp. 5-6, and No. 8, p. 7).

[195] Letter to GOI regarding Verification, (Exhibit US-76).

[196] GOI Letter to USDOC Regarding IBRA, (Exhibit US-87); GOI and APP/SMG Case Brief to USDOC, (Exhibit US-44), pp. 62-63. The Letter states that the GOI "had finally located the remaining few documents and had them ready to be reviewed during the verification"; the Case Brief is less clear as to whether the GOI had located all or only some of the requested documents.

[197] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 52-55.

[198] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

> significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.101. The "process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record".[199] Thus, Article 12.7 is concerned with overcoming the absence of information required to complete a determination; it is not directed at mitigating the absence of "any" or "unnecessary" information.[200] Moreover, an investigating authority must use those "facts available" that "*reasonably replace* the information that an interested party failed to provide", with a view to arriving at an accurate determination.[201] The explanations and analysis provided in the determination must be sufficient to allow a panel to assess whether the facts available relied upon by the authority are reasonable replacements for the missing information.[202]

7.102. In addition, paragraph 7 of Annex II of the Anti-Dumping Agreement, which is relevant to the interpretation and application of Article 12.7[203], provides that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.5.3.3 Whether the conditions for resorting to facts available were met

7.103. We first consider Indonesia's argument that the conditions for resorting to facts available under Article 12.7 of the SCM Agreement were not met in this case.

7.104. Indonesia argues that the GOI acted to the best of its ability and cooperated with the USDOC's many requests for information by submitting all the necessary information requested by the USDOC on the issue of affiliation − i.e. the documents concerning Orleans and the debt sale to that buyer − as well as information on IBRA's internal procedures as it provided all evidence required under Indonesian law to certify that the debt sale in question was not to an affiliate.[204] Indonesia adds that the information requested by the USDOC relating to the other PPAS debt sales was not "necessary" to assess the APP/SMG sale and would not have shed light on affiliation because these sales involved different companies.[205] Thus, in Indonesia's view, this information was not "necessary" to assess the APP/SMG sale and the question of affiliation.

7.105. Indonesia also argues that information concerning Orleans' ownership was not missing; it was simply not part of the documents that IBRA required from buyers in the PPAS programme. Indonesia asserts that there were obstacles to the GOI's ability to cooperate, given that IBRA was dissolved in 2004, its records (which were not in electronic format) archived, and its employees released. Indonesia contends that the USDOC set a constantly moving target, which it used as a pretext for drawing an adverse inference. In particular, Indonesia argues that the USDOC waited before requesting information on the other PPAS sales even though it knew from the beginning of the investigation that it would require these documents. Indonesia argues that the "organic principle of good faith" embodied in Annex II of the Anti-Dumping Agreement restrains investigating authorities from imposing on interested parties burdens which are unreasonable in the circumstances.[206] Indonesia also takes issue with the fact that the USDOC cancelled verification of the Orleans transaction, noting in particular that the GOI had indicated that officials with knowledge of the transaction would be present at verification and that it would continue to

[199] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416.
[200] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416.
[201] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report *Mexico − Anti-Dumping Measures on Rice*, paras. 293-294). (emphasis by the Appellate Body in *US − Carbon Steel (India)*)
[202] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.421.
[203] Appellate Body Reports, *Mexico − Anti-Dumping Measures on Rice*, para. 295; *US − Carbon Steel (India)*, paras. 4.423 and 4.425.
[204] Indonesia's first written submission, para. 55; opening statement at the first meeting of the Panel, para. 46; and closing statement at the first meeting of the Panel, para. 5.
[205] Indonesia's first written submission, para. 65.
[206] Indonesia's first written submission, paras. 62-65 (quoting Appellate Body Report, *US − Hot-Rolled Steel*, para. 101).

search for the missing documents and would make them available at verification if they could be located.[207]

7.106. Finally, Indonesia considers that the application of facts available with an adverse inference is limited to situations in which the party possesses the requested information and withholds it. The facts of the underlying investigation did not permit USDOC to apply facts available with an adverse inference because Indonesia was not withholding the information from USDOC.[208]

7.107. The United States argues that the USDOC rightly found that the GOI failed to cooperate to the best of its ability such that an adverse inference was warranted.[209] In this respect, the United States considers that the phrase "does not cooperate" in paragraph 7 of Annex II of the Anti-Dumping Agreement, which informs the meaning of Article 12.7, is not limited to situations in which the party possesses the requested information and withholds it, but also covers other types of non-cooperation such as failing to provide information in a timely manner, failing to take steps to obtain requested information, or misrepresenting the meaning of certain information.[210]

7.108. The United States submits that the GOI was aware from the beginning of the investigation that affiliation would be an issue, that it had multiple opportunities and a reasonable period of time (seven weeks) to submit the information requested and did not request an extension of the deadline (as it could have), that the USDOC warned the GOI that it might resort to facts available if the GOI did not provide the information, and that Indonesia does not cite valid reasons for the alleged "difficulties" encountered in providing the information. The United States also submits that the USDOC did not create a "moving target". Rather, the focus of the USDOC's enquiries changed during the investigation because the documents concerning the Orleans transaction that were eventually provided by the GOI did not reveal Orleans' ownership, as expected. The documentation that was eventually provided by the GOI concerned IBRA's policies and did not allow the USDOC to confirm the extent of IBRA's efforts in other PPAS sales to identify the buyers' ownership and ensure that debtors did not buy back their own debt. The USDOC then altered its focus to test the validity of the GOI's assertions that IBRA had not inquired into Orleans' ownership beyond requiring Orleans' (and other purchasers') statements of non-affiliation, and that proceeding in this manner was consistent with IBRA's procedures and the level of diligence it applied in other PPAS sales. This is why the USDOC sought more information concerning IBRA guidelines and policies, as well as documents concerning the other PPAS transactions. The GOI provided documentation concerning the former, but this documentation did not allow the USDOC to confirm the extent of IBRA's efforts in other PPAS sales to identify the buyers' ownership and ensure that debtors did not buy back their own debt.[211]

7.109. The United States submits that the information sought was, in the absence of direct evidence of non-affiliation on the record, "necessary" for the USDOC to determine the plausibility of the GOI's assertions concerning IBRA's efforts in the Orleans sales and its level of diligence in other PPAS transactions, in particular its representation that IBRA acted in the Orleans sale in the same manner as in other PPAS sales, i.e. that it relied on statements of no affiliation from the buyer and did not carry out additional verifications. Thus, due to the GOI's failure to provide the requested information, necessary information was absent from the record and the USDOC appropriately resorted to Article 12.7 "to fill in gaps". Finally, the United States argues that it was appropriate for the USDOC to cancel the verification because the purpose of verification is not to review new evidence.[212]

7.110. We first consider whether the missing information requested by the USDOC – i.e. the documents pertaining to the other four PPAS sales[213] – was "necessary" within the meaning of Article 12.7.

[207] Indonesia's first written submission, paras. 57-59 and 63.
[208] Indonesia's response to Panel question No. 87.
[209] United States' first written submission, para. 150.
[210] United States' comments on Indonesia's response to Panel question No. 87.
[211] United States' first written submission, paras. 136-140 and 150-156.
[212] United States' first written submission, paras. 136-140 and 150-156.
[213] Winning bidder's articles of association, certificates of incorporation, and certifications that the winning bidder was not affiliated with the original debtor.

7.111. In its determination, the USDOC linked its request for the information concerning the other PPAS sales "to the GOI's claims that IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders are not affiliated with the debtor companies". The USDOC considered that the missing information "was needed to test the validity of the GOI's claims that it was normal procedure not to further inquire into the ownership or possible affiliations of bidders" and was "necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities".[214] The USDOC also stated that the failure to provide the requested information, "combined with the apparent lack of any procedural guidelines used in the PPAS program or other IBRA administered programs", prevented it from corroborating the GOI's claims regarding the inquiries made concerning Orleans and the contents of its application file.[215]

7.112. As we have noted above, the term "necessary information" has been interpreted to refer to information that is "required to complete a determination".[216] It is, in the first instance, for the investigating authority to determine what information it considers "necessary" to make its determination, in light of the specific circumstances of the investigation at issue.[217] In our view, an authority may reasonably consider that information needed to verify the accuracy of information submitted by interested parties or to corroborate such information is "necessary" within the meaning of Article 12.7, particularly as Article 12.5 of the SCM Agreement requires investigating authorities to "satisfy themselves as to the accuracy of the information supplied".[218] The information requested by the USDOC was not information that would have directly established affiliation or non-affiliation between Orleans and APP/SMG. It was, however, information that the USDOC would have used to ascertain the accuracy of the GOI's statement that IBRA did not enquire into the ownership of bidders beyond the statements of non-affiliation. For this reason, we consider that the USDOC reasonably considered the information to be "necessary" for the USDOC to satisfy itself of the accuracy of the GOI's representations that IBRA had followed normal procedures in the Orleans sale. In addition, in arriving at this conclusion we consider it relevant that the information submitted by the GOI did not conclusively establish who were Orleans' shareholders, and that other information on the record of the investigation – in particular the press reports, World Bank Report, and the expert statement mentioned above[219] – raised doubts concerning Orleans' non-affiliation with APP/SMG. In our view, this other information justified the USDOC further probing IBRA's procedures concerning the question of affiliation.

7.113. We now turn to considering Indonesia's allegation that the GOI did not fail to provide necessary information within a reasonable period, in light of the USDOC's determination that the GOI had not cooperated as it had failed to act to the best of its ability, which was the basis for the USDOC's decision to apply an "adverse inference". This being the case, we consider whether an objective and unbiased investigating authority could reasonably have concluded, in light of the circumstances of the case and the facts before the USDOC, that the GOI failed to cooperate.

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[214] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 48-55.
[215] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.
[216] See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[217] Panel Report, *Egypt – Steel Rebar*, para. 7.155.
[218] In this respect, we agree with the *EC – Countervailing Measures on DRAM Chips* panel's statement that:

> Article 12.7 … enables an authority to continue with the investigation and make determinations based on the facts that are available in case the information necessary to make such determinations is not provided by the interested parties, *or, for example, verification of the accuracy of the information submitted is not allowed by an interested party*, thereby significantly impeding the investigation.

(Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245 (emphasis added))
[219] As noted above, fn 186, the press reports and World Bank Report were placed on the record of the coated paper investigation by the petitioners and provided to the Panel in Exhibit US-40. The press reports contain statements to the effect that, *inter alia*: (a) APP/SMG had past dealings with companies in the British Virgin Islands (internal exhibit 11 to Petitioners' General Factual Information Submission, (Exhibit US-40)); (b) there were suspicions among foreign creditors that APP and the Widjaja family purchased substantial portions of APP's debt in an effort to manipulate its restructuring (internal exhibit 18 to Petitioners' General Factual Information Submission, (Exhibit US-40)); and (c) creditors and bidders had raised questions about who might be behind the Orleans bid, in part because of the mysterious nature of the bidder and the long-running suspicions that APP had been "surreptitiously buying back its debt" (internal exhibit 33 to Petitioners' General Factual Information Submission, (Exhibit US-40)). Other press reports contained more general information concerning APP/SMG's debt situation and IBRA's sale of APP/SMG's debt. The World Bank Report stated that IBRA was allegedly allowing debtors to buy back their debt through third parties. (Internal exhibit 24 to Petitioners' General Factual Information Submission, (Exhibit US-40)).

7.114. We recall that paragraph 7 of Annex II of the Anti-Dumping Agreement recognizes that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.115. We note that the ordinary meaning of "cooperate" is, *inter alia*, to "act jointly with or with another (in a task … to an end); participate in a joint or mutual enterprise".[220] Moreover, in our view the use of the term "failure to cooperate" in paragraph 7 can be contrasted with the more neutral term "or otherwise does not provide" in Article 12.7 of the SCM Agreement and Article 6.8 of the Anti-Dumping Agreement. We also find it relevant that paragraph 5 of Annex II provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party *has acted to the best of its ability.*"[221] In light of the foregoing, the use of the term "fails to cooperate" in paragraph 7 of Annex II connotes more than simply a party's failure to provide the requested information, and goes instead to the question whether the interested party from whom information was requested applied its best efforts − "acted to the best of its ability" − in attempting to provide it. The foregoing suggests that, for instance, if an interested party is prevented from providing necessary requested information by external factors outside its control, an investigating authority could not reasonably conclude that that party "fail[ed] to cooperate". The Appellate Body reached a similar conclusion in *US − Hot-Rolled Steel*:

> [C]ooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well "cooperate" to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of "cooperating" is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a "less favourable" outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has "cooperated" with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*.[222]

7.116. In the same decision, the Appellate Body further considered − on the basis of, *inter alia*, paragraph 5 of the Annex II, that "the level of cooperation required of interested parties is a high one − interested parties must act to the 'best' of their abilities".[223] The Appellate Body also considered, however, that paragraph 2 of Annex II[224] requires investigating authorities to strike a balance between the efforts that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. The Appellate Body saw this provision as another detailed expression of the principle of good faith, which, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable.[225] The Appellate Body thus considered that paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* reflect a careful balance between the interests of investigating authorities and exporters, adding that:

> In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort − to the "best of their abilities" − from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.[226]

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[220] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 517.

[221] Emphasis added.

[222] Appellate Body Report, *US − Hot-Rolled Steel*, para. 99. (emphasis original)

[223] Appellate Body Report, *US − Hot-Rolled Steel*, para. 100.

[224] Paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be "maintained" if complying with that request would impose an "*unreasonable extra burden*" on the interested party, that is, would "entail *unreasonable additional cost and trouble*". (emphasis added in Appellate Body Report, *US − Hot-Rolled Steel*, para. 101)

[225] Appellate Body Report, *US − Hot-Rolled Steel*, para. 101.

[226] Appellate Body Report, *US − Hot-Rolled Steel*, para. 102. (emphasis original)

7.117. In addition, the Appellate Body considered that Article 6.13 of the Anti-Dumping Agreement[227] (which is identical to Article 12.11 of the SCM Agreement) underscores that "cooperation" is a two-way process involving joint effort as it requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information, adding that "if the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot … fault the interested parties concerned for a lack of cooperation".[228] Consistent with these principles, the Appellate Body also explained that the term "'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case", adding that:

> In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.[229]

7.118. While the Appellate Body made these statements in the context of considering claims under the Anti-Dumping Agreement, the Appellate Body has indicated that it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigation.[230]

7.119. In the present case, it is clear from the record that the GOI provided a large amount of information sought by the USDOC, including Orleans' bid package. It is also clear, however, that the GOI did not provide all the information sought by the USDOC. In particular, the GOI failed to provide the USDOC with the information pertaining to other PPAS sales that the USDOC had requested. In its final determination, the USDOC found that the GOI "failed to cooperate by not acting to the best of its ability". The USDOC noted in this respect that the GOI had not been asked to provide the missing information on short notice as it had had seven weeks' notice that the USDOC required the specific information at issue concerning the other sales under IBRA's PPAS programme. The USDOC considered that, on balance, the GOI did not put forth its maximum efforts, despite its many protests to the contrary. The USDOC added that the GOI was aware as of the initiation of this investigation in October 2009 that the possible affiliation of APP/SMG and Orleans would be an issue. The USDOC also considered that there was nothing overly burdensome in its request for information − it was neither "boundless", nor would it appear to involve "several bankers boxes of information", as the Indonesian respondents had characterized it. For this reason, "it was reasonable to expect the GOI to be more forthcoming with this information". The USDOC also considered that the GOI's repeated refusal to provide the requested information by the deadlines evinced, at a minimum, inadequate inquiries and attempts to locate the information.[231]

7.120. Indonesia argues that, as a developing country, the GOI's difficulties in locating the documents requested by the USDOC should be taken into account in assessing its efforts and its cooperation in the investigation. Indonesia argues that Article 27 of the SCM Agreement and Article 15 of the Anti-Dumping Agreement provide "context" to the interpretation and application of the specific requirements in Article 12.7 of the SCM Agreement and Annex II of the Anti-Dumping Agreement.[232] The provisions invoked by Indonesia, Articles 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement are, on their face, not relevant to an investigating authority's use of facts available under Article 12.7, and nothing in Article 12.7 or

[227] Article 12.11 of the SCM Agreement and Article 6.13 of the Anti-Dumping Agreement provide that: "The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable."
[228] Appellate Body Report, *US − Hot-Rolled Steel*, para. 104.
[229] Appellate Body Report, *US − Hot-Rolled Steel*, para. 85.
[230] Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, para. 295.
[231] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 54-55.
[232] Indonesia's first written submission, paras. 50-53, and 65; response to Panel question No. 32.

elsewhere in the SCM Agreement suggests that a Member's developing country status, *per se*, modifies the disciplines of Article 12.7, interpreted in light of Annex II of the Anti-Dumping Agreement.[233]

7.121. Article 12.7 strikes a balance between the obligation for an interested party to submit necessary information and to have that information taken into account, on the one hand, and the obligation placed upon the investigating authority to conclude its investigation within prescribed timeframes, on the other.[234] This means that there came a time in the coated paper investigation when the information had to be provided, or the USDOC could resort to using facts available. Taking into account the extensions received, the GOI effectively had more than seven weeks (from the date the USDOC issued the third questionnaire to the GOI's response to the fifth questionnaire) to provide the requested information. Even taking into consideration the fact that the USDOC requested voluminous information from the GOI, the GOI's explanations concerning factual circumstances surrounding the fact that IBRA's operations had been terminated several years prior and the resulting difficulties in locating the documents alleged by the GOI, we are of the view that in the circumstances of this case, the USDOC did not act unreasonably in concluding that by failing to provide the requested information within the seven weeks it had to do so, the GOI failed to provide necessary information within a "reasonable period". As discussed above, the information was initially requested as part of the USDOC's Third Questionnaire to the GOI, but not submitted, and requested anew as part of the USDOC's Fifth Questionnaire to the GOI. In this respect, we note, by way of comparison, the Agreement mandates a 37-day minimum period to respond to an initial questionnaire.[235]

7.122. Moreover, we note that the USDOC progressively gained knowledge about the Orleans sale and IBRA's procedures, which led to further questions and requests for information. For instance, the USDOC initially requested that the GOI provide it with Orleans' complete bid package, which the GOI had not provided in the CFS investigation. The USDOC stated that once it obtained these documents, given that they did not contain information revealing Orleans' ownership, it broadened the scope of its inquiry and requested that the GOI provide it with documents pertaining to the other PPAS sales and IBRA's due diligence procedures for ascertaining compliance with the prohibition on debtors buying back their own debt: "we altered our focus to test the validity of the GOI's claims not to have inquired into the ownership of Orleans, or any other company purchasing debt, beyond requiring certain affirmations from bidders regarding their bona fides, which the GOI stated was consistent with IBRA's evaluation procedures for sales in the PPAS."[236] This being the case, we do not consider that the USDOC's successive requests for the information were unduly burdensome in the circumstances or created a "moving target". We also note that the USDOC informed the GOI that failure to provide requested information may result in the USDOC resorting to the use of "facts available".[237]

7.123. The USDOC's decision to cancel "verification" regarding the debt buy-back issue because the GOI had not provided the requested information and documentation concerning the other PPAS sales[238] does not affect our conclusion in this respect. Verification visits are only one of several

[233] This is not to say that specific problems which may or may not be related to the fact that a Member is a developing country may not be relevant in considering whether information is submitted within a "reasonable period", in assessing the burden placed on the interested party from which information is sought, and in determining whether it has failed to cooperate.

[234] The Appellate Body has recognized the importance for investigating authorities of being able to set deadlines for the submission of information, adding that investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 73).

[235] Article 12.1.1 and fn 40 of the SCM Agreement.

[236] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 31. (underline original)

[237] GOI Third Supplemental Questionnaire, (Exhibit US-41), cover letter; GOI Fifth Supplemental Questionnaire, (Exhibit US-42), cover letter.

[238] Letter to GOI regarding Verification, (Exhibit US-76), quoted above, para. 7.96. In the final determination, the USDOC reiterated the reasons provided in the letter for cancelling the verification, and added that "it is well-established that verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted", that "neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions", and that "the resources available at verification are completely different than those available at Department headquarters." (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 56).

ways in which an authority may satisfy itself of the accuracy of the information before it[239], and the SCM Agreement does not require an investigating authority to conduct such visits.[240]

7.124. In addition, Indonesia's argument is premised on the assumption that the USDOC would have been required to accept the missing information had it been provided by the GOI at verification. However, paragraph 7 of Annex VI of the SCM Agreement[241] notes that the primary purpose of verifications is to verify information provided in questionnaire responses, suggesting that the receipt of new evidence is not. Moreover, the Appellate Body explained in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, with respect to Article 6.7 of the Anti-Dumping Agreement, which is identical to Article 12.6 of the SCM Agreement in all relevant respects, that "investigating authorities have some degree of latitude in deciding whether to accept and use information submitted by interested parties during on-the-spot investigations and thereafter"[242], and that an investigating authority is not required "to accept *all* information presented to it during a verification visit."[243] In the present instance, the deadline set by the USDOC for the submission of the information was six days prior to verification. The GOI could not unilaterally decide to extend the deadline for the submission of the requested information by promising to make it available at verification – if it were located – when the USDOC would be less able to verify it, if it could do it at all, without a prior opportunity to consider it. In any event, the GOI made no effort to submit the requested information either before or after verification, even though it later asserted that it had located some of the documents after the USDOC cancelled verification of the debt buy-back issue.

7.125. In sum, in the investigation at issue, the GOI provided some of the information that was requested by the USDOC, and thus, did cooperate to *some* extent, but ultimately failed to provide the USDOC with necessary information it sought concerning the other PPAS transactions. The information sought by the USDOC was in the control of the GOI, and even though it stated that some of the information requested had ultimately been located, the GOI never attempted to submit the information. In light of the foregoing, we consider that in the circumstances of this case, an unbiased and objective authority could have concluded, as the USDOC did, that the GOI had failed to provide necessary information within a reasonable period, and thereby failed to act to the best of its ability to cooperate in the investigation.

7.5.3.4 Whether the facts relied upon by the USDOC "reasonably replaced" the missing "necessary information"

7.126. Indonesia submits that the facts used by the USDOC did not "reasonably replace" the missing information, as required by Article 12.7. Indonesia argues that the APP/SMG transaction documents submitted by the GOI to the USDOC show that there was no affiliation between Orleans and APP/SMG, and that the information sought by the USDOC would not have shed light on whether Orleans was an affiliate because those other transactions involved different companies. Moreover, the other evidence (newspaper articles and World Bank Report) that the USDOC relied upon was either uninformative (did not relate to APP/SMG itself), or speculative (merely suggested affiliation between the Orleans and APP/SMG). Indonesia also argues that by giving more weight to speculative newspaper articles and rumour than to the actual documents from the transaction, the USDOC acted inconsistently with the requirement, in Annex II of the Anti-Dumping Agreement that

[239] Panel Report, *EC – Salmon (Norway)*, para. 7.358. Article 12.5 of the SCM Agreement requires investigating authorities to "satisfy themselves as to the accuracy of the information supplied".

[240] Article 12.6 of the SCM Agreement provides that "The investigating authorities *may* carry out investigations in the territory of other Members [i.e. verifications] as required …" (emphasis added).

[241] Paragraph 7 of Annex VI provides that:

> As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it[.]

[242] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.74.

[243] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.75 (quoting Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.100). (emphasis added by the Appellate Body)

investigating authorities, if they are to rely on information from a secondary source, do so with special circumspection.[244]

7.127. The United States argues that the facts relied upon by the USDOC − newspaper articles, the World Bank Report and the expert statement, all suggesting an affiliation between Orleans and APP/SMG − were "on the record" and that Indonesia's contention that the USDOC gave more weight to "speculative newspaper articles and rumour than the actual documents from the transaction" is mistaken, given that the actual documents on the record provided no information on Orleans' ownership. The United States further argues that, in the present case, it would not have been practicable for the USDOC to comparatively evaluate record information to determine the "best" facts available. The question of affiliation was a binary one (yes/no), and although the GOI placed information on the record to support its contention that the two companies were not affiliated, it failed to satisfy its evidentiary burden in this respect by failing to provide all the information necessary to allow the USDOC to make a determination. Finally, the United States argues that Article 12.7 acknowledges that non-cooperation can lead to an outcome that is less favourable for the non-cooperating party, and that the selection of "facts available" leading to "a less favourable result" is permissible under the Anti-Dumping Agreement and the SCM Agreement.[245] In the present case, to avoid rewarding the GOI for its failure to cooperate, the USDOC selected facts on record that reflected the GOI's non-cooperation and led to a less favourable outcome.[246]

7.128. We recall that Article 12.7 "permits the use of facts available solely for the purpose of replacing information that may be missing"; consequently, an investigating authority must use those "facts available" that "*reasonably replace* the information that an interested party failed to provide"[247], with a view to arriving at an accurate determination[248], i.e. with a view to selecting the best information.[249] The Appellate Body has stressed that an investigating authority must consider the evidence on the record through a process of reasoning and evaluation, with a view to selecting information that reasonably replaces the missing information, although the degree and nature of the reasoning and evaluation required will depend on the circumstances of a particular case.[250] Where there are multiple "available facts" from which to choose, the process of reasoning and evaluation should involve a degree of comparison[251]; conversely, there may be situations in which a comparative approach is not feasible, such as where there is only one set of reliable information on the record that is relevant to a particular issue.[252] The Appellate Body has also indicated that an investigating authority may take into account the procedural circumstances in which information is missing, including the non-cooperation of an interested party, as part of the process of reasoning and evaluation of which facts available constitute replacements for missing necessary information.[253] However, the use of inferences in order to select adverse facts that punish non-cooperation would not accord with Article 12.7, and procedural circumstances, including any resulting inferences, may not alone form the basis of a determination; rather, determinations pursuant to Article 12.7 must be made on the basis of "facts" that reasonably replace the "necessary information" that is missing.[254]

7.129. Moreover, we recall and agree with the views of the panel in *EC − Countervailing Measures on DRAM Chips* that an interested party's failure to cooperate is an element that may be taken into account by the authority when weighing the evidence and the facts before it, and may be the

[244] Indonesia's first written submission, paras. 66-71; opening statement at the first meeting of the Panel, para. 42; and second written submission, para. 32.
[245] United States' response to Panel question No. 87.
[246] United States' first written submission, paras. 119, 141, and 158-165.
[247] Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, para. 294. (emphasis added)
[248] Appellate Body Reports, *Mexico − Anti-Dumping Measures on Rice*, para. 293; *US − Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico − Anti-Dumping Measures on Rice*, paras. 293-294).
[249] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.435.
[250] Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.418, 4.424, and 4.431. The Appellate Body explained that the extent of the evaluation of the "facts available" that is required, and the form it may take, will "depend on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation". (Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.421-4.422).
[251] See, in particular, Appellate Body Report, *US − Carbon Steel (India)* para. 4.426.
[252] Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.417 and 4.428.
[253] Appellate Body Report, *US − Carbon Steel (India)*, paras. 4.426 and 4.468.
[254] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.468.

element that tilts the balance in a certain direction. The panel also considered that while facts available should not be used in a punitive manner, and that non-cooperation does not allow an investigating authority to simply use the information available which leads to the worst possible result for the interested party, this does not render completely irrelevant the failure to cooperate in weighing and assessing the information before the authority.[255]

7.130. In the case before us, the USDOC's determination that Orleans was affiliated with APP/SMG rested on an adverse inference drawn from its finding that:

> [T]he GOI failed to cooperate by not acting to the best of its ability in responding to our requests. Therefore, the application of an adverse inference is warranted. As an adverse inference, we are determining that Orleans is affiliated with APP/SMG and that, therefore, the purchase of APP/SMG's debt by Orleans from the GOI constituted a buyback by APP/SMG of its own debt.[256]

7.131. The USDOC referred to the other evidence on the record in the next subsection of the determination, stating that "[n]evertheless, newspaper articles and reports suggesting that APP/SMG may have purchased its own debt, and that Orleans was an affiliate of APP/SMG, have been placed on the record of this investigation."[257]

7.132. We recall that the GOI provided factual evidence to the USDOC that stated that Orleans was unaffiliated with APP/SMG. The USDOC reasonably considered that other factual evidence, submitted by the petitioners (World Bank Report, press reports and expert statement) raised doubts as to the accuracy and veracity of those documents. We have found above that, particularly in light of this other information, it was reasonable for the USDOC to seek additional information in order to test the veracity of the various statements of non-affiliation and of the GOI's representations concerning the processes − or lack thereof − that IBRA followed in ascertaining compliance with the prohibition on parties purchasing the debt of an affiliated debtor. We have also concluded that the USDOC was justified in concluding that the information it had requested was necessary and had not been provided to it, in spite of clear requests to do so, and that it was reasonable for the USDOC to consider that the GOI had failed to cooperate by not providing the missing information.[258] In our view, in these circumstances, there was a sufficiently close connection between the missing information, which pertained to other PPAS sales and, indirectly, to IBRA's due diligence, and the USDOC's conclusion − reached on the basis of an adverse inference − regarding the broader question of the affiliation between Orleans and APP/SMG.[259] We reach this conclusion in light of the fact that the information not provided was requested for the purpose of verifying the accuracy of the GOI's position that it was normal for IBRA not to enquire into the question of ownership or possible affiliation.

7.133. Moreover, we agree with the United States that the issue on which necessary information was missing − i.e. that of the affiliation of Orleans to APP/SMG − being a binary "yes or no" one, the USDOC's use of an inference in light of the GOI's failure to cooperate logically could only lead it

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[255] Panel Report, *EC − Countervailing Measures on DRAM Chips*, para. 7.80; see also ibid. para. 7.61.
[256] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6; see also ibid. pp. 48-55.
[257] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6. (fn omitted)
[258] See above, para. 7.112.
[259] We note in this respect that the USDOC indicated that it determined that Orleans was affiliated with APP/SMG:

> [B]ecause the GOI has been unable to demonstrate the accuracy of its assertion that it did not inquire into the ownership of Orleans, and that information regarding the ownership of Orleans was never included in Orleans' application file. Failure to provide the requested information for the three other PPAS bidders, combined with the apparent lack of any procedural guidelines used in the PPAS program or other IBRA administered programs, prevented the Department from corroborating the GOI's claims regarding the Orleans inquiry and the contents of its application file.

(USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20)
See also ibid. p. 53:

> Due to the GOI's failure to provide this information by the required deadlines, there is a hole in the record pertaining to IBRA's procedures during the strategic asset sales. The GOI has provided information pertaining to the Orleans transaction, but there is little indication on the record that this transaction was handled according to normal IBRA procedures, especially as pertains to the bona fides of bidders. Without information pertaining to other transactions, we cannot "test" the GOI's claims that Orleans and APP/SMG were not affiliated.

to conclude that Orleans was affiliated with APP/SMG. In such circumstances, Article 12.7 does not require the authority to perform a comparative evaluation − there simply were not different facts for the USDOC to consider as the drawing of an inference in light of the GOI's failure to cooperate could only lead the USDOC to find that Orleans was affiliated with APP/SMG.[260, 261]

7.134. In light of the foregoing, we find that Indonesia has failed to establish that the USDOC acted inconsistently with Article 12.7 in its determination that Orleans was affiliated with APP/SMG.

7.5.4 Claims under Article 2.1(c) and the chapeau of Article 2.1 of the SCM Agreement (specificity)

7.5.4.1 Introduction

7.135. Indonesia challenges the USDOC's specificity determinations with respect to the three subsidies at issue in this dispute, i.e. the provision of standing timber, the log export ban, and the debt buy-back.[262]

7.136. The USDOC determined that each of these subsidies were *de facto* specific. In the case of the provision of standing timber, the USDOC found that, of the 23 industry categories recognized by the GOI, "standing timber was provided by the GOI to five industries during the POI, including the paper industry".[263] The USDOC determined, on this basis, that "the provision of stumpage [was] specific … because it [was] limited to a group of industries".[264] The USDOC also determined that the log export ban was *de facto* specific "because the industries receiving subsidies from the operation of the ban [were] limited in number".[265] Finally, the USDOC determined that the debt buy-back constituted a company-specific subsidy. It found, in this respect, that "[b]ecause the debt was sold to an APP/SMG affiliate, in violation of the GOI's own prohibition against selling debt to affiliated companies … the sale was company-specific."[266]

7.137. Indonesia claims that these findings are inconsistent with Article 2.1(c) because, in each case, the USDOC failed to determine that the subsidies "were part of a plan or scheme intended to confer a benefit", i.e. a "subsidy programme". In addition, Indonesia claims that the USDOC's finding of *de facto* specificity with respect to the debt buy-back is also inconsistent with the

[260] As noted above, para. 7.128, in *US − Carbon Steel (India)*, the Appellate Body rejected the proposition that Article 12.7 of the SCM Agreement requires a comparative evaluation of the "facts available" in every case and pointed to a situation in which "there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination" as an example of situation where a comparative approach would not be feasible. (Appellate Body Report, *US − Carbon Steel (India)*, para. 4.434).

[261] In the light of this conclusion, and given that the USDOC did not base its determination on the other evidence on the record (press articles, World Bank Report, statement by the expert), we do not consider that we need to consider any further Indonesia's argument that the USDOC gave undue weight to the other evidence on record and that it should have used circumspection in relying on these documents. Nor do we need to consider Indonesia's objections with respect to the expert statement, pertaining to the fact that the USDOC did not disclose the expert's identity and the USDOC's characterization of the person as an independent expert. (Indonesia's comments on the United States' response to Panel question No. 68).

[262] Indonesia's first written submission, para. 3.

[263] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7 (referring to Part Two of GOI First Supplemental Questionnaire Response, (submitted to the Panel as Exhibit US-34 (BCI)), p. 40).

[264] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

[265] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[266] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20. The USDOC's determinations of *de facto* specificity were made pursuant to section 771(5A)(D)(iii)(I) of the US Tariff Act of 1930. The United States indicated that this provision implements Article 2.1(c) of the SCM Agreement. (United States' response to Panel question No. 82(a)). Section 771(5A)(D)(iii)(I) of the US Tariff Act of 1930 provides that:

> (D) Domestic subsidy. In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:
> …
> (iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:
> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.

(Section 771(5A) of the Tariff Act of 1930, (Exhibit US-118), p. 303)

chapeau of Article 2.1 because the USDOC failed to "identify the jurisdiction allegedly providing a benefit".[267]

7.138. The United States requests that the Panel reject Indonesia's claims.[268]

7.139. We first address the legal standard under the provisions at issue before examining Indonesia's claims under Article 2.1(c), and then its claim under the chapeau of Article 2.1. Finally, we address, in a separate section, certain allegations presented by Indonesia, in the context of its claims under both Article 2.1(c) and the chapeau of Article 2.1, that pertain to the USDOC's determination that the sale of APP/SMG to Orleans was a company-specific subsidy.[269]

7.5.4.2 Legal standard under Article 2.1(c) and the chapeau of Article 2.1 of the SCM Agreement

7.140. Indonesia's claims concern the notion of "subsidy programme" in the first factor under Article 2.1(c) and the identification of the granting authority providing the subsidy under the chapeau of Article 2.1 of the SCM Agreement.[270]

7.141. Article 2.1 of the SCM Agreement provides as follows:

> *Article 2*
> *Specificity*
>
> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") *within the jurisdiction of the granting authority*, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: *use of a subsidy programme by a limited number of certain enterprises*, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of

[267] Indonesia's first written submission, para. 3. As noted in para. 3.1 and fn 27 above, Indonesia initially submitted claims under the chapeau of Article 2.1 of the SCM Agreement against the USDOC's findings of specificity in connection with the provision of standing timber and the log export ban. However, Indonesia informed the Panel at the first meeting that it had abandoned those claims. (Indonesia's first written submission, para. 3; opening statement at the first meeting of the Panel, para. 56).

[268] United States' opening statement at the first meeting of the Panel, para. 43.

[269] In the case of the provision of standing timber and the log export ban, Indonesia does not dispute the USDOC's findings that the recipients of the subsidies were limited in number.

[270] Indonesia's claim under the chapeau of Article 2.1 concerns an alleged failure by the USDOC to "identify the jurisdiction allegedly providing a benefit" or "the relevant jurisdiction". (Indonesia's first written submission, para. 3; see also opening statement at the first meeting of the Panel, para. 56; and closing statement at the first meeting of the Panel, para. 6). However, as we describe in more detail below, the arguments raised by Indonesia in support of its claim fault the USDOC for not having properly identified the *granting authority* that conferred the subsidy. (See, for instance, Indonesia's first written submission, paras. 94-95; response to Panel question No. 30; and second written submission, para. 49).

> economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[271]

7.142. We start by noting that the issue of specificity concerns the limitation of access to a subsidy. The specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1, but rather about access thereto.[272] This distinction is explicitly reflected in Article 1.2, which states that "[a] *subsidy as defined in paragraph 1* shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if *such a subsidy is specific* in accordance with the provisions of Article 2".[273] The chapeau of Article 2.1 also reflects this distinction by limiting the analysis of specificity to measures that constitute a subsidy "as defined in paragraph 1 of Article 1". The specificity analysis, therefore, assumes the existence of a subsidy, that is, a financial contribution that confers a benefit[274] and the determination that a given measure constitutes a subsidy informs the scope and content of the analysis required to establish *de facto* specificity with respect to that subsidy.[275]

7.143. Article 2 of the SCM Agreement elaborates on the concept of "specificity". Article 2.1 sets out principles for determining whether a subsidy is specific by virtue of its limitation to "an enterprise or industry or group of enterprises or industries".[276] Article 2.1(a) establishes that a subsidy is specific if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to that subsidy to eligible enterprises or industries. This is referred to as *de jure* specificity, i.e. the limitation of access to a subsidy is explicitly set forth in the particular legal instrument pursuant to which the granting authority operates. Article 2.1(b) in turn sets out that specificity "shall not exist" if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions that guard against selective eligibility.[277]

7.144. Article 2.1(c) points to certain indicia that an investigating authority may evaluate in determining whether, despite not being *de jure* specific, a subsidy is specific in fact.[278] In particular, the inquiry under Article 2.1(c) focuses on whether a subsidy, although not appearing to be specific on the face of the relevant legislation, is nevertheless granted in a manner that belies the apparent neutrality of the measure.[279] The focus of this provision is, therefore, on factual circumstances surrounding the granting of a subsidy.[280] Article 2.1(c) lists factors that an investigating authority may consider in its evaluation. The first factor under this provision, which is the one at issue here, pertains to the "use of a subsidy programme by a limited number of certain enterprises". The focus under the first factor of Article 2.1(c) is on a quantitative assessment of the entities that actually use a subsidy programme and, in particular, on whether such use is shared by a "limited number of certain enterprises".[281]

7.145. With regard to the notion of "subsidy programme" in the first factor of Article 2.1(c), in *US – Countervailing Measures (China)*, the Appellate Body understood this term to refer to "a plan or scheme regarding the subsidy at issue".[282] The Appellate Body considered that the reference to "use of a subsidy programme" in Article 2.1(c) suggests that "it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind".[283] The panel in the same dispute was of the view that the fact that the term "programme" is used only in the context of an analysis of *de facto* specificity, combined with the fact that the SCM Agreement contains no definition of the term, suggests that the term "subsidy programme" should be interpreted broadly. A broad interpretation of the term "subsidy programme" gives due recognition

[271] Emphasis added; fns omitted.
[272] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21.
[273] Emphasis added.
[274] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.
[275] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140 (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 750).
[276] By contrast, Article 2.2 establishes principles relevant to determine whether a subsidy is regionally-specific.
[277] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367.
[278] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.
[279] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 877.
[280] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.
[281] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374.
[282] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.
[283] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

to the reality that subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit.[284]

7.146. The Appellate Body in *US – Countervailing Measures (China)* held that evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. It further found that a subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.[285] The panel in *EC and certain member States – Large Civil Aircraft* considered that an understanding of the legal regime pursuant to which an alleged subsidy is granted is a relevant and important consideration when making a specificity determination under Article 2.1(c) as it helps to define the relevant "programme".[286]

7.147. With respect to the duty imposed on an investigating authority to identify the subsidy programme as part of its specificity analysis, the Appellate Body observed in *US – Countervailing Measures (China)* that, because Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*, "[i]t stands to reason … that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1."[287]

7.148. A specificity analysis under Article 2.1 also requires a proper determination of whether the jurisdiction of the granting authority covers the entire territory of the relevant WTO Member or is limited to a designated geographical region within that territory.[288] Since in determining whether a financial contribution exists, an investigating authority must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the "government", by "any public body within the territory of a Member", or by a "private body" entrusted or directed by the government, such assessment will inform the identification of the jurisdiction of the granting authority.[289] Thus, the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination.[290]

7.149. With these considerations in mind, we assess Indonesia's claims against the USDOC's specificity determinations in the underlying investigation.

7.5.4.3 Whether the USDOC's determinations of *de facto* specificity are inconsistent with Article 2.1(c) of the SCM Agreement

7.150. Indonesia claims that, in the underlying investigation, the USDOC failed to determine or identify the relevant "subsidy programme" in connection with each of the subsidies at issue, in contravention of Article 2.1(c) of the SCM Agreement.[291]

7.151. Before we turn to Indonesia's arguments in this regard, we note that although it formulates its claims as pertaining to the subsidy programmes at issue, Indonesia is in fact challenging the USDOC's findings with respect to the existence of the three subsidies at issue. The

[284] Panel Report, *US – Countervailing Measures (China)*, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32).
[285] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141. The Appellate Body held, in addition, that "[a]n examination of the existence of a plan or scheme regarding the use of the subsidy at issue may also require assessing the operation of such plan or scheme over a period of time." (Ibid. para. 4.142).
[286] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.988.
[287] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.
[288] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.165-4.166. This is because if the granting authority is a regional or local government, a subsidy available to enterprises throughout the territory over which that regional or local government has jurisdiction would not be specific; conversely, if the granting authority is the central government, a subsidy available to the same enterprises would be specific.
[289] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.167.
[290] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.169.
[291] Indonesia's first written submission, para. 3; response to Panel question No. 26; and opening statement at the second meeting of the Panel, para. 31.

gist of Indonesia's challenge is that the USDOC improperly found that the measures at issue constituted financial contributions conferring a benefit. In so doing, Indonesia is effectively seeking to challenge anew, under Article 2.1(c), findings which are not governed by that provision but are primarily governed by Article 1.1 of the SCM Agreement. This being the case, it would be inappropriate for us to consider Indonesia's arguments challenging the USDOC's findings of financial contribution and benefit in our analysis of its claims under 2.1(c).[292]

7.152. Indonesia submits that the use of the term "subsidy programme" in the first factor of Article 2.1(c) means that, in determining whether a subsidy is *de facto* specific, an investigating authority is required to identify that a subsidy programme exists. Indonesia agrees with the United States that evidence regarding a subsidy programme may be found in a wide variety of forms, e.g. in the form of written instruments or by a systematic series of actions pursuant to which subsidies are provided to certain enterprises, and that an investigating authority is not required to rely, in every instance, on both types of evidence.[293] Indonesia submits that, when the subsidies at issue emanate from legal instruments, and these "on the face of the writing" do not provide sufficient evidence to conclude that a plan or scheme *that confers a benefit to certain enterprises* exists, further analysis is required. Indonesia considers that, consistent with the Appellate Body Report in *US – Countervailing Measures (China)*, if there is no written plan or scheme that evidences the existence of a subsidy programme on the face of the writing, the investigating authority must cite evidence of a systematic series of actions that constitutes a subsidy programme.[294]

7.153. Indonesia also agrees with the United States that, in the underlying investigation, the measures the USDOC found to constitute countervailable subsidies were manifested in certain laws and decrees issued by the GOI.[295] However, Indonesia contends that these written instruments were insufficient to demonstrate the existence of subsidy programmes because none of them, on their face, provided evidence of a financial contribution conferring a benefit. Indonesia in particular contends that the written instruments at issue did not confer, or suggest that the measures were designed to confer, a benefit to paper producers in Indonesia or, in the case of the debt buy-back, to APP/SMG.[296] Indonesia links this contention to what it considers are shortcomings in the USDOC's benefit findings for the three subsidies at issue.[297] In addition, Indonesia raises certain arguments challenging the USDOC's findings that the measures constituted financial contributions.

7.154. Indonesia argues, first, that the legal instruments regulating the collection of stumpage fees do not confer a benefit to paper producers because: (a) the GOI does not "provide" standing timber within the meaning of Article 1.1(a) given that nearly all the timber at issue during the POI was grown on plantations by licence holders; and (b) these instruments impose obligations on the licence holders, including the payment of revenues from the use of the land, which ultimately

[292] We recall that the United States argues that the arguments that Indonesia advances in paragraph 79 of its first written submission are addressed to a claim under Article 1.1(a) of the SCM Agreement, which is not one of the provisions enumerated in Indonesia's panel request. (See above, fn 43). In paragraph 79 of its first written submission, Indonesia argues, *inter alia*, that a ban on export of logs does not entrust or direct the sale of logs at suppressed prices in Indonesia especially as chipwood and pulp could be freely exported.

[293] Indonesia's response to Panel question No. 27; second written submission, para. 45. We note that Indonesia's position evolved through the course of these panel proceedings. Initially, Indonesia argued that to establish the existence of a subsidy programme under the first factor of Article 2.1(c), the investigating authority must have adequate evidence of the existence of "a systematic series of actions" pursuant to which financial contributions that confer a benefit are provided to certain enterprises. Indonesia argued that, in the underlying investigation, the USDOC failed to make a finding that the provision of standing timber, the log export ban, and the debt buy-back each constituted "a systematic series of actions" that confers a benefit, because in each instance, it failed to establish that there was a "plan or scheme" based on evidence of "a systematic series of actions" that confers a benefit. (Indonesia's first written submission, para. 73). In other words, Indonesia initially argued that irrespective of whether the subsidy programme at issue is expressed in written form, the authority is required to find that there exists a "systematic series of actions". We understand Indonesia to now accept that there is no such requirement where the programme is manifested in written form, insofar as both elements pertaining to the existence of a subsidy (financial contribution conferring a benefit) are evident from the written manifestation of the subsidy programme.

[294] Indonesia's first written submission, paras. 72-83; opening statement at the first meeting of the Panel, para. 50; second written submission, para. 45; and opening statement at the second meeting of the Panel, para. 31 (all referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143).

[295] Indonesia's response to Panel question Nos. 27(b) and 27(c).

[296] Indonesia's second written submission, paras. 46-48.

[297] Indonesia's response to Panel question No. 27(b).

benefit the GOI.[298] Second, regarding the log export ban, Indonesia takes issue with the USDOC's finding, in the CFS investigation, that the ban results in inputs being provided to producers of coated paper at "lower" or "supressed" prices[299], contests that the Indonesian decree imposing the ban confers, or was designed to confer, a benefit because its purpose was to address illegal logging and deforestation, and argues that the ban did not confer a benefit because it did not extend to pulp or wood chips.[300] Indonesia also submits that, even if the effect of the log export ban were an increased domestic supply of logs potentially benefitting downstream industries in Indonesia, the panel in *US − Export Restraints* found, and subsequent panels confirmed, that export restraints including export bans do not constitute countervailable subsidies within the meaning of the SCM Agreement.[301] Finally, regarding the debt buy-back, Indonesia argues that the written instruments pursuant to which IBRA sold APP/SMG's debt to Orleans suggested no benefit was conferred. Indonesia argues that, in fact, these instruments prohibited the sale of debt to affiliates, and that the USDOC only found that a subsidy existed because it determined, following the application of adverse facts available, that APP/SMG and Orleans were affiliated and that the GOI violated its own law.[302]

7.155. Indonesia argues that, given the lack of evidence of a benefit conferred in the relevant legal instruments, the USDOC was required to establish the existence of each subsidy programme by citing to evidence of a "systematic series of actions" that confer a benefit, but failed to do so.[303]

7.156. The United States asks the Panel to reject Indonesia's claims. For the United States, Indonesia misreads the findings of the Appellate Body in *US − Countervailing Measures (China)* and conflates the issue of specificity with elements that are relevant for the establishment of a subsidy, i.e. the existence of a financial contribution and a benefit.[304] Moreover, the United States submits that the three subsidies before the USDOC − the provision of standing timber, the log export ban, and the debt buy-back − were evidenced by specific documents laying out the respective subsidy programmes concerning the granting of the subsidies. Therefore, the United States submits, there was no need for the USDOC to additionally consider whether each subsidy constituted a "systematic series of actions".[305]

7.157. We turn first to the question whether, as claimed by Indonesia, Article 2.1(c) requires an investigating authority to establish that the written instruments concerning the subsidy at issue provide sufficient evidence to conclude that a plan or scheme that *confers a benefit* exists and consequently, whether in the absence of such evidence, Article 2.1(c) requires a finding of "a systematic series of actions" that *confers a benefit* to certain enterprises.

7.158. We agree with Indonesia that an analysis under the first factor of Article 2.1(c) entails the identification of the relevant "subsidy programme" pursuant to which the subsidy is provided.[306] However, we reject the view that, in considering a subsidy programme that is manifested in the

[298] Indonesia's first written submission, paras. 76-77; opening statement at the first meeting of the Panel, para. 51; response to Panel question No. 27(b); second written submission, para. 46; and opening statement at the second meeting of the Panel, para. 32.

[299] Indonesia's first written submission, paras. 79-80; opening statement at the first meeting of the Panel, paras. 52-53; response to Panel question No. 27(b); and second written submission, para. 47.

[300] Indonesia's second written submission, para. 47.

[301] Indonesia first written submission, para. 79 (referring to Panel Reports, *US − Export Restraints*, para. 8.75; *China − GOES*, para. 7.90; and *US − Countervailing Measures (China)*, para. 7.401).

[302] Indonesia's first written submission, para. 83; response to Panel question No. 27(b). In addition, Indonesia argues that to the extent there was even a "programme" at issue, "it concerned the sale of approximately 300,000 non-performing loans" (Indonesia's response to Panel question No. 85), and that what informed the USDOC's specificity finding that a subsidy programme had been used was not the existence of the programme "operating in its intended fashion" but the USDOC's adverse facts available finding that Indonesia acted contrary to the terms of the programme, i.e. violated its own law and allowed an affiliate of a debtor to buy-back debt, without any "hard" evidence supporting that finding. Indonesia submits that "a newspaper article is the only piece of evidence propping up USDOC's finding that a subsidy programme was used". (Ibid.).

[303] Indonesia's opening statement at the first meeting of the Panel, paras. 31 and 50; response to Panel question No. 27(b); and second written submission, para. 45.

[304] United States' second written submission, para. 90.

[305] United States' second written submission, paras. 89 and 96.

[306] As noted above para. 7.145, in *US − Countervailing Measures (China)*, the Appellate Body considered that the reference to "use of a subsidy programme" in Article 2.1(c) suggests that "it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind". (Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.141).

form of written instruments in order to assess whether it has been used by a limited number of certain enterprises, Article 2.1(c) requires that both the financial contribution and the benefit be discernible from such instruments. In our view, the term "subsidy programme" in Article 2.1(c) does not require the determination or identification of the relevant subsidy programme on the basis of evidence showing a particular conjunction of elements.

7.159. We recall, in this respect that the relevant inquiry under Article 2 is whether access to a subsidy already found to exist is limited to certain enterprises. Hence, the identification of the subsidy programme presupposes that the subsidy in question exists.[307] It would, in our view, be redundant and incongruous if the reference to a "subsidy programme" in Article 2.1(c) were understood to have the effect of requiring the investigating authority not only to address anew whether a subsidy exists, but further to show that the relevant laws or regulations governing the subsidy programme explicitly provide for both elements of the subsidy, i.e. a financial contribution conferring a benefit. In our view, this is, in effect, the logical outcome of Indonesia's interpretation of Article 2.1(c).

7.160. Requiring that both the financial contribution and the benefit be set forth explicitly in the written instruments for those instruments to constitute a "subsidy programme" would not acknowledge the reality that governments provide subsidies under programmes that take many forms, some more explicit than others. In many cases, it will not be evident on the face of the written instruments or acts of the granting authority whether the financial contribution at issue confers a benefit. Rather than by reference to the written instrument, the investigating authority will only know whether a benefit exists (and in what amount) after comparing the terms of the financial contribution to a market-determined benchmark.[308]

7.161. We note that Indonesia bases its interpretation of Article 2.1(c) largely on the following paragraph in the Appellate Body Report in *US – Countervailing Measures (China)*:

> The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[309]

7.162. We note that, unlike the subsidies in question in this dispute, the subsidies at issue in *US – Countervailing Measures (China)* were not reflected or expressed in written instruments, but consisted of the consistent provision of certain inputs by state-owned enterprises for less than adequate remuneration.[310] We read the Appellate Body's statement quoted above as addressing a specific situation in which a subsidy programme is not manifested in written form. We recall in this regard the earlier statement by the Appellate Body in the same case, to the effect that a subsidy programme may either be expressed in written form or manifest itself as a systematic series of actions.[311] In any event, we do not understand the above statement to stand for the proposition that when a subsidy programme is manifested in written instruments, Article 2.1(c) requires the investigating authority to find that these written instruments set forth both a financial contribution and the benefit conferred by that financial contribution, or alternatively, where either element is

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[307] See above, para. 7.142; and Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413:

> [T]he purpose of Article 2 of the *SCM Agreement* is not to identify the elements of the subsidy as set out in Article 1.1, but to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of beneficiaries (Article 2.2).

[308] In this respect, we share the view of the panel in *US – Anti-Dumping and Countervailing Duties (China)* that a wide variety of possible forms of subsidization falls within the definition in Article 1 of the SCM Agreement, and that nothing in Article 2 appears to narrow down those forms. (Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.29).

[309] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

[310] Panel Report, *US – Countervailing Measures (China)*, para. 7.242; Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.149.

[311] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

not apparent from the written instruments, the authority needs to establish the existence of "a systematic series of actions" revealing the missing element(s).

7.163. We also find it relevant that the panel in *US – Anti-Dumping and Countervailing Duties (China)*, in the context of a claim under Article 2.1(a) challenging a finding of *de jure* specificity, i.e. where the limitation of access to a subsidy was set forth in the relevant legal instruments, considered that such legal instruments need not reflect a limitation of each of the definitional elements of the subsidy. The panel considered that, although "there are many ways in which access to a subsidy could be explicitly limited", it was not the case "that both the financial contribution and the benefit necessarily would have to be set forth explicitly to effect such a limitation".[312] If limitation of access to both elements of the subsidy is not required in the relevant legal instruments in a *de jure* specificity analysis – where the focus of the analysis is those relevant legal instruments – we see no reason why an investigating authority should be required to find that the relevant legal instruments evidence both constitutive elements of the subsidy in the context of *de facto* specificity – where the analysis normally focuses on the actual use of, or access to, the subsidy.

7.164. In sum, we are of the view that nothing in Article 2.1(c) requires that an investigating authority, in considering the relevant subsidy programme at issue in its specificity analysis, must in all instances make a finding that the programme explicitly sets forth both elements of the subsidy at issue. Particularly where the subsidy proceeds from a legal framework that is expressed in written instruments, it in our view suffices that the authority identifies the subsidy programme by describing the legal framework pursuant to which the financial contribution is provided. Moreover, because the subsidy programme at issue often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy, we do not accept Indonesia's suggestion that, in examining whether subsidies are *de facto* specific, an investigating authority is required to make an *explicit* finding of the existence of the relevant subsidy programme "before" proceeding to the consideration of the factors provided for in Article 2.1(c).[313]

7.165. Turning to the USDOC's determinations in the underlying investigation, as noted above, we do not consider Indonesia's arguments challenging the USDOC's findings concerning the existence of each of the subsidies in our analysis of its claims under 2.1(c).

7.166. Indonesia does not dispute that the stumpage programme and the log export ban emanated from written instruments. Indonesia also does not dispute that the sale of APP/SMG's debt was made pursuant to written instruments, but argues that the USDOC's findings rested on an alleged violation of these instruments.

7.167. In our view, with respect to each of the three subsidies at issue, the USDOC identified and determined each of the relevant subsidy programmes consistently with Article 2.1(c). It did so in the process of determining the existence of each of the three subsidies at issue.

7.168. As we have described in the section of this Report addressing Indonesia's claims under Article 14(d) concerning the provision of standing timber, the USDOC found that the GOI provided standing timber to pulp and paper producers through the granting of licences to harvest timber from forest land owned by the GOI, in exchange for stumpage fees. The GOI granted these licences and collected the respective fees pursuant to certain laws and regulations.[314] The USDOC

[312] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.26. The Appellate Body agreed with the panel. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 377-378).

[313] Indonesia's response to Panel question No. 85. As we have noted above, para. 7.147, in *US – Countervailing Measures (China)*, the Appellate Body stated that, because Article 2.1 assumes the existence of a subsidy, and focuses on the question of whether that subsidy is specific, "[i]t stands to reason … that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1." (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144).

[314] For instance, the procedures for obtaining the HTI licences were promulgated in Minister of Forestry Regulation No. P19/Menhut-II/2007 and associated Amendment No. P11/Menhut-II/2008 (GOI Initial Questionnaire Response, (Exhibit US-32), p. 9, discussed in USDOC Verification of GOI Questionnaire Response, (Exhibit US-35 (BCI)), p. 2); to obtain annual logging permits after receiving the HTI licence, a company had to obtain approval of a Working Plan of Forest Utilization Document, as stipulated by the Minister of Forestry Regulation No. P.62/Menhut-II/2008) (GOI Initial Questionnaire Response, (Exhibit US-32),

found that this measure constituted a financial contribution in the form of the provision of goods by the government and that it conferred a benefit to paper producers.[315] Based on the information provided by the GOI, the USDOC found that the beneficiaries of the granting of harvesting licences were five industries in Indonesia, including the paper industry, out of a larger number of industries existing in that country (23 categories). On this basis, the USDOC concluded that the provision of stumpage was specific because it was limited to a group of industries.[316]

7.169. With respect to the log export ban, as we have described in the section of this Report addressing Indonesia's claims under Article 14(d), the USDOC found that, by means of the log export ban (which, in the CFS investigation, it had found was established pursuant to Joint Decree No. 1132/Kpts-II/2001 and No. 292/MPP/Kep/10/2001), the GOI entrusted or directed forest companies to provide goods (i.e. logs and chipwood) to pulp and paper producing companies.[317] The USDOC determined that the prohibition on log and chipwood exports constituted a financial contribution and that it conferred a benefit to paper producers. The USDOC then found that the log export ban was *de facto* specific because the industries receiving the subsidies from the operation of the ban were limited in number.[318]

7.170. It is clear to us that in its specificity analysis with respect to both the stumpage programme and the log export ban, the USDOC relied on the subsidy programme it had defined − if somewhat implicitly − in its consideration of the existence of the subsidy, that this programme was manifested in writing, and that the USDOC found that the programme provided for the provision of a financial contribution in the form of the provision of a good (in the case of the export ban, through entrustment and direction). In our view, the USDOC's findings satisfied the obligation to identify the subsidy programme at issue as a preliminary step in considering whether that programme was used by a limited number of certain enterprises or industries.

7.171. In the case of the debt buy-back, as we have described in the section of this Report addressing Indonesia's claims under Article 12.7, the USDOC's determination, relying on facts available, that Orleans was affiliated to APP/SMG was one of the findings underlying its conclusion that the sale of APP/SMG's debt constituted a financial contribution in the form of debt forgiveness.[319] The USDOC identified the particular action attributed to the GOI that was found to constitute a subsidy, i.e. the sale of APP/SMG's debt to Orleans, and the written instruments that constituted the framework pursuant to which IBRA conducted the sale. The USDOC also found that a benefit was provided to APP/SMG equal to the difference between the value of the outstanding debt and the amount Orleans paid for it.[320] The USDOC then found that, because the debt was sold to an APP/SMG affiliate, in violation of the GOI's own prohibition against selling debt to affiliated companies, the sale was company-specific.[321]

7.172. Indonesia argues that the specificity determination was based on the USDOC's mistaken conclusion that the relevant law had been violated. The USDOC's findings concerning the existence of the financial contribution and benefit, which in turn were the basis for the USDOC's finding of specificity, were based not only on the USDOC's reliance on facts available under Article 12.7 of the SCM Agreement, but also on a number of written documents emanating from the GOI and IBRA.[322] These documents established the scheme pursuant to which the subsidy was provided,

pp. 11-12) and; the reference prices used in the calculation of the PSDH stumpage fees during 2008 were set forth in Minister of Trade No. 08/M-DAG/PER2/2007 (GOI Initial Questionnaire Response, (Exhibit US-32), p. 14), discussed in USDOC Verification of GOI Questionnaire Response, (Exhibit US-35 (BCI)), p. 8.

[315] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7 and 11.

[316] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

[317] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 12-13. As indicated above, para. 7.26, the USDOC relied largely on its findings in the CFS investigation in determining that the log export ban constituted a financial contribution. In the CFS investigation, concerning the same ban that is at issue here, the USDOC found that the log export ban was originally imposed in 1985 and lifted in the late 1990s. While log exports were briefly permitted from 1998 to 2001, the GOI reimposed the ban on log and chipwood exports in October 2001, pursuant to the Joint Decree No. 1132/Kpts-II/2001 and No. 292/MPP/Kep/10/2001. (CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), pp. 27-28).

[318] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[319] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 5.

[320] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

[321] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

[322] For instance, the bidding documents and the sales agreement for the APP/SMG debt sale, including the provisions pertaining to the prohibition on a debtor (and its affiliates) buying back its own debt. (USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 17-20).

albeit on the basis of a violation of the terms of the instruments at issue. We note Indonesia's argument that the sale of APP/SMG's debt to Orleans was a one-time occurrence of alleged violation of the law and, therefore, it did not constitute a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[323] Indonesia's argument suggests that a subsidy provided to only one recipient requires some kind of systemic application in order to be found specific. In other words, a subsidy programme only exists if it provides for a subsidy granted to more than one recipient. We are not persuaded by Indonesia's argument in this regard. In our view, a one-off subsidy to a company may be considered to be pursuant to a programme. Moreover, a subsidy that is granted to a specific enterprise, either pursuant to a written instrument or by means of a single governmental action is, by definition, specific[324]; in any event, it can in such cases certainly be concluded that the programme was used by a limited number of enterprises.

7.173. In sum, in our view, the USDOC identified the three subsidy programmes at issue for purposes of its specificity analysis under Article 2.1(c) in the context of describing the measures that it found to constitute the respective subsidies.

7.174. For the foregoing reasons, we conclude that Indonesia has failed to establish that the USDOC's *de facto* specificity determinations in connection with the provision of standing timber, the log export ban, and the debt buy-back are inconsistent with Article 2.1(c) of the SCM Agreement.

7.5.4.4 Whether the USDOC's determination of *de facto* specificity in connection with the debt buy-back is inconsistent with the chapeau of Article 2.1 of the SCM Agreement

7.175. Indonesia's second claim refers to an alleged failure by the USDOC to identify the "jurisdiction allegedly providing a benefit".[325] However, the arguments raised by Indonesia in support of its claim under the chapeau of Article 2.1 refer to an alleged omission by the USDOC to properly identify the granting authority in connection with the debt buy-back subsidy.[326]

7.176. In this respect, Indonesia challenges the USDOC's determination that the GOI was the entity that provided the debt buy-back subsidy. Indonesia argues that the USDOC's finding rests on an unsupported conclusion, based on two lines from a single newspaper article, that the GOI knowingly and deliberately violated Indonesian law, which in its view is hardly sufficient support for a specificity finding.[327] Indonesia initially argued that the USDOC was required to identify the government entity that allegedly forgave debt.[328] Indonesia revised its position to argue that, because the USDOC found that it was the action of an individual breaking the law that conferred a benefit on APP/SMG, the USDOC was required, under the chapeau of Article 2.1, to identify the individual or individuals acting on behalf of the GOI who violated the law.[329]

7.177. The United States submits that Indonesia's arguments in fact pertain to the existence of the subsidy and the USDOC's use of facts available in its determination of the existence of the subsidy. The United States submits that the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination. The United States submits that, contrary to Indonesia's assertions, the granting authority was discernible from the determination, i.e. "the GOI's sale of APP/SMG's debt to Orleans constituted a financial contribution, in the form of debt forgiveness."[330] The United States argues that, although not required to do so, the USDOC also identified the particular agency within Indonesia that provided

[323] Indonesia's first written submission, para. 83.
[324] The chapeau of Article 2.1 provides that a subsidy is specific where access to the subsidy is limited to "certain enterprises". This term includes a single company or a firm. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373).
[325] Indonesia's first written submission, para. 3.
[326] Indonesia's first written submission, paras. 94-95; response to Panel question No. 30; and second written submission, para. 49.
[327] Indonesia's second written submission, para. 49; opening statement at the second meeting of the Panel, para. 34.
[328] Indonesia's first written submission, paras. 93-95.
[329] Indonesia's response to Panel question No. 30; second written submission, para. 49.
[330] United States' first written submission, para. 221 (referring to USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20).

the financial contribution, IBRA. The United States submits that Indonesia cites no basis in the SCM Agreement for the proposition that the USDOC should have identified the individual or individuals who knowingly violated Indonesian law.[331]

7.178. It is clear to us that, in the investigation at issue, the USDOC identified the granting authority (the Indonesian national government, through IBRA) and the jurisdiction at issue (the whole of Indonesia).[332] Thus, the determinations identified the government entity that effectively provided the financial contribution, IBRA.

7.179. Indonesia submits that the USDOC should have identified the individual or individuals who violated Indonesian law by allowing an affiliate of APP/SMG to buy back its debt. We recall, however, that the purpose of the specificity analysis under Article 2 is to determine whether access to a subsidy is limited to certain enterprises or industries. The identity of the individual or individuals involved is not immediately relevant to this question[333], and Indonesia cites no legal basis, in Article 2.1 of the SCM Agreement or elsewhere, for its contention in this regard. Indonesia's argument appears to rest on the fact that the individual or individuals concerned allegedly acted in violation of Indonesian law. We consider, however, that this does not suffice to make their alleged actions not attributable to the GOI in the context of this dispute; it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law.[334]

7.180. For the foregoing reasons, we conclude that Indonesia has failed to establish that the USDOC failed to properly identify the granting authority of the debt buy-back subsidy, or the jurisdiction of that granting authority, and, as a consequence, that the USDOC's *de facto* specificity determination is inconsistent with the chapeau of Article 2.1 of the SCM Agreement.

7.5.4.5 Indonesia's allegations concerning the USDOC's determination that the debt buy-back was a company-specific subsidy

7.181. Even though Indonesia's claims focus on the alleged failure of the USDOC to identify the subsidy programme at issue and the granting authority, Indonesia also makes certain allegations that pertain to the USDOC's determination that the sale of APP/SMG's debt to Orleans was

[331] United States' second written submission, para. 110.
[332] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 17-20.
[333] We find support for this proposition in the Appellate Body's statement in *US – Large Civil Aircraft (2nd complaint)*, that:

> While the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is not the purpose of a specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*.

(Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 756 (emphasis original))
[334] See Articles 4 and 7 of the International Law Commission's (ILC) Articles on Responsibility for Internationally Wrongful Acts. In particular, Article 7 provides that:

> *Article 7. Excess of authority or contravention of instructions*
> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.
> In the Commentary on Article 7, the ILC indicates that:
> (1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.
> (2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.

(International Law Commission, Responsibility of States for Internationally Wrongful Acts. Responsibility of States for Internationally Wrongful Acts; text adopted by the ILC at its fifty-third session, in 2001, and submitted to the United Nations General Assembly as a part of the ILC's report covering the work of that session)

company-specific, in the context of its claims under both Article 2.1(c) and the chapeau of Article 2.1.

7.182. First, Indonesia argues, in the context of its claim under the chapeau of Article 2.1, that the World Bank Report and the newspaper articles the USDOC relied upon as evidence in reaching the conclusion that Orleans was affiliated with APP/SMG suggest that IBRA generally allowed other companies to buy back the debt of their related companies.[335] Indonesia maintains that, if newspaper reports are sufficiently credible to support a finding that the GOI violated its own law, then they should also be sufficient evidence to refute the USDOC's finding that the APP/SMG sale was the only instance in which the GOI allowed a company to buy back its own debt through an affiliate.[336] Indonesia adds that the World Bank Report, which it argues the USDOC relied upon, was not discussing sales under the PPAS, but was discussing sales of small loans, and there were some 300,000 non-performing loans that were sold by IBRA. Indonesia also argues that the "speculation" in the World Bank Report concerning affiliates repurchasing debt does not relate specifically to APP/SMG, given that the report pre-dates by more than a month the announcement of the sale of APP/SMG's assets.[337]

7.183. Second, Indonesia submits, in the context of its Article 2.1(c) claim, that the APP/SMG's debt sold to Orleans "consisted of multiple companies" − the various APP/SMG entities − which Indonesia asserts means the debt buy-back could not have been a company-specific subsidy.[338]

7.184. The United States considers that Indonesia's argument concerning the World Bank Report and newspaper articles has nothing to do with whether the determination of specificity was consistent with Article 2.1, but merely rehashes aspects of Indonesia's claim under Article 12.7. Moreover, the United States submits that the fact that some of the evidence before the USDOC speaks in general terms about companies buying their own debt through the PPAS does not undermine the USDOC's finding that the subsidy arising from the APP/SMG sale was *de facto* company-specific, particularly as only the specific company debtor was "eligible to receive that same subsidy".[339] In addition, the United States submits that APP/SMG constituted a single company, regardless of the fact that it comprised multiple entities.[340]

7.185. Indonesia's allegation concerning the World Bank Report was mentioned for the first time in its oral statement at the first meeting and developed in its second written submission, and its allegation that the debt sold to Orleans comprised the debt of various APP/SMG entities was raised for the first time in its responses to Panel questions following the first meeting of the Panel. We share the United States' concern that Indonesia has raised a number of new allegations − including the ones in respect of the debt buy-back at issue here − at a late stage of these proceedings.[341] Indonesia's presentation of its case has evolved significantly during the course of the proceedings, which has made the Panel's task of assessing these claims all the more difficult. Notwithstanding our concerns in this regard, with respect to the allegations at issue here, we consider that the United States was afforded the opportunity to address these arguments in a manner that we consider respected the United States' due process rights. We also note that the relevant factual evidence pertaining to these new arguments of Indonesia was placed before the Panel at the outset of the proceedings.

[335] Indonesia has made contradictory statements as to whether, in its view, the USDOC based its conclusion on affiliation on a single newspaper report or based it on a series of newspaper articles and the World Bank Report.

[336] Indonesia's opening statement at the first meeting of the Panel, para. 57; second written submission, para. 49.

[337] Indonesia's second written submission, paras. 50-51.

[338] Indonesia's response to Panel question Nos. 29 and 84. As support for its argument, Indonesia refers to the list of companies in Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), exhibit 24, pp. 4-5, and to Exhibit 33 to Part Two of the GOI First Supplemental Questionnaire Response, (Exhibit IDN-41 (BCI)).

[339] United States' response to Panel question No. 31 (quoting Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.140).

[340] United States' second written submission, paras. 102 and 107-109.

[341] The United States points out that paragraph 6 of the Panel's Working Procedures provides that "[b]efore the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments". The United States reads this paragraph as requiring that any argument necessary to sustain the complaining party's *prima facie* case of a breach be presented in its first written submission. (United States' comments on Indonesia's response to Panel question No. 86).

7.186. A more fundamental concern is whether these new allegations are within our terms of reference. We recall in this respect that Article 6.2 of the DSU provides that a panel request "shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Consistency with Article 6.2 must be determined on the basis of an objective examination of the panel request as a whole, as it existed at the time of filing, and on the basis of the language used therein[342], that is "'on the face' of the panel request".[343]

7.187. Paragraph 1(c)(i) of Indonesia's panel request sets forth a claim under Article 2.1 with respect to the debt buy-back alleging that the:

> USDOC did not identify whether the entity allegedly providing the purported subsidy was the national, regional or local government, and therefore, failed to properly examine whether the purported subsidy was "specific to an enterprise … within the jurisdiction of the granting authority".[344]

7.188. Paragraph 1(c)(ii) of Indonesia's panel request sets forth a claim under Article 2.1(c) alleging that the:

> USDOC improperly failed to demonstrate that Indonesia's alleged debt forgiveness constituted a subsidy program specific to an enterprise or industry or group of enterprises or industries. USDOC did not cite to evidence establishing the existence of a plan or scheme sufficient to constitute a "subsidy programme."[345]

7.189. Indonesia contends that this language is broad enough to allow it to challenge the USDOC's determination that the debt buy-back subsidy was company-specific. Indonesia notes that it expressly challenged, under Article 2.1(c) of the SCM Agreement, the fact that the "USDOC improperly failed to demonstrate that Indonesia's alleged debt forgiveness constituted a subsidy program specific to an enterprise or industry or group of enterprises or industries." In Indonesia's view, the next sentence, referring to the USDOC's alleged failure to cite evidence establishing the existence of a subsidy programme, is not dependent on, and does not limit the preceding sentence. Rather, it sets forth a separate and additional claim under Article 2.1(c).[346]

7.190. The United States considers that Indonesia's panel request is not broad enough to cover Indonesia's challenge to the USDOC's finding that the debt buy-back subsidy was *de facto* company-specific. For the United States, Indonesia's panel request focuses on the USDOC's identification of the granting authority and the subsidy programme, and not on any other aspects of the specificity analysis. Thus, Indonesia's arguments purporting to challenge the USDOC's analysis or evidentiary basis for finding the debt buy-back *de facto* company-specific do not go to the matters that were presented in Indonesia's panel request and, consequently, are outside the Panel's terms of reference.[347]

7.191. In our view, paragraph 1(c)(i) of Indonesia's panel request is properly understood as setting forth a claim under the chapeau of Article 2.1 that is limited to the issue of the USDOC's identification of the jurisdiction of the granting authority, to the exclusion of other aspects of the USDOC's determination of the company-specific nature of the debt buy-back subsidy. Nothing in the text of that paragraph can be read as suggesting that Indonesia also takes issue with the USDOC's determination that the debt buy-back subsidy was limited to APP/SMG. Rather, this paragraph clearly focuses on the USDOC's alleged failure to identify whether the entity providing the subsidy was the national, regional, or local government. Therefore, Indonesia's allegations in the context of its claims under the chapeau of Article 2.1 that the APP/SMG sale did not constitute

[342] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

[343] Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

[344] Indonesia's panel request, para. 1(c)(i).

[345] Indonesia's panel request, para. 1(c)(ii).

[346] Indonesia's response to Panel question No. 86; comments on the United States' response to Panel question No. 86.

[347] United States' response to Panel question No. 31; second written submission, paras. 107-109.

a company-specific subsidy in light of evidence that IBRA allowed other companies to buy back their own debt do not pertain to claims that are within the Panel's terms of reference.[348]

7.192. As for Indonesia's claim under Article 2.1(c), we read paragraph 1(c)(ii) of the panel request as setting forth a claim under Article 2.1(c) that is limited to the issue of the USDOC's alleged failure to establish the existence of the subsidy programme. We refer in this regard in particular to the use of the term "subsidy program" (or "subsidy programme") in both the first and the second sentence of paragraph 1(c)(ii) of the panel request, which in our view makes clear that Indonesia intended to set forth a claim with respect to the identification of the subsidy programme, and not a broader, more general, claim encompassing additional aspects of the USDOC's specificity determination. For this reason, we do not accept that the first sentence of paragraph 1(c)(ii) of Indonesia's panel request sets forth a claim which is distinct from the claim set forth under the second sentence of the same paragraph. Thus, we read paragraph 1(c)(ii) of Indonesia's panel request as setting forth a claim under Article 2.1(c) that is circumscribed in scope by the second sentence. This being the case, Indonesia's allegation that the debt buy-back could not have been a company-specific subsidy because APP/SMG's debt comprised the debt of multiple companies does not relate to a claim that is within our terms of reference.

7.193. Nonetheless, despite the fact that Indonesia's new allegations are not properly before us, we address these allegations in case they become relevant in the event of any implementation of the DSB rulings. With respect to Indonesia's allegations in the context of its claims under the chapeau of Article 2.1, Indonesia's suggestion that the World Bank Report could not support the USDOC's finding of affiliation because it pre-dates the announcement of the sale of APP/SMG's debt has nothing to do with the USDOC's determination that the debt buy-back was *de facto* specific or with the disciplines in Article 2.1 of the SCM Agreement. Rather, it pertains to the USDOC's use of facts available in finding affiliation, a matter governed by Article 12.7, and which Indonesia challenges under this provision. Similarly, we reject Indonesia's argument to the effect that the evidence relied upon by the USDOC suggests that the subsidy was generally available. First, we recall that the USDOC's finding of affiliation between APP/SMG and Orleans was based on an adverse inference. In our view, the evidence before the USDOC was such that a reasonable and unbiased authority could have concluded that the subsidy at issue was limited to APP/SMG; it is not at all clear that the documents in fact support the proposition that the subsidy at issue was generally available.[349] In particular, the World Bank Report merely states that "*some* IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency".[350]

7.194. Moreover, with respect to Indonesia's allegation in the context of its claims under Article 2.1(c), we note that Indonesia's argument indirectly challenges the USDOC's determination that the various APP/SMG companies were a single producer/exporter for purpose of its investigation, and the USDOC's definition of the financial contribution at issue. Indonesia does not, however, make any claims under the provisions of the SCM Agreement governing those issues.[351] Moreover, we note that APP/SMG's debt was sold as a single asset.[352] This fact alone would have justified the USDOC treating APP/SMG as a single company for purposes of its specificity analysis under Article 2.1(c).

[348] Although these arguments logically pertain to the scope of the subsidy programme, Indonesia makes these arguments regarding the World Bank Report in the section concerning its claim under the chapeau of Article 2.1.

[349] This is not to say that an analysis of specificity must limit itself to the subsidy that was found to exist. On the contrary, the investigating authority may have to consider whether other financial contributions may have been granted as part of the same subsidy programme, so as to render non-specific the subsidy that is the subject of the complaint. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 748-753).

[350] Petitioners' General Factual Information Submission, (Exhibit US-40), exhibit 24, p. 13. (emphasis added)

[351] We recall that the evaluation of whether a subsidy is specific assumes that the subsidy at issue already exists and focuses rather on whether access to that subsidy is limited to certain enterprises.

[352] In particular, we note that the "terms of reference" prepared by IBRA for the APP/SMG's debt sale state that "[t]he current Strategic Asset Portfolio of [IBRA] is made up of 1 (one) asset, namely the APP Group launched on 8 December 2003, which comprises [...]" (a list of five APP/SMG companies and their subsidiaries follows). (Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), exhibit 24, pp. 4-5). The fact that the debt was comprised of the debts of various APP/SMG companies or affiliates does not, in our view, detract from the unitary nature of the debt sale.

7.5.4.6 Overall conclusion concerning Indonesia's claims under Article 2.1(c) of the SCM Agreement and the chapeau of Article 2.1 of the SCM Agreement

7.195. In light of the foregoing, we find that Indonesia has failed to establish that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to determine or identify the relevant subsidy programmes in connection with the provision of standing timber, the log export ban, or the debt forgiveness.

7.196. In addition, we find that Indonesia has failed to establish that the USDOC acted inconsistently with the chapeau of Article 2.1 of the SCM Agreement by failing to identify the granting authority that forgave debt in favour of APP/SMG, or the jurisdiction of that granting authority.

7.6 "As applied" claims concerning the USITC's threat of injury determination

7.6.1 Introduction

7.197. The USITC conducted an investigation into whether the US domestic industry was injured by reason of subsidized and dumped imports of certain coated paper from China and Indonesia. For purposes of its analysis, the USITC cumulated subject imports from these two Members.[353] The USITC considered data for a POI consisting of three full calendar years, from 2007 to 2009, as well as the first six months of 2009 and 2010 ("interim" 2009 and 2010). Chinese and Indonesian producers of the subject product participated in the investigation through their corporate affiliates Asia Pulp and Paper, Ltd. (China) and Asia Pulp and Paper, Ltd. (Indonesia) (APP).[354] The USITC defined the domestic industry as the US producers and converters of certain coated paper.[355]

7.198. The USITC determined that the US domestic industry was threatened with material injury by reason of dumped and subsidized imports from China and Indonesia.[356, 357] In reaching this determination, the USITC determined that dumped and subsidized imports were likely to increase significantly, that they were likely to have adverse effects on domestic prices, and that they were likely to have a negative impact on the condition of the domestic industry, including market share and sales, in the imminent future. The USITC found that there was a likely causal relationship between the subject imports and the imminent adverse impact on the domestic industry, and that

[353] USITC Final Determination, (Exhibit US-1), pp. 15-17.
[354] USITC Final Determination, (Exhibit US-1), p. 3. We note that "APP" in the USITC investigation refers to both the Indonesian and Chinese corporate entities affiliated with the APP/SMG group. It is therefore not the same entity as "APP/SMG" in the USDOC investigation. The USITC indicated that, in 2009, the large majority of subject merchandise was produced and exported by Chinese and Indonesian producers under the corporate umbrella of APP. (Ibid. p. 24).
[355] USITC Final Determination, (Exhibit US-1), p. 13.
[356] USITC Final Determination, (Exhibit US-1), pp. 1 and 39. Five Commissioners determined that the domestic industry was threatened with injury. One of the Commissioners made an affirmative determination of present injury. (USITC Final Determination, (Exhibit US-1), pp. 41-47). In our findings, we consider the views of the majority as being those of the USITC.
[357] The parties have submitted to the Panel the public version of the USITC Final Determination as Exhibits IDN-18 and US-1. The version of the determination submitted by Indonesia contains the views of the USITC but does not contain the Staff Report (which compiles the data the USITC relied upon and is an integral part of the USITC's Report) contained in Parts I to VII or the appendixes to the determination. Since the exhibit submitted by the United States (Exhibit US-1) is the complete version of the USITC Report, and Indonesia has also referred to the US version of the USITC Final Determination in its submissions to the Panel, in this Report we refer to the exhibit submitted by the United States. In addition, the Panel requested that the United States provide the confidential version of the USITC's final determination, which contains confidential data redacted from the public version. In response, the United States stated that due to confidentiality concerns, it was not in a position to submit the confidential version of the determination to the Panel. (United States' response to Panel question No. 68). In addition, only the public versions of several exhibits, in particular those containing submissions made by interested parties to the USITC, were provided to the Panel by the parties. The Panel requested that the parties submit the confidential versions of these exhibits; for most documents, the parties indicated that they were not in a position to do so. That is the case, for instance, for APP Pre-hearing Brief to USITC, (Exhibit IDN-45) and APP Final Comments to USITC, (Exhibit US-105). We base our analysis on the record evidence that was submitted to the Panel; in any event, Indonesia has not made any specific representations that suggest to us that information contained in the confidential version of relevant documents is germane to our resolution of Indonesia's claims.

other factors would not render insignificant the likely effects of subject imports as found by the USITC.[358]

7.199. Indonesia claims that the USITC's threat of injury determination is inconsistent with:

a. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to subject imports adverse effects attributable to "other factors" causing injury to the domestic industry at the same time as subject imports;

b. Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement because the USITC based certain of its findings in its threat of injury determination on conjecture and remote possibility; and

c. Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise "special care" in the underlying investigation.

7.200. The United States requests that the Panel reject Indonesia's claims.[359]

7.6.2 Claims under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement (non-attribution)

7.6.2.1 Introduction

7.201. Indonesia claims that the USITC's threat of injury determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement. We understand Indonesia to argue that the USITC attributed to the subject imports likely adverse effects of three other known factors that would injure the domestic industry in the future at the same time as subject imports: (a) declining US demand for coated paper; (b) imports from non-investigated countries ("non-subject imports"); and (c) the expiration of the "black liquor" tax credit, an alternative fuel tax credit that certain US producers received in 2009.[360]

7.202. Indonesia submits that the USITC failed to properly separate and distinguish the adverse effects attributable to each of the three "other factors" in its threat of injury determination. Indonesia argues that Articles 3.5 and 15.5 contain three requirements: (a) non-attribution; (b) a concrete examination of "other factors" using economic models or constructs; and (c) isolation of factors other than subject imports causing injury.[361] Indonesia argues that the USITC acted inconsistently with each of these requirements. In Indonesia's view, the USITC found a threat of injury not based on subject imports, but because of these other factors, among other causes. The USITC attributed the effects of these other factors to subject imports, in violation of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.[362] Indonesia argues that the only reasonable conclusion from the evidence before the USITC and the USITC's finding that no *present* injury existed was that the projected decline in demand, expiration of the black liquor tax credit, and non-subject imports were likely to cause injury to the domestic industry such as to render insignificant the contribution of subject imports to the imminent injury threatening the domestic industry.[363]

7.203. The United States submits that the USITC's non-attribution analysis complied with Articles 3.5 and 15.5. The United States argues that the USITC properly separated and distinguished the effects of other factors from the injury threatened by subject imports by first

[358] USITC Final Determination, (Exhibit US-1).
[359] United States' second written submission, para. 113.
[360] Indonesia's first written submission, para. 4.
[361] Indonesia's first written submission, para. 99; second written submission, para. 53. In response to a question from the Panel as to whether it considers "non-attribution" and "isolation of other factors" to be distinct concepts, Indonesia explained that, in its view, the principle of non-attribution prohibits the investigating authority from attributing injury or threat of injury caused by other factors to subject imports, and the principle of "isolation of other factors" requires for the investigating authority to identify what factors other than subject imports exist in the market that may be affecting the domestic industry's performance. (Indonesia's response to Panel question No. 44).
[362] Indonesia's second written submission, para. 63.
[363] Indonesia's response to Panel question No. 92(a).

demonstrating a strong causal link between subject imports and the threat of injury, and then explaining that other factors did not detract from this link and by demonstrating that subject imports would have injurious effects independent of those factors.[364]

7.6.2.2 Legal standard under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement

7.204. The text of Article 3.5 of the Anti-Dumping Agreement and that of Article 15.5 of the SCM Agreement are largely identical. Article 3.5 of the Anti-Dumping Agreement provides that:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.* Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[365]

Article 15.5 of the SCM Agreement provides as follows:

> It must be demonstrated that the subsidized imports are, through the effects[*] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports.* Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[366]
>
> [*fn original][47] As set forth in paragraphs 2 and 4.

7.205. Thus, the first two sentences of both Articles impose on the investigating authority an obligation to demonstrate a causal link between the dumped or subsidized imports and the injury to the domestic industry.[367] The last two sentences require that the investigating authority not attribute to dumped or subsidized imports injury caused by other "known" factors, i.e. the "non-attribution" requirement. Indonesia's claims are limited to this non-attribution requirement.

7.206. In this respect, Articles 3.5 and 15.5 require that an investigating authority examine any factor: (a) "other than dumped or subsidized imports"; (b) that is "known" to the authority; and (c) that is injuring the domestic industry at the same time as dumped or subsidized imports.[368] The investigating authority must ensure that it does not attribute to subject imports the injury caused by any such "other factor"; in the context of a finding of threat of injury, we understand this obligation to encompass non-attribution of injury by other known factors *threatening to cause* injury to the domestic industry. Indonesia disaggregates the non-attribution requirement into

[364] United States' first written submission, paras. 294-297; opening statement at the second meeting of the Panel, para. 54.
[365] Emphasis added.
[366] Emphasis added.
[367] We recall in this regard that "injury" as used in these Articles means, *inter alia*, threat of material injury to a domestic industry. (Anti-Dumping Agreement, fn 9; and SCM Agreement, fn 45).
[368] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

three separate requirements: (a) non-attribution; (b) concrete examination of "other factors" using economic models or constructs; and (c) isolation of factors other than subject imports causing injury. However, this disaggregation of the non-attribution requirement is without support in the text of Articles 3.5 and 15.5 and in prior WTO decisions. Rather, an appropriate assessment of the injurious effects of "other factors" "involve[s] separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped [or subsidized] imports".[369] This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from those of the dumped (or subsidized) imports.[370]

7.207. The Anti-Dumping and SCM Agreements do not specify how the non-attribution analysis is to be undertaken − they do not prescribe any methods or approaches by which an investigating authority may avoid attributing injuries caused by factors other than dumped or subsidized imports.[371] Consequently, provided that it does not attribute the injuries of other factors to dumped or subsidized imports, an investigating authority "is free to choose the methodology it will use in examining the 'causal relationship' between dumped [or subsidized] imports and injury".[372] Consistent with the applicable standard of review, prior panels have taken the view that it is appropriate "to undertake a careful and in depth scrutiny" of a non-attribution determination in order to evaluate whether the explanations given by the investigating authority are "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given".[373]

7.208. In this respect, we note that an integral part of Indonesia's argument concerning an alleged obligation to conduct a "concrete" examination of the likely future effects of "other factors", is its view that an investigating authority's examination of other factors must be quantitative and rely on economic models or constructs. Indonesia argues that the USITC did not examine the "other factors" in concrete terms but rather merely listed these factors, without applying any concrete economic constructs or models, which Indonesia asserts is required by Articles 3.5 and 15.5.[374] Indonesia initially argued that an investigating authority is required to use a quantitative analysis in all cases. Later, Indonesia acknowledged that in certain cases, a qualitative analysis might suffice, depending on the facts, but maintained that in any event, the investigating authority's non-attribution analysis in a threat determination must be as rigorous as its non-attribution analysis with respect to present injury. Indonesia asserts that in the present case, the USITC's non-attribution analysis in the threat context was less "concrete" and "rigorous" than its analysis of whether subject imports caused present injury to the domestic industry.[375]

7.209. As we have just noted, Articles 3.5 and 15.5 set forth no limits or guidelines as to the methodology an investigating authority may use for purposes of a non-attribution analysis. Indonesia proffers no basis in the text of these provisions or in prior decisions for its assertion that authorities are required, in certain situations, to rely on quantitative methods, economic constructs or models in their assessment of the injury caused by other factors. In fact, the very panel report cited by Indonesia as support for its argument, while expressing the view that using elementary economic constructs or models would be desirable, recognizes that investigating authorities are not required to do so:

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[369] Appellate Body Report, *US − Hot-Rolled Steel*, para. 223.
[370] Appellate Body Report, *US − Hot-Rolled Steel*, para. 226.
[371] Appellate Body Report, *US − Hot-Rolled Steel*, para. 224.
[372] Appellate Body Report, *EC − Tube or Pipe Fittings*, para. 189.
[373] See, e.g. Panel Report, *EU − Footwear (China)*, para. 7.483.
[374] Indonesia's first written submission, paras. 111-113 (quoting Panel Report, *EC − Countervailing Measures on DRAM Chips*, para. 7.405).
[375] Indonesia's first written submission, para. 114; opening statement at the first meeting of the Panel, para. 61; response to Panel question No. 43(b); and second written submission, paras. 57-58. Indonesia asserts that the USITC used less precise measurements in its threat of injury analysis than in its present injury analysis. Indonesia argues that the latter contains "a volume analysis consisting of precise measurements of the volume of subject imports, non-subject imports, domestic industry shipments, and market share", "a pricing analysis based on four pricing products", and "an impact analysis that is based on several trade and financial performance indicators" while the former "appl[ies] less precise, amorphous standards phrased in general terms like 'increasing volumes of low-priced imports,' 'will take sales from current suppliers such as the domestic industry,' and 'will gain additional U.S. market share in the imminent future'". (Indonesia's second written submission, para. 58 (fns omitted); Indonesia made similar assertions in its opening statement at the first meeting of the Panel, para. 62). As noted below, para. 7.326, Indonesia also argues that the fact that the USITC allegedly conducted a more concrete and rigorous present injury analysis than threat of injury analysis is inconsistent with Articles 3.8 and 15.8.

> It is clear that Article 15.5 does not impose any particular methodology when conducting the causation analysis set forth therein, provided that an investigating authority does not attribute the injuries of other causal factors to subsidized imports. The Appellate Body has not provided guidance as to how an investigating authority should examine other known factors in order to make sure that the non-attribution requirement is fulfilled. In our view, it does not suffice for an investigating authority merely to "check the box". An investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions, such as "the factor did not contribute in any significant way to the injury", or "the factor did not break the causal link between subsidized imports and material injury." In our view, an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports, *preferably using elementary economic constructs or models. At the very least, the non-attribution language of Article 15.5 requires from an investigating authority a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports*.[*][376]

[*fn original][282] Appellate Body report, *US – Hot-Rolled Steel*, para. 226.

7.210. We agree with this view. While it might, depending on the record information before the investigating authority and the circumstances of the investigation at issue, be useful or desirable for an investigating authority to undertake a quantitative assessment of the impact of other factors, there is no requirement that it do so: an adequately reasoned explanation of the qualitative effects of other factors based on the evidence before it will suffice.[377] Indonesia's position – including its suggestion that if an authority relied on a quantitative analysis in its analysis of whether imports caused present material injury, it must do the same in its threat analysis and its non-attribution analysis with respect to threat of injury – also disregards the fact that threat of injury determinations are by definition based on projections, and that quantifying the injurious effects of other factors may be difficult or even impossible in such circumstances.[378] Indonesia has also advanced no support for its proposition that, in determining consistency with the non-attribution requirement, a panel should compare the non-attribution analysis performed by the authority in its threat of injury determination with the authority's analysis in the present injury context. Nothing in the text of these provisions suggests that such a comparative approach is required. The legal sufficiency of an authority's non-attribution analysis in a threat of injury context must be assessed with regard to that determination itself and the explanations provided by the authority in reaching it.

7.211. In light of the above, the principal issue to be addressed in considering Indonesia's non-attribution claims is whether the USITC ensured, in its threat of injury determination, that it did not attribute to dumped and subsidized imports from Indonesia and China any (future) injury likely to be caused by alleged "other factors". In addressing this issue, insofar as Indonesia's arguments raise questions in this regard, we will consider whether the USITC provided a satisfactory explanation of the nature and extent of the likely injurious effects of the other factors, as distinguished from the likely injurious effects of the subsidized imports, and whether the USITC's explanations allow us to determine that the conclusions it reached are such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before the USITC.

[376] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405. (emphasis added)

[377] See also Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.360: "there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidies and non-subject imports, respectively".

[378] In this respect, we agree with the United States that while data concerning subject imports and industry performance during the POI can be collected and analysed by the investigating authority in analysing both present injury and threat of injury:

> [D]ata on the future volumes and price effects of subject imports obviously cannot exist. ADA Article 3.7 and SCMA Article 15.7 recognize this difference between analysis of the past (for which data are available) and of the future (for which they are not), providing, for instance, that investigating authorities should consider "the likelihood of substantially increased importation," based on trends during the period of investigation and the capacity of subject exporters.

(United States' second written submission, para. 129 (emphasis original))

7.212. In our analysis, we first consider two general arguments that Indonesia makes with respect to the USITC's non-attribution analysis before considering Indonesia's specific allegations with respect to each of the alleged "other factors". Before doing so, however, we first briefly summarize the relevant aspects of the USITC's determination.

7.6.2.3 The USITC's consideration of the three alleged "other factors"

7.213. The USITC's non-attribution analysis, as it pertains to its threat of injury determination, is contained in its analysis of the future impact of subject imports on the domestic industry. The USITC did, however, also discuss the decline in demand (during the POI or projected), the black liquor tax credit, and non-subject imports in the sections of its determination concerning the volume − present and future − of subject imports, the price effects − present and future − of subject imports and in the section of its determination in which it considered the impact − also present and future − of subject imports on the domestic industry.

7.214. With respect to the volume of subject imports during the POI, the USITC noted that as apparent US consumption of coated paper declined by 21.3% from 2007 to 2009, subject imports were the only source of increased volume; domestic industry and non-subject import volumes declined during that period.[379]

7.215. With respect to the future volume of subject imports, the USITC recalled that even though US demand had declined from 2007 to 2009, the volume and market share of subject imports had increased.[380] It also stated that although US demand was "expected to remain depressed in the near future", subject producers would likely target orders that arise, consistent with their behaviour in aggressively seeking to gain sales and market share during the POI.[381]

7.216. With respect to price effects during the POI, the USITC found that subject imports depressed domestic prices at least to some extent for part of the POI, but stopped short of finding significant price depression by reason of subject imports because other factors − the decline in demand and the black liquor tax credit − "likely also contributed importantly to lower prices" and it was unable to gauge whether significant price effects were attributable to subject imports.[382] With respect to price suppression, the USITC observed that although the domestic industry's ratio of cost of goods sold (COGS) to net sales had risen from 2007 to 2009, "other factors", in particular the effects of the black liquor tax credit, undermined the ratio as a reliable indicator that the industry was experiencing a growing cost/price squeeze.[383] The USITC added that even if the industry did experience a cost/price squeeze, "factors other than subject imports may have prevented domestic producers from raising prices, including the accelerating fall in demand from 2007 to 2009".[384] On this basis, the USITC found no evidence that subject imports had prevented price increases which otherwise would have occurred to a significant degree during the POI.[385]

7.217. With respect to future price effects, the USITC noted that "U.S. demand for certain coated paper [was] projected to decline moderately over the next two years", and considered that any increase in subject import volumes would therefore not be absorbed by increased demand.[386] The USITC also found that the "other factors" that it had identified as having negative effects on domestic prices during the POI, i.e. the decline in demand and the black liquor tax credit, "[would]

[379] USITC Final Determination, (Exhibit US-1), pp. 26-27.
[380] USITC Final Determination, (Exhibit US-1), p. 27.
[381] USITC Final Determination, (Exhibit US-1), p. 29.
[382] USITC Final Determination, (Exhibit US-1), p. 33:
[D]emand for certain coated paper was significantly depressed, with apparent U.S. consumption dropping by 14.7 percent from 2008 to 2009. The black liquor tax credit spurred greater pulp production by domestic producers in 2009, contributing to lower prices for fiber/pulp which is a key input to production of coated paper. We find that the failure of domestic prices to rebound significantly in interim 2010 even after subject imports largely ceased in March 2010 indicates the important role that factors other than subject imports played in the market. Accordingly, although we find some evidence of price depression by subject imports, we do not find that cumulated subject imports from China and Indonesia significantly depressed prices of the domestic like product in the U.S. market. (fns omitted)
[383] USITC Final Determination, (Exhibit US-1), p. 33.
[384] USITC Final Determination, (Exhibit US-1), p. 33.
[385] USITC Final Determination, (Exhibit US-1), p. 33.
[386] USITC Final Determination, (Exhibit US-1), p. 34.

not play the same role in the imminent future", and consequently that subject imports would be a "key driver" affecting prices.[387] Overall, with respect to the future price effects of likely future imports, the USITC concluded that increased quantities of subject imports, priced aggressively, would put pressure on domestic producers to lower prices "in a market recovering from severely depressed demand". On this basis it concluded that subject imports were likely to cause significant price depression or suppression in the imminent future.[388]

7.218. In its analysis of the impact of subject imports during the POI, the USITC recalled that from 2007 to 2009, US consumption fell by 21.3% and noted that "most indicators of domestic industry performance declined" during that period.[389] The USITC described the domestic industry's situation as having improved in interim 2010 compared to interim 2009. It also noted that over the period 2007-2009, the market shares of the domestic industry and subject imports had increased at the expense of non-subject imports, whose market share fell by 9.3 percentage points.[390] Overall, the USITC did not find a sufficient causal nexus such that it could determine that subject imports were having a significant adverse impact on the domestic industry. The USITC noted that the deterioration "in almost all of the domestic industry's performance indicators between 2007 and 2009 coincided with the economic downturn and a sharp decline in demand for CCP". It also noted that domestic producers had a significant revenue stream from the black liquor tax credit in 2009, which encouraged them to produce greater volumes of pulp, and may have insulated them to some degree from coated paper price declines in 2009.[391]

7.219. In its analysis of the likely impact of subject imports in the imminent future, the USITC first found that the industry was vulnerable to material injury, given the downward trend in most of its performance indicators during the POI; in this context it also considered that the black liquor tax credit, which expired in 2009, would not be a mitigating factor to injury in the future, as it had been during the latter part of the POI:

> Even in light of an overall decline in apparent U.S. consumption during the period of investigation, the downward trends in virtually all of the domestic industry's performance indicators during the period examined weigh heavily in our consideration of the impact of subject imports in the imminent future. … We recognize that the domestic industry's financial indicators may have been worse in 2009 if not for the revenue it received from the black liquor tax credit. As discussed, this tax credit expired in 2009, and therefore any benefit that the domestic industry received from it in 2009 will not continue into the imminent future. Even as demand recovered somewhat in interim 2010, and a large majority of subject imports left the market, the domestic industry's COGS/sales ratio continued to increase as its number of production workers and operating margins continued to decline. Accordingly, we find that the industry is vulnerable to material injury.[392]

7.220. The USITC considered that as a result of the declining trends and given its vulnerable state, the domestic industry would "likely continue to experience even lower employment levels, net sales, operating income, and profitability as increasing volumes of low-priced subject imports enter the U.S. market and compete with the domestic like product".[393] The USITC considered that, given the projected decline in US consumption, the US market would not be able to accommodate growth in subject imports without material injury to the domestic industry and, in this context, future volumes of subject imports would not be in response to growing demand, but would take sales from current suppliers, including the domestic industry. The USITC concluded that, given

[387] USITC Final Determination, (Exhibit US-1), p. 34:
> Domestic consumption is likely to decline only modestly from 2010 to 2011. Although sluggish demand will likely restrain price recovery to some degree, there are no projections of a sharp falloff in consumption similar to the one in 2009. In addition, the "black liquor" tax credit expired in 2009 and is not likely to be renewed. Without the prominence of these other market forces, we anticipate that a key driver of domestic market prices will be the significant volumes of subject imports.

[388] USITC Final Determination, (Exhibit US-1), p. 35.
[389] USITC Final Determination, (Exhibit US-1), p. 35.
[390] USITC Final Determination, (Exhibit US-1), p. 36.
[391] USITC Final Determination, (Exhibit US-1), p. 37. The USITC also described a certain lack of temporal correlation between movements in import volumes and the situation of the domestic industry.
[392] USITC Final Determination, (Exhibit US-1), p. 38
[393] USITC Final Determination, (Exhibit US-1), p. 38.

that the domestic industry was already in a weakened state, unless anti-dumping duty and countervailing duty orders were issued, material injury by reason of subject imports would occur, and found that there was a "likely causal relationship between the subject imports and an imminent adverse impact on the domestic industry".[394]

7.221. In its non-attribution analysis properly speaking, the USITC considered whether there were other factors, i.e. the reduced levels of domestic consumption and non-subject imports, that would likely have an imminent impact on the domestic industry. It concluded that the modest decline in demand projected for 2010-2012 would not "render insignificant" the causal link between projected subject imports and the likely imminent injury:

> As noted, U.S. consumption of CCP is projected to decline modestly from 2010 to 2011. Although a lower level of consumption is likely to limit the domestic industry's sales opportunities and restrain potential price increases to some degree, the decline is not of a magnitude that would render insignificant the likely effects of subject imports that we have described above.[395]

7.222. The USITC also found that non-subject imports were not an "other factor" that rendered insignificant the likely effects of subject imports as a cause of imminent injury to the domestic industry.[396]

7.223. Our analysis below focuses on the explanations contained in this non-attribution analysis with respect to the threat of injury to the domestic industry, while also taking into account the USITC's discussion of other factors elsewhere in its determination.

7.6.2.4 The USITC's re-statement of the legal standard under US law

7.224. Indonesia argues that a statement of the USITC in the section of its determination discussing the relevant "legal standards" under US law – to the effect that the USITC "need not isolate the injury caused by other factors from that caused by unfairly traded imports" – makes it clear that the USITC acted inconsistently with what Indonesia argues is the requirement to "isolate" the threat of injury resulting from other factors.[397] The United States submits that Articles 3.5 and 15.5 contain no "isolation" requirement distinct from the need to "distinguish" injury caused by other factors, that the statement of the USITC on which Indonesia focuses was part of the USITC's re-statement of applicable US law, and that the USITC did in fact "separate and distinguish" (i.e. effectively "isolate") the effects of other factors.[398]

7.225. The USITC statement referred to by Indonesia appears in the following discussion of applicable US law:

> The legislative history explains that the Commission must examine factors other than subject imports to ensure that it is not attributing injury from other factors to the subject imports, thereby inflating an otherwise tangential cause of injury into one that satisfies the statutory material injury threshold. *In performing its examination,*

[394] USITC Final Determination, (Exhibit US-1), p. 38. That the USITC attached significant weight to the vulnerability of the domestic industry in reaching this conclusion is also evident from the USITC's statement (ibid. p. 38) that "the downward trends in virtually all of the domestic industry's performance indicators during the period examined weigh heavily in our consideration of the impact of subject imports in the imminent future" and from the USITC's final conclusion in its threat of injury analysis:

> [G]iven the vulnerability of the domestic industry, together with the likelihood that cumulated subject imports will increase significantly in the imminent future at prices that will likely undersell the domestic like product and depress or suppress domestic prices to a significant degree, material injury by reason of subject imports will occur absent issuance of antidumping duty and countervailing duty orders against subject imports. We therefore conclude that the domestic CCP industry is threatened with material injury by reason of cumulated subject imports from China and Indonesia.

(Ibid. p. 39)

[395] USITC Final Determination, (Exhibit US-1), pp. 38-39.

[396] USITC Final Determination, (Exhibit US-1), p. 39.

[397] Indonesia's first written submission, paras. 118-121 (quoting Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 18).

[398] United States' first written submission, fn 630.

> *however, the Commission need not isolate the injury caused by other factors from injury caused by unfairly traded imports*. Nor does the "by reason of" standard require that unfairly traded imports be the "principal" cause of injury or contemplate that injury from unfairly traded imports be weighed against other factors, such as nonsubject imports, which may be contributing to overall injury to an industry. It is clear that the existence of injury caused by other factors does not compel a negative determination.
>
> Assessment of whether material injury to the domestic industry is "by reason of" subject imports "does not require the Commission to address the causation issue in any particular way" as long as "the injury to the domestic industry can reasonably be attributed to the subject imports" and the Commission "ensure{s} that it is not attributing injury from other sources to the subject imports." Indeed, the Federal Circuit has examined and affirmed various Commission methodologies and has disavowed "rigid adherence to a specific formula.[399]

7.226. Although informative of the USITC's understanding of US law, we do not consider this statement of US law to be determinative of the consistency of the USITC's determination with Articles 3.5 and 15.5. The consistency of the USITC's non-attribution analysis with these provisions is to be determined with regard to whether, in its determination, the USITC properly ensured that it did not attribute to dumped and subsidized imports injury caused by other factors.[400]

7.6.2.5 The USITC's finding of vulnerability

7.227. Indonesia takes issue with the fact that, having found that the decline in demand, along with the expiration of the black liquor tax credit, rendered the domestic industry vulnerable[401], the USITC went on to find that subject imports threatened to injure the domestic industry in the imminent future. Indonesia considers that if the domestic industry was rendered vulnerable by other factors, then the investigating authority cannot find threat of injury caused by subject imports. Indonesia also notes that the vulnerable condition of the US domestic industry weighed heavily in the USITC's affirmative threat of injury analysis.[402] Indonesia argues that rather than finding that the domestic industry's vulnerability made it more likely that subject imports threatened injury, the USITC should have analysed the impact of the subject imports on the domestic industry during the POI in isolation, isolating out the other factors and, based on that

[399] USITC Final Determination, (Exhibit US-1), pp. 18-19. (emphasis added; fns omitted)

[400] In addition, we are reluctant to read the USITC's statement that, under US law, it "need not isolate the injury caused by other factors from injury caused by unfair imports" as demonstrating that the USITC did not consider it necessary to "separate and distinguish" the injurious effects of different causal factors. Indonesia relies on the Appellate Body Report in *US – Hot-Rolled Steel* for the proposition that Articles 3.5 and 15.5 require the investigating authority to "isolate" injury caused by other factors. (Indonesia's first written submission, paras. 118-119 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 226)). However, the Appellate Body's views were more nuanced:

> The United States contends that the panel in *United States – Atlantic Salmon Anti-Dumping Duties* correctly stated that there is no need to "isolate" the injurious effects of the other factors from the injurious effects of the dumped imports. We are not certain what the panel, in that dispute, intended to imply through the use of the word "isolation". Nevertheless, we agree with the United States that the different causal factors operating on a domestic industry may interact, and their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry. We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 228 (emphasis original))

In our view, in this passage the Appellate Body clearly distinguished the requirement to "separate and distinguish" the effects of other factors from a putative requirement to "isolate" those factors, and found the former was required, while the latter was not.

[401] In its submissions, Indonesia sometimes refers to the economic downturn and the decline in demand as being the cause of the US industry's vulnerability; at other times, it refers to the decline in demand and the expiration of the black liquor tax credit.

[402] Indonesia's first written submission, paras. 109 and 116; response to Panel question No. 92(a).

analysis, determined whether a threat of injury was likely in view of the condition of the industry unaffected by such other factors.[403]

7.228. The United States argues that the USITC's assessment of vulnerability was based on the domestic industry's condition at the end of the POI, *based on trends in its performance indicators during the POI*. It was not, as Indonesia asserts, based exclusively on events at the end of the POI, i.e. the expiration of the black liquor tax credit and declining demand.[404] In fact, the United States contends, these two elements, moderately declining demand and the expiration of the black liquor tax credit, were changes in circumstances from those during the earlier part of the POI which underlay the USITC's conclusion that the likely significant increase in subject imports would be a key driver of domestic prices in the imminent future, and would likely depress prices to a significant degree.[405] In addition, the United States argues that the USITC cited the declining demand and expiration of the black liquor tax credit in assessing the "vulnerability" of the domestic industry as part of establishing the baseline condition of the domestic industry for purposes of the threat analysis, including the non-attribution analysis, that followed. Hence, the United States submits, the USITC's "vulnerability" analysis was not part of its non-attribution analysis, but was rather a prelude to that threat analysis.[406]

7.229. The United States further argues that past panels have recognized that an investigating authority's finding that an industry is vulnerable to material injury would reduce the magnitude of the change in circumstances necessary to cause the industry to experience material injury in the imminent future.[407] The United States argues that Indonesia's argument would create a Catch-22 situation: Indonesia's theory suggests that a finding of vulnerability stemming from considerations other than subject imports would preclude attribution of any subsequent future injury to subject imports and therefore preclude a finding of threat of injury; but where a domestic industry was not shown to be vulnerable, subject imports could not threaten the industry. The result would be that investigating authorities could not make findings of threat of material injury, a proposition that would render Articles 3.7 and 3.8 of the Anti-Dumping Agreement and Articles 15.7 and 15.8 of the SCM Agreement inutile.[408]

7.230. We understand Indonesia to argue that the USITC improperly attributed to subject imports the injury caused by the expiration of the black liquor tax credit and the decline in demand because it relied on its finding of vulnerability in its evaluation of the likely future impact of subject imports, without giving due consideration to the fact the domestic industry's vulnerability had been caused by these other factors, and not by subject imports.[409]

7.231. We note that panels in several prior disputes have considered it appropriate, and even necessary, for investigating authorities to first consider the present state of the domestic industry, before considering whether it is threatened with injury by reason of subject imports. In particular, the panel in *Egypt – Steel Rebar* explained that:

> Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority

[403] Indonesia's second written submission, para. 62; response to Panel question No. 41.
[404] United States' second written submission, para. 115.
[405] United States' first written submission, paras. 296-299.
[406] United States' first written submission, para. 293.
[407] United States' opening statement at the first meeting of the Panel, para. 52 (referring to Panel Reports, *Egypt – Steel Rebar*, para. 7.91; and *Mexico – Corn Syrup*, para. 7.140); second written submission, para. 114 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.91).
[408] United States' opening statement at the first meeting of the Panel, para. 53; second written submission, paras. 119-120; and opening statement at the second meeting of the Panel, para. 36.
[409] Indonesia's opening statement at the first meeting of the Panel, para. 60; second written submission, para. 54.

> to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.[410]

7.232. Recently, the panel in *EU – Biodiesel (Argentina)* observed that the concept of injury is not limited to a situation in which the condition of a "healthy" domestic industry worsens over the course of the POI, but also covers circumstances in which a domestic industry already in a difficult situation at the beginning of the POI sees its situation deteriorate:

> [W]hether an industry is in good or poor condition at the outset of the period examined is not determinative of whether dumped imports caused material injury. … the concept of injury under Article 3 of the Anti-Dumping Agreement is not limited to the situation in which a healthy industry is injured by dumped imports. Rather, the notion of "injury", in our view, calls for an inquiry into whether the situation of the industry *deteriorated* during the period considered. Our view is supported by the fact that Article 3.5 itself envisages the possibility of more than one factor causing injury.[411]

7.233. We agree with the understanding of the panel in *EU – Biodiesel (Argentina)*. In our view, the same considerations apply in the context of a threat analysis. The fact that other factors may have contributed to rendering the domestic industry "vulnerable" – i.e. more susceptible to future injury – does not, in our view, preclude an investigating authority from finding a causal link between subject imports and a threat of future injury to the domestic industry. Thus, to the extent that Indonesia is suggesting that the fact that the domestic industry's vulnerable condition was caused by factors other than dumped or subsidized imports requires the authority not to attribute future injury to subject imports or precludes a finding of threat of injury, we consider that there is no basis in Articles 3 and 15 for this suggestion. We reject the view that, if a domestic industry is found to be vulnerable to future injury for reasons other than the effect of subject imports during the POI, then it cannot be found to be threatened with injury by future subject imports. That said, where other factors contributed to the vulnerability of a domestic industry, we would expect that the likely future impact of such other factors would be considered and addressed by the investigating authority, so as to ensure that any likely future injury resulting from these other factors is not attributed to the subject imports.

7.234. In the present case, on the basis of its consideration of various factors, the USITC found that the domestic industry was vulnerable at the end of the POI.[412] The USITC reached this conclusion in its consideration of the question of threat of injury, having already determined that there was no present material injury by reason of subject imports during the POI. In the course of reaching the latter conclusion, the USITC determined that the deterioration in the domestic industry's condition coincided with an economic downturn and a sharp decline in demand for coated paper.[413] On this basis, and in light of the fact that when subject imports largely left the market in interim 2010 due to the pendency of the investigation, many of the domestic industry's performance indicators did not improve, the USITC "[did] not find a sufficient causal nexus necessary to make a determination that the subject imports [were] having a significant adverse impact on the domestic industry".[414] However, notwithstanding declining demand, the downward trends in virtually all of the domestic industry's performance indicators during the period weighed heavily in the consideration of the impact of subject imports in the imminent future as part of the USITC's conclusion that the industry was vulnerable to material injury.[415]

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[410] Panel Report, *Egypt – Steel Rebar*, para. 7.91. See also Panel Report, *Mexico – Corn Syrup*, para. 7.131:

> [T]he text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

[411] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.469. (fn omitted; emphasis original)

[412] USITC Final Determination, (Exhibit US-1), p. 38.

[413] USITC Final Determination, (Exhibit US-1), p. 37.

[414] USITC Final Determination, (Exhibit US-1), p. 38. The USITC had found that there were "some evidence that the imports depressed domestic prices, but the record [did] not establish that the effects of subject imports on domestic prices were significant". (Ibid. p. 37).

[415] USITC Final Determination, (Exhibit US-1), p. 38.

7.235. The USITC considered that this vulnerability made the domestic industry more susceptible to future injury caused by increased subject imports.[416] Contrary to Indonesia's suggestion, the USITC did not find that the expiration of the black liquor tax credit contributed to rendering the domestic industry vulnerable. Rather, the USITC observed that the situation of the domestic industry might have been worse at the end of the POI, but for the revenues from this tax credit.[417] In our view, that the decline in demand during the POI may have contributed to the domestic industry's vulnerability did not, in and of itself, preclude the USITC from finding that industry vulnerable, or from concluding that subject imports would, in the imminent future, cause material injury to the domestic industry.

7.236. Finally, we note that Indonesia maintains that the United States wrongly presumes that the USITC did not err in considering whether subject imports threatened to cause injury taking into account the condition of the domestic industry at a single point in time, the end of the POI. Indonesia contends that nothing in Articles 3.7 and 15.7 requires an investigating authority to consider a single point in time in assessing the domestic industry's condition and whether there is a threat of injury. According to Indonesia, these provisions require an investigating authority to consider the totality of what happened during the entire POI and to identify clear and foreseeable changes in circumstances that would cause subject imports to injure the domestic industry.[418] We see nothing in the text of these provisions that would support Indonesia's position.

7.237. We now turn to the USITC's consideration of the three alleged "other factors" which negatively affected the domestic industry during the POI in the context of its non-attribution analysis in finding threat of material injury.

7.6.2.6 Projected decline in demand

7.238. Indonesia argues that the USITC should have found that the projected decline in demand broke the causal link between subject imports and the threat of injury to the domestic industry, particularly given that the declining US demand led to the domestic industry's vulnerability, which in turn was a basis of the USITC's threat of injury determination. Indonesia also argues that the USITC's consideration of the decline in demand as an "other factor" consists of a single conclusory sentence (quoted in paragraph 7.241 below) and lacks analysis, such that it is impossible to evaluate whether it is reasonable.[419]

7.239. The United States maintains that the USITC demonstrated that subject imports would have adverse effects on the domestic industry independent of the projected decline in demand: the USITC explained that the likely increase in the volume of subject imports, coupled with underselling by those imports, would cause material injury to the domestic industry in the imminent future given its vulnerable condition. The United States submits that the USITC explained that the projected moderate decline in demand would likely exacerbate the adverse impact of subject imports on the domestic industry, as in view of moderately declining demand, the market could not accommodate the likely increase in subject import volumes without injury to the domestic industry, and this increase would take sales from current suppliers, including domestic producers.[420] The United States adds that the USITC explained in its findings that the

[416] USITC Final Determination, (Exhibit US-1), p. 38: "*Given that the industry is already in a weakened state*, we conclude that, unless antidumping duty and countervailing duty orders are issued, significant volumes of dumped and subsidized imports will gain additional U.S. market share in the imminent future and material injury by reason of subject imports will occur" (emphasis added). The USITC also considered that, in light of the *projected* moderate decline in demand, future growth in import volumes would not be in response to growing demand, but would take sales from current suppliers such as the domestic industry. (Ibid.).

[417] USITC Final Determination, (Exhibit US-1), fn 249. As we have noted above, the USITC also considered that the black liquor tax credit contributed to lowering domestic prices during the POI. This was one of the considerations that led the USITC not to find that subject imports significantly depressed domestic prices during the POI, notwithstanding some evidence of price depression by subject imports during the POI. (Ibid. p. 33).

[418] Indonesia's response to Panel question No. 92(c).

[419] Indonesia's first written submission, paras. 109 and 116.

[420] United States' first written submission, para. 300; opening statement at the first meeting of the Panel, para. 55.

projected decline in demand was not of such a magnitude as to render insignificant the likely injurious effects of subject imports or to obscure their contribution to these injurious effects.[421]

7.240. We recall that an investigating authority may consider the state of the domestic industry at the end of the POI as the starting point of its threat of injury analysis notwithstanding the fact that the state of the domestic industry may in part result from the effect of factors other than subject imports. For this reason, the fact that the decline in demand during the POI negatively affected the domestic industry did not preclude the USITC from concluding that subject imports would cause injury to the domestic industry in the imminent future. Thus, our analysis focuses on the USITC's consideration of the likely impact, in the imminent future, of the *projected* decline in demand.

7.241. The USITC concluded that the "modest" decline in demand projected for 2010-2012 (3.3% for 2011 and 2.5% for 2012)[422] would not render insignificant the likely effects of subject imports on the domestic industry:

> As noted, U.S. consumption of CCP is projected to decline modestly from 2010 to 2011. Although a lower level of consumption is likely to limit the domestic industry's sales opportunities and restrain potential price increases to some degree, the decline is not of a magnitude that would render insignificant the likely effects of subject imports that we have described above.[423]

7.242. In addition, we recall that, in finding that subject imports threatened injury in the imminent future, the USITC had observed that, given the projected decline in US consumption, the US market would not be able to accommodate growth in subject imports without material injury to the domestic industry because in this context, future subject imports would not be in response to growing demand, but would take sales from current suppliers, including the domestic industry.[424]

7.243. The USITC also discussed the decline in demand during the POI in its consideration of the price effects of subject imports and of the impact of such imports during the POI. Concerning price effects, the USITC described the decline in demand during the POI as a factor that contributed to lowering prices during the POI.[425] In its consideration of the impact of subject imports, the USITC noted that US demand had declined by 21.3% from 2007 to 2009.[426] The USITC also cited the economic downturn and the "sharp decline in demand" as an "other factor" contributing to injuring the domestic industry, that led it, *inter alia*, to conclude that there was an insufficient causal nexus between the subject imports and the adverse impact on the domestic industry. The domestic industry's resulting "weakened state" was an important consideration in the USITC's conclusion

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[421] United States' first written submission, paras. 300 and 305.

[422] The figures are redacted from the public version of the USITC Final Determination, (Exhibit US-1), pp. 38 and II-12. However, the US demand projections data were provided to the Panel, Indonesia, and the third parties in Excerpt from Petitioners Post-hearing Brief to USITC, a public document, ((Exhibit US-4), p. 1 and exhibit 1 (RISI Paper Trader, July 2010), p. 21), and were discussed in the United States' first written submission (*inter alia*, in paras. 229 and 243). Indonesia does not challenge the USITC's reliance on these projections.

[423] USITC Final Determination, (Exhibit US-1), pp. 38-39.

[424] USITC Final Determination, (Exhibit US-1), p. 38. The USITC stated that "Although apparent U.S. consumption recovered somewhat in interim 2010 from its lowest levels in 2009, RISI projects a decline of [3.3] percent in apparent U.S. consumption from 2010 to 2011 and a further reduction of [2.5] percent in 2012." As noted above (fn 422) the figures were redacted from the public version of the USITC Final Determination but were included in the Petitioners' Post-hearing Brief and provided to the Panel as Exhibit US-4. Moreover, in its analysis of the future price effects of subject imports, the USITC considered that falling consumption and increased pulp production due to the black liquor tax credit, which had likely placed negative pressure on domestic prices during the POI, would not play the same role in the imminent future. The USITC considered that:

> Domestic consumption is likely to decline only modestly from 2010 to 2011. Although sluggish demand will likely restrain price recovery to some degree, there are no projections of a sharp falloff in consumption similar to the one in 2009. In addition, the "black liquor" tax credit expired in 2009 and is not likely to be renewed. Without the prominence of these other market forces, we anticipate that a key driver of domestic market prices will be the significant volumes of subject imports. We have described above how the subject imports led domestic prices downward in late 2008 and early 2009.

(USITC Final Determination, (Exhibit US-1), p. 34)

[425] USITC Final Determination, (Exhibit US-1), p. 33.

[426] USITC Final Determination, (Exhibit US-1), e.g. pp. 22 and C-6 (table C-3).

that unless anti-dumping and countervailing duty orders were issued, subject imports would cause material injury to the domestic industry in the imminent future.[427]

7.244. The USITC's analysis of likely injury primarily hinges on its findings concerning the effects of the projected increase in the volume of imports (due, in large part, to the projected increase in capacity in China) and its conclusion that they would undersell domestic coated paper.[428] In reviewing the USITC's consideration of the future impact of the projected decline in demand, we note in particular the USITC's characterization of the projected decline in demand as "modest". In this respect we note that while from 2007 to 2009, US coated paper consumption declined by 21.3% (-7.7% in 2007-2008 and -14.7% in 2008-2009)[429], according to the Resource Information Systems Inc. (RISI) data on which the USITC relied, it was projected to decline by 3.3% in 2011 and 2.5% in 2012.[430] The fact that a much larger decline in demand (21.3%) had not persuaded the USITC to conclude that there was a causal link between subject imports and the injury to the domestic industry at the end of the POI does not in our view mean that it was precluded from finding threat of injury notwithstanding a projected decline of 5.8%. We see no reason why the lesser magnitude of the projected decline, in the circumstances of the domestic industry projected for the imminent future, should necessarily have led the USITC to the same negative conclusion it reached with respect to causation of present material injury. In our view, the USITC's explanation regarding the likely future impact of the projected decline in demand, that it was "not of a magnitude that would render insignificant the likely effects of subject imports," is a reasonable one in light of the facts, and one that could have been reached by an objective and unbiased investigating authority. In light of the foregoing, we conclude that Indonesia has failed to establish that the USITC attributed to subject imports imminent injury that was likely to be caused by the projected decline in demand.

7.6.2.7 Expiration of the "black liquor" tax credit

7.245. "Black liquor" is a by-product of paper pulp production. The tax credit at issue was an alternative fuel tax credit of USD 0.50 per gallon of "black liquor" that certain domestic industry producers received in 2009.[431] The tax credit went into effect in late 2007 and expired at the end of 2009.[432] Before the USITC, respondent parties contended that the tax credit allowed domestic producers to lower prices on certain coated paper in 2009[433], whereas petitioners argued that the tax credit was not a factor in domestic producers' pricing decisions in 2009.[434]

[427] USITC Final Determination, (Exhibit US-1), p. 38.

[428] However, contrary to the United States' suggestion, the USITC's finding with respect to the effects of subject imports in the future is not entirely independent of the projected decline in demand − the USITC makes the point that "the U.S. market cannot accommodate growth in subject imports without material injury to the U.S. industry" and that the increased import volumes will not be in response to a growing demand, but will take sales from, *inter alia*, the domestic industry.

[429] USITC Final Determination, (Exhibit US-1), table C-3 on p. C-6.

[430] USITC Final Determination, (Exhibit US-1), p. 38; Excerpt from Petitioners Post-hearing Brief to USITC, (Exhibit US-4), p. 1 and exhibit 1 (RISI Paper Trade, July 2010), p. 21; and United States' first written submission, paras. 229 and 243.

[431] USITC Final Determination, (Exhibit US-1), pp. V-2 and VI-18-VI-20. The United States indicates that domestic producers qualified for the alternative fuel mixture credit because they used black liquor, a by-product of their wood pulping process, as an alternative fuel to power their paperboard mills. (United States' response to Panel question No. 46(a)).

[432] USITC Final Determination, (Exhibit US-1), p. 25. The final determination indicates that between USD 132 million and USD 2.1 billion in black liquor tax credit, albeit not all attributable to coated paper production, was reported by individual US producers as part of their "operating income" or "other income". (USITC Final Determination, (Exhibit US-1), fn 164).

[433] In its Pre-hearing Brief, APP referred to the black liquor tax credit as "a massive … subsidy, that created an enormous incentive for domestic producers to lower prices to buy the volume that would earn them these tax credits". (Excerpt from APP Pre-hearing Brief to USITC, pp. 24, 30, 36, 49-53, and 72, (Exhibit US-95), p. 24). See also APP Pre-hearing Brief to USITC, (Exhibit IDN-45) p. 3 where APP argues that "NewPage has repeatedly stated that it passed through this tax credit in the form of lower prices to customers. The record confirms substantial pass-through of these credits. This change in 2009 had a major impact on domestic price levels, for both integrated and non-integrated producers" and that "Intra-industry competition intensified in 2009, as domestic producers increasingly began to compete fiercely for a larger share of a declining total market, so they could expand production to claim the lucrative 'black liquor' subsidies. These credits and the ensuring [*sic*] intra-industry competition seriously distorted the market in 2009, and drove down prices." (emphasis original). APP makes similar comments on p. 36 of the same document.

[434] USITC Final Determination, (Exhibit US-1), p. 25.

7.246. Although Indonesia's formulation of its argument has varied over the course of these proceedings[435], we understand Indonesia to take the position that the expiration of the black liquor tax credit was an "other factor" that would be causing injury to the domestic industry in the future, and that the USITC impermissibly attributed injury caused by the expiration of this tax credit to subject imports. Indonesia notes in this respect that the USITC found that the black liquor tax credit mitigated the effects of price depression by subject imports and benefited domestic producers' costs and production-related activities. Indonesia asserts that the USITC considered the black liquor tax credit as one of the factors that broke the causal link between subject imports and the domestic industry's condition during the POI. Indonesia argues that the USITC failed to give any consideration or devote any of its threat analysis to the fact that subject imports would likely respond differently in a market without the "subsidy" of the black liquor tax credit.[436] Indonesia also faults the USITC for failing to undertake a "concrete analysis" of this factor, based on economic constructs, as it had done in its present injury analysis.[437] Indonesia also faults the USITC for examining the question of threat of injury in the context of a domestic industry that was vulnerable.[438]

7.247. The United States argues that having expired in 2009, the black liquor tax credit was no longer an "other factor" for the investigating authority to "examine" pursuant to Articles 3.5 and 15.5, and the USITC logically considered that the credit would have no effect − positive or negative[439] − going forward. The United States disputes Indonesia's assertion that the USITC found that the expiration of the black liquor tax credit was a source of domestic industry vulnerability. Rather, the USITC noted that the domestic industry's financial indicators in 2009 might have been even worse than they were, but for the temporary black liquor tax credit payments in that year. The United States submits that the USITC considered the black liquor tax credit as a one-time event that might have obscured the full extent of the domestic industry's vulnerability in 2009 and found that its non-renewal eliminated a factor that had contributed to lower domestic like product prices in 2009, thereby obscuring the contribution of subject imports to price depression in that year.[440] The United States also submits that, in the investigation, Indonesian interested parties did not argue that the expiration of the black liquor tax credit would likely injure the domestic industry in the future.[441]

7.248. The USITC considered that black liquor tax credit payments received by producers during the POI reduced their costs and improved their financial position in 2009. The USITC also mentioned the black liquor tax credit as a factor that obscured the contribution of subject imports to negative price effects during the POI and made it unclear whether the prices evidenced a negative trend, given that the tax credit contributed to reducing domestic producers' prices.[442] In its threat of injury determination, the USITC noted that the tax credit expired at the end of 2009; therefore any benefit that the domestic industry had received from it in 2009 would not continue into the imminent future.[443] The USITC did not address the black liquor tax credit further and did not discuss it in considering non-attribution.

[435] Indonesia has argued that the USITC found that the black liquor tax credit was another factor that broke the causal link between subject imports and the condition of the domestic industry during the POI (Indonesia's response to Panel question No. 47); that the tax credit rendered the domestic industry vulnerable (Indonesia's first written submission, para. 114; response to Panel question No. 97); that its expiration rendered the domestic industry vulnerable (Indonesia's first written submission, paras. 109; response to Panel question Nos. 41 and 47; second written submission, paras. 55-63); and that the USITC found that the expiration of the tax credit was a cause of likely future injury to the domestic industry because it contributed to the US industry's vulnerability (Indonesia's first written submission, paras. 106, 108, and 109; response to Panel question No. 45(a)).

[436] Indonesia's second written submission, para. 55.

[437] Indonesia's opening statement at the first meeting of the Panel, para. 61.

[438] Indonesia's response to Panel question No. 47.

[439] The United States also submits that while the USITC "recognized that domestic producers received revenues from the black liquor tax credit in 2009, [it] never found that the black liquor tax credit yielded a net benefit to the domestic industry". (United States' response to Panel question No. 46(a) (referring to USITC Final Determination, (Exhibit US-1) fns 164 and 249)).

[440] United States' second written submission, paras. 117 and 125.

[441] United States' first written submission, para. 309; second written submission, para. 125.

[442] USITC Final Determination, (Exhibit US-1), p. 33.

[443] USITC Final Determination, (Exhibit US-1), p. 38. As noted above (fn 424) in its analysis of the future price effects of subject imports, the USITC also considered that falling consumption and increased pulp production due to the black liquor tax credit, which had expired in 2009, had likely put negative pressure on

7.249. We recall that, rather than finding the black liquor tax credit to have been an "other factor" causing injury to the domestic industry, the USITC found that it mitigated the injury suffered by the domestic industry during the POI. Having noted that the black liquor tax credit had expired at the end of 2009, such that it would have no effect going forward, it is clear that the USITC regarded the black liquor tax credit as a one-time event (limited to year 2009), the expiry of which would have no impact on the domestic industry in the future. In our view, an unbiased and objective investigating authority could have considered, as the USITC did, that the expiration of a tax credit which only benefited the domestic industry during one year of the POI was not an "other factor" threatening to cause injury to the domestic industry in the future.[444] In other words, an unbiased and objective authority could, in the circumstances, have considered the *absence* of a temporary, one-off, financial benefit that was no longer in effect at the end of the POI as the "baseline" for its consideration of whether subject imports threatened material injury to the domestic industry. In our view, the USITC's treatment of the absence of the black liquor tax credit in the future is reasoned and adequate.[445, 446]

7.250. For the foregoing reasons, we conclude that Indonesia has not established that the USITC acted inconsistently with Articles 3.5 and 15.5 with respect to its treatment of the expiration of the black liquor tax credit.

7.6.2.8 Non-subject imports

7.251. The USITC found that non-subject imports were not an "other factor" that rendered insignificant the likely effects of subject imports as a cause of imminent injury to the domestic industry. The USITC observed that non-subject imports lost market share to both subject imports and the domestic like product (except in interim 2010 when subject imports declined, and non-subject imports gained market share) and that they were generally priced higher than subject imports. The USITC concluded that in the future, subject imports would compete on price to regain the market share that they lost both to the domestic industry, and to non-subject imports in interim 2010.[447]

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domestic prices during the POI, but would not play the same role in the imminent future. The USITC found that "[w]ithout the prominence of these other market forces … a key driver of domestic market prices will be the significant volumes of subject imports". (USITC Final Determination, (Exhibit US-1), p. 34).

[444] There is some disagreement between the parties as to whether the overall impact of the tax credit on the domestic industry was, during the period that it was in place, a positive one. We are, in our analysis, focusing on the impact of the tax credit during the POI as benefiting domestic producers and mitigating the downward trend in their financial condition and the absence of that positive impact on domestic producers in the future.

[445] As noted above, Indonesia also argues that the USITC failed to give any consideration or devote any of its threat analysis to the fact that subject imports likely would respond differently in a market without the "subsidy". It is not clear to us whether this argument of Indonesia is a reference to the USITC's analysis of future price effects of subject imports. In any event, we address the USITC's analysis concerning future price effects in the following section of this Report, concerning Indonesia's claims under Articles 3.7 and 15.7.

[446] In reaching this determination, we recall that Indonesian interested parties did not argue during the investigation that the expiration of the black liquor tax credit would likely injure the domestic industry in the future. Thus, it is not clear to us that the expiration of the black liquor tax credit was a "known" other factor threatening injury to the domestic industry. Interested parties' arguments focused on the price-lowering effects of the tax credit during the POI, and to some extent the impact of its expiration on the domestic industry's performance. (Indonesia's response to Panel question No. 47 (referring to Excerpt from APP Pre-hearing Brief to USITC, pp. 5 and 51, (Exhibit IDN-36), p. 5)).

[447] USITC Final Determination, (Exhibits IDN-18/US-1), p. 39:

> The same [i.e. that they would not render insignificant the likely effects of subject imports] is true for CCP imports from countries other than China and Indonesia. These nonsubject imports were sold in the U.S. market throughout the period examined, although from 2007 to 2009 their market share declined by 9.3 percentage points overall from 25.4 percent in 2007 to 16.1 percent in 2009. The market share held by nonsubject imports was 18.4 percent in interim 2009 and 24.5 percent in interim 2010. Although nonsubject imports did gain market share in interim 2010 when subject imports left the market due to the pendency of the investigations, the domestic industry also gained 6.8 percentage points of market share from interim 2009 to interim 2010. Moreover, the available data reflect that non-subject imports are generally priced higher than subject imports. Once the preliminary duties are lifted, subject imports will compete on price to regain the market share that they lost both to the domestic industry and to non-subject imports in interim 2010, which will in turn result in a more price-competitive U.S. market.

7.252. Indonesia argues that the USITC's threat of injury determination is devoid of any analysis that accounts for the fact that subject imports would not take market share exclusively from the domestic industry but, rather, were likely to gain market share from non-subject imports. Indonesia notes in this respect that the USITC found that during the POI, subject imports gained market share at the expense of non-subject imports and not the domestic industry. Indonesia argues that to the extent subject imports gained market share from non-subject imports in the future, this would reduce the likelihood of an adverse impact on the domestic industry.[448] Thus, Indonesia's argument goes to the USITC's explanation for its finding that subject imports would, in the future, take market share from both the domestic industry and non-subject imports.

7.253. The United States argues that the USITC identified no injurious effects caused by non-subject imports during the POI, and that Indonesia does not argue that non-subject imports would cause injury to the domestic industry, and therefore cannot establish that the USITC improperly attributed to subject imports injury likely to be caused by non-subject imports.[449] The United States also argues that there is no inconsistency between the USITC's findings concerning market shares during the POI and its finding that subject imports would take sales from the domestic industry in the future.[450]

7.254. Indonesia does not argue that non-subject imports would in the future cause injury to the domestic industry.[451] To the contrary, Indonesia's argument seems to be that non-subject imports would mitigate any injurious effect of future subject imports by losing market share to those imports, rather than the domestic industry losing such market share. Given that Indonesia does not allege that non-subject imports were an "other factor" threatening to cause injury to the domestic industry[452], we conclude that Indonesia has failed to establish a claim that the USITC failed to properly examine whether injury threatened by non-subject imports was attributed to the subject imports. Consequently, we conclude that Indonesia has failed to make a *prima facie* case of violation of the non-attribution obligation under Articles 3.5 and 15.5 with respect to the USITC's examination of non-subject imports, and we reject Indonesia's claim as it pertains to this alleged "other" factor.

7.6.2.9 Overall conclusion concerning Indonesia's claims under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement

7.255. In light of the foregoing, we find that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors.

7.6.3 Claims under Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement (threat of injury)

7.6.3.1 Introduction

7.256. Indonesia claims that the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement because the USITC based certain findings on conjecture and remote possibility.[453] Specifically, Indonesia challenges two intermediate findings that form part of the basis for the USITC's affirmative threat of injury determination: that subject imports would gain market share at the expense of the domestic industry; and that subject imports would have adverse price effects on domestic

[448] Indonesia's first written submission, paras. 110 and 117; response to Panel question No. 48(b).
[449] United States' first written submission, paras. 301 and 306-308; second written submission, fn 218.
[450] United States' first written submission, paras. 301 and 306-308.
[451] See Indonesia's response to Panel question No. 48(b): "To the extent subject imports gained market share from nonsubject imports, this would reduce the likelihood of an adverse impact on the domestic industry." This suggests that Indonesia's position is not that non-subject imports threatened injury, i.e. were an "other known factor [threatening to cause] injury" but rather that they would mitigate any injury caused by subject imports by losing market share to those imports.
[452] We also note that there is no indication in the record evidence submitted to the Panel that arguments were made before the USITC to the effect that non-subject imports were causing, or would in the future cause, injury to the domestic industry.
[453] Indonesia's first written submission, para. 4.

prices.[454] For Indonesia, the USITC based these findings on conjecture or speculation regarding certain events which were not clearly foreseen and imminent, in violation of Article 3.7 and Article 15.7.[455]

7.257. The United States argues that the USITC based its threat of injury determination on facts and changes in circumstances which were clearly foreseen and imminent and requests that the Panel reject Indonesia's claims.[456]

7.6.3.2 Legal standard under Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement

7.258. Article 3.7 of the Anti-Dumping Agreement provides as follows:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[*] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
>
> > (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
> >
> > (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
> >
> > (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
> >
> > (iv) inventories of the product being investigated.
>
> No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.
>
> [fn original][10] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

7.259. The text of Article 15.7 of the SCM Agreement largely parallels that of Article 3.7 of the Anti-Dumping Agreement, without footnote 10, and with the addition of a factor that the investigating authority should consider, namely the nature of the subsidy and the trade effects likely to arise therefrom (Article 15.7(i)).[457]

7.260. Indonesia's claims concern the first sentence of Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, which require an investigating authority to base an affirmative threat of injury determination "on facts and not merely on allegation, conjecture or remote possibility". In addition, Indonesia refers to the second sentence of the provisions which

[454] Indonesia's first written submission, para. 124 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), pp. 38-39).
[455] Indonesia first written submission, para. 124; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.
[456] United States' first written submission, para. 259.
[457] Prior panels have concluded that decisions concerning Article 3.7 instruct the understanding of Article 15.7 and vice versa. See, e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2159. Any differences between the two provisions are not pertinent to the issues in this dispute.

provides that the change of circumstances, which would create a situation in which the dumping or subsidy would cause injury, must be clearly foreseen and imminent.[458]

7.261. The Appellate Body has stated that Article 3.7 and Article 15.7 combine positive requirements − a determination of threat of injury must "be based on facts" and show how a "clearly foreseen and imminent" change in circumstances would lead to further subject imports causing injury in the near future − with an express prohibition of a determination based "merely on allegation, conjecture or remote possibility".[459] A threat of injury determination thus requires that the determination of the investigating authority clearly disclose its inferences and explanations in order to ensure that any projections or assumptions made by it regarding likely future occurrences, are adequately explained and supported by positive evidence on the record[460], and show a high degree of likelihood that projected occurrences will occur.[461]

7.262. Article 3.7 and Article 15.7 make clear that certain, listed, factors relating to the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters, the availability of other export markets and, under Article 15.7, the nature of the subsidy and the trade effects therefrom), the effects of imports on future prices and likely future demand for imports, and inventories should be considered in making a threat of injury determination.[462] It is also understood that the Anti-Dumping Agreement and the SCM Agreement require consideration of the Article 3.4 and Article 15.4 factors in a threat of material injury determination. This is in order to establish a background against which the investigating authority can evaluate whether imminent further subject imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action.[463] In determining the existence of a threat of material injury, the investigating authorities will also necessarily have to make projections relating to the "occurrence of future events" since such future events "can never be definitively proven by facts". Notwithstanding this intrinsic uncertainty, a "proper establishment" of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent", in accordance with Article 3.7 and Article 15.7.[464]

7.263. In this respect, Article 3.7 and Article 15.7 provide that "[t]he change in circumstances which would create a situation in which the [dumping/subsidy] would cause injury must be clearly foreseen and imminent". The change in circumstances that would give rise to a situation in which injury would occur is not limited − it may encompass a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently.[465]

7.6.3.3 The USITC's finding that subject imports would gain market share at the expense of the domestic industry

7.264. Indonesia challenges the USITC's conclusion that subject imports would gain market share at the expense of the domestic industry in the imminent future. Indonesia, in particular, takes issue with the USITC's finding that "future volumes of subject imports [would] take sales from current suppliers such as the domestic industry".[466] This conclusion was preceded by the USITC's finding that the volume and market share of subject imports was likely to be significant in the

[458] Indonesia's first written submission, para. 122; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.
[459] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 96 (quoting Appellate Body Report, *US − Lamb*, para. 136). See also Appellate Body Report, *Mexico − Corn Syrup (Article 21.5 − US)*, para. 85; and Panel Report, *Japan − DRAMs (Korea)*, para. 7.415.
[460] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 96 (referring to Appellate Body Report, *US − Lamb*, para. 136). See also Appellate Body Report, *Mexico − Corn Syrup (Article 21.5 − US)*, para. 85.
[461] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 109.
[462] Panel Report, *Mexico − Corn Syrup*, paras. 7.125-7.126.
[463] See above, para. 7.231 and fn 410.
[464] Appellate Body Report, *Mexico − Corn Syrup (Article 21.5 − US)*, para. 85 (referring to Appellate Body Report, *US − Hot-Rolled Steel*, fn 59 and para. 56).
[465] Panel Report, *US − Softwood Lumber VI*, para. 7.57.
[466] Indonesia's first written submission, para. 124 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 38); opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.

imminent future. Indonesia also asserts that the USITC based its finding of likely significant increase in subject import volume on conjecture rather than facts.[467]

7.265. The USITC concluded that subject import volume was likely to be significant in the imminent future, both in absolute terms and relative to consumption and production in the United States, and that the increase in subject imports' market share was likely to be significant.[468] The USITC based these conclusions on subject import trends during the POI and on certain projections it made about the imminent future. These findings are part of the broader set of considerations that led the USITC to conclude that the domestic industry was threatened with material injury by reason of subject imports.

7.266. In reaching its finding of a likely increase in subject import volume, the USITC relied principally on the fact that subject imports increased substantially during the POI, despite a substantial decline in apparent US consumption, and on its conclusion that subject foreign producers had the ability and the incentive to further increase shipments to the United States in the imminent future. With respect to the former, the USITC first concluded that, during the POI, subject imports from China and Indonesia increased significantly, both on an absolute basis and relative to apparent US consumption and production.[469] The USITC noted that subject imports were present in substantial volumes and market share at the beginning of the POI and increased their presence in the US market during the period 2007-2009. It observed that during this period subject import volume increased by 3.8% and market share increased by 4.4 percentage points. Subject imports declined from 398,309 shorts tons in 2007 to 382,245 short tons in 2008, before increasing "sharply" to 413,593 short tons in 2009. The USITC also noted that, during the same period (2007-2009), the ratio of subject imports to US production increased by 4.3 percentage points.[470] The USITC observed that subject imports increased despite a substantial decline in apparent US consumption.[471]

7.267. As noted above, in addition, the USITC concluded that subject foreign producers had the ability to increase exports to the United States. The USITC concluded that the increase in production capacity in China between 2009 and 2011 would be substantial and that projected consumption growth in China and in the rest of Asia would not be sufficient to absorb the new capacity.[472]

7.268. The USITC also concluded that subject foreign producers had the incentive to increase exports to the United States. The USITC first found that these producers had a strong interest in increasing shipments to the US market. The USITC relied, *inter alia*, on an affidavit by an official of a domestic distributor (Unisource affidavit) which indicated that one such producer, APP had planned to double shipments to the United States and was willing to lower its prices.[473] The USITC also noted that, soon after APP lost its major US distributor − Unisource Worldwide, Inc.

[467] In the sections of its submissions concerning its claims under Articles 3.5 and 15.5 and under Articles 3.8 and 15.8, Indonesia further elaborated on some of the arguments in support of its Articles 3.7 and 15.7 claims. In this section, where relevant we take into account Indonesia's statements that concern its Articles 3.7 and 15.7 claims, irrespective of where in its submissions Indonesia made these arguments.

[468] USITC Final Determination, (Exhibit US-1), pp. 30-31.

[469] USITC Final Determination, (Exhibit US-1), p. 27.

[470] USITC Final Determination, (Exhibit US-1), p. 26.

[471] USITC Final Determination, (Exhibit US-1), p. 30 and fn 230. The USITC noted that apparent US consumption had declined from 2.86 million short tons in 2007 to 2.64 million short tons in 2008, and to 2.25 million short tons in 2009, for an overall decline of 21.3% between 2007 and 2009. The USITC also noted that subject imports declined sharply in interim 2010, both in absolute terms and relative to production and consumption, relative to interim 2009. Subject imports were 210,506 short tons in interim 2009 and 85,033 short tons in interim 2010. On a monthly basis, subject imports continued at elevated levels in January and February 2010 and then dropped precipitously in March 2010, the month in which the USDOC issued affirmative preliminary countervailing duty determinations. The USITC found that the decline in subject import volumes at the end of the POI was attributable to the pendency of these investigations and that, absent these investigations, the absolute and relative volumes of subject imports would likely have been greater in interim 2010. (USITC Final Determination, (Exhibit US-1), p. 27). The USITC noted in this respect that the statutory provision governing the USITC's treatment of post-petition information provides that if any change in the volume of the subject merchandise since the filing of the petition in an investigation is related to the pendency of the investigation, the USITC may reduce the weight accorded to the data for the period after the filing of the petition. (USITC Final Determination, (Exhibit US-1), fn 174).

[472] USITC Final Determination, (Exhibit US-1), p. 28.

[473] USITC Final Determination, (Exhibit US-1), p. 29; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), pp. 1-2.

(Unisource) − in 2009, APP established its own distributor in the US market − Eagle Ridge Paper Co. (Eagle Ridge), which the USITC found was for the purpose of retaining and growing APP's presence in the US market.[474] The USITC further considered that the US market was well understood by producers in China and Indonesia, and that it was attractive to subject foreign producers in terms of prices and other market characteristics.[475]

7.269. Moreover, the USITC also found that subject imports would cause adverse price effects − specifically, price underselling and price depression − in the imminent future.[476]

7.270. The USITC then assessed the likely impact of subject imports on the domestic industry. The USITC found that the domestic industry was vulnerable to material injury given the downward trend in virtually all of the domestic industry performance indicators during the POI.[477] The USITC concluded that, given this vulnerable state, the domestic industry would likely continue to experience even poorer results, as increasing volumes of low-priced subject imports entered the US market and competed with the domestic like product.[478] The USITC added that:

> Subject producers have already shown the ability and willingness to lower prices for subject merchandise that was already underselling the domestic like product in order to significantly increase their exports to the United States, even in a contracting market. We believe that this behavior will continue in the imminent future, particularly in light of the significant new capacity in China, the establishment of Eagle Ridge in 2009, and the attractiveness of the U.S. market.
>
> The U.S. market cannot accommodate growth in subject imports without material injury to the U.S. industry. Although apparent U.S. consumption recovered somewhat in interim 2010 from its lowest levels in 2009, RISI projects a decline of [3.3] percent in apparent U.S. consumption from 2010 to 2011 and a further reduction of [2.5[479]] percent in 2012. Accordingly, future volumes of subject imports will not be in response to growing U.S. demand for CCP, but will take sales from current suppliers such as the domestic industry.
>
> Given that the industry is already in a weakened state, we conclude that, unless antidumping duty and countervailing duty orders are issued, significant volumes of dumped and subsidized imports will gain additional U.S. market share in the imminent future and material injury by reason of subject imports will occur.[480]

[474] USITC Final Determination, (Exhibit US-1), p. 29.

[475] The USITC found that prices were generally higher in the United States than in China or other markets in Asia. In the USITC's view, the fact that a large share of coated paper was supplied on a spot sales basis allowed purchasers to switch between suppliers with relative ease. In addition, the USITC considered that the prevalence of private label products, in which merchants or retailers offer coated paper products under their own brands, provided a ready avenue for subject imports to expand their presence in the US market even without an advertising or distribution infrastructure. (USITC Final Determination, (Exhibit US-1), p. 29). Indonesia submits that the attractiveness of the US market could not be considered a factor that was going to change in the imminent future. We note that the attractiveness of the US market to subject producers was a factor that existed throughout the POI. However, the USITC did not conclude that this factor was going to change in the imminent future. Rather, the USITC concluded that there was no indication that subject producers would find the US market any less attractive in the imminent future than they did from 2007 to 2009 when they increased their exports to the United States and their market share. (USITC Final Determination, (Exhibit US-1), p. 29).

[476] USITC Final Determination, (Exhibit US-1), pp. 34-35.

[477] The USITC indicated that, from 2007 to 2009, the domestic industry suffered double-digit percentage declines in production, shipments, capacity utilization, net sales, production workers, operating income, and capital expenditures. (USITC Final Determination, (Exhibit US-1), p. 38).

[478] USITC Final Determination, (Exhibit US-1), p. 38.

[479] This percentage, as well as the 3.3% projected decline in US consumption from 2010 to 2011, are redacted from the public version of the USITC's determination. (USITC Final Determination, (Exhibit US-1), p. 38). However, as noted above, fn 422, the US demand projections data were provided to the Panel, Indonesia, and the third parties in Excerpt from Petitioners Post-hearing Brief to USITC, a public document, ((Exhibit US-4), p. 1 and exhibit 1 (RISI Paper Trade, July 2010), p. 21), and were discussed in the United States' first written submission (*inter alia*, in paras. 229 and 243).

[480] USITC Final Determination, (Exhibit US-1), p. 38 (fns omitted). As discussed in the previous section of this Report, the USITC further considered that the effect of other factors in the imminent future would not render insignificant the likely effects of subject imports.

7.271. We now turn to the consideration of Indonesia's arguments in support of its claim that the USITC based its finding that subject imports would gain market share at the expense of the domestic industry on conjecture or speculation.

7.6.3.3.1 Market share trends during the POI

7.272. Although Indonesia frames its claims and its arguments as pertaining to the USITC's findings concerning market share, we understand Indonesia to also take issue with the USITC's conclusion that future volumes of subject imports would not be in response to growing US demand, but would take sales from current suppliers, including the domestic industry.[481]

7.273. Indonesia argues that the USITC's finding that subject imports would gain market share at the domestic industry's expense was based on conjecture or speculation. According to Indonesia, there was no basis on the record for the USITC to draw this conclusion because that situation − subject imports taking market share from the domestic industry − did not occur during the POI; Indonesia submits that during the POI subject imports competed for market share with non-subject imports, rather than with the domestic industry.[482] In addition, Indonesia argues that, contrary to the United States' assertion, there was no correlation between increased subject imports and declining domestic industry US shipments during the POI.[483]

7.274. Indonesia's central argument in support of its claims is that the absence of an evident correlation between subject import and the domestic industry's market share trends during the POI undermines the likelihood that subject imports would gain market share from the domestic industry in the imminent future.

7.275. The United States submits that the USITC had ample evidentiary support for its conclusion that subject imports would gain market share at the expense of the domestic industry. The United States considers that Indonesia's arguments are based on mistaken assumptions that trends during the POI, which influenced the USITC's negative present injury determination, would continue in the imminent future. For the United States, Indonesia ignores the explanations provided by the USITC that clearly foreseen and imminent changes in circumstances made it likely that subject import volume would increase significantly in the imminent future.[484] The United States further argues that the USITC's conclusion was based, *inter alia*, on the fact that the projected demand could not absorb such an increase, on volume trends during the period 2007-2009 and on market share trends during the interim period.[485]

7.276. We start by noting that Indonesia's position suggests that a finding with respect to future events contributing to an affirmative threat of injury determination could be considered to be based on conjecture rather than facts if events that occurred during the POI do not clearly reflect the situation the investigating authority predicts would occur. In other words, with respect to the issue before the Panel, if the market share and volume of subject imports, on the one hand, and of the domestic industry, on the other, show no clear inverse correlation during the POI, a determination that in the imminent future subject imports would gain market share at the expense of the domestic industry would necessarily be based on conjecture rather than facts.

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[481] Indonesia's first written submission, para. 129 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 38).

[482] Indonesia submits that, during the period 2007-2009, subject imports and the domestic industry gained market share from non-subject imports; and, in the interim period, subject imports lost market share, while non-subject imports gained market share. (Indonesia's first written submission, para. 128. (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), pp. 22-23)).

[483] Indonesia's opening statement at the first meeting of the Panel, para. 65 (referring to United States' first written submission, para. 263).

[484] The United States, in particular, refers to the USITC's conclusion that subject producers possessed both the ability and the incentive to increase their exports to the United States in the imminent future. (United States' first written submission, paras. 223, 261, and 284).

[485] United States' first written submission, paras. 267-271. The United States submits that Indonesia does not dispute that subject import volume was likely to increase significantly in the imminent future. (United States' opening statement at the first meeting of the Panel, para. 45; second written submission, para. 131). However, several of Indonesia's arguments, particularly those related to the USITC's determination of likely increase in subject producers' capacity, the establishment of Eagle Ridge and the Unisource affidavit, challenge this very finding. (See, for instance, Indonesia's second written submission, para. 75).

7.277. We do not agree. In our view, projections about future events need not necessarily reflect a continuation of trends that took place during the POI for a threat of injury determination to be based on facts as opposed to allegation, conjecture or remote possibility. As noted above, an investigating authority is required to provide a reasoned and adequate explanation as to how evidence in the record supports its finding that a situation of injury would occur in the imminent future.[486] While we would expect the authority to rely on facts from the present to support the projections it makes about the future and its resulting conclusions about the future, in our view events that took place during the POI provide the background against which an investigating authority can evaluate the likely future events, but do not limit the scope of projections that the authority may make concerning future events.[487] Of course, the investigating authority would be expected to explain the change in circumstances that will result in the future situation being different from the past.

7.278. With these considerations in mind, we proceed to examine the arguments put forward by Indonesia in support of its contention that the USITC's finding regarding the likely future market share of subject import was based on conjecture rather than facts.

7.279. We note that, as Indonesia asserts, the USITC observed that over the period 2007-2009, subject imports and the domestic industry gained market share at the expense of non-subject imports, in a context of a significant decline in demand of 21.3%.[488] While non-subject imports' market share decreased from 25.4% in 2007 to 16.1% in 2009 (-9.3 percentage points)[489], subject imports' market share increased from 13.9% in 2007 to 18.3% in 2009 (+4.4 percentage points)[490] and the domestic industry's market share increased from 60.7% in 2007 to 65.5% in 2009 (+4.8 percentage points).[491] However, the USITC also noted that in the last part of the POI, i.e. in the interim period, when subject imports left the market due to the pendency of the investigations, both non-subject imports' and the domestic industry's market share increased.[492] The volume of subject imports decreased from 210,506 short tons in interim 2009 to 85,033 short tons in interim 2010[493], and their market share declined by 12.9 percentage points from interim 2009 to interim 2010 (from 19.7% to 6.8%), while non-subject imports' and the domestic industry's market shares increased by 6.1 percentage points (from 18.4% to 24.5%) and 6.8 percentage points (from 61.9% to 68.7%), respectively.[494]

7.280. Indonesia submits that there was no correlation between subject import volumes and the decline in the domestic industry's shipments, because the volume of the domestic industry's shipments declined in each year of the POI, including from 2007 to 2008, when the volume of subject imports also declined.[495] According to Indonesia, if there were a correlation between subject import volumes and domestic shipments, one would expect domestic shipments to have increased during the period in which subject imports declined (i.e. 2007-2008).

7.281. Volume trends during the POI do not support Indonesia's allegation that subject import volumes and domestic industry shipments were not correlated. The USITC noted that during the period 2007-2009, in a context of significant decline of demand, subject imports were the only source whose volume increased in the US market, as the volume of the domestic industry's US

[486] See para. 7.6 of this Report.

[487] In this regard, we share the view of the panel in *US – Softwood Lumber VI* that the consideration of the factors set out in Article 3.2 and Article 3.4 of the Anti-Dumping Agreement, and Article 15.2 and Article 15.4 of the SCM Agreement, in the context of a threat of injury analysis, "forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports". (Panel Report, *US – Softwood Lumber VI*, para. 7.111).

[488] Apparent US consumption declined from 2.86 million short tons in 2007 to 2.64 million short tons in 2008, and to 2.25 million short tons in 2009. Apparent US consumption was 1.07 million short tons in interim 2009 and 1.25 million short tons in interim 2010. (USITC Final Determination, (Exhibit US-1), pp. 22, 26, 36, and 44; fns 129 and 230; and table C-3).

[489] USITC Final Determination,(Exhibit US-1), pp. 23, 36, and 39; table IV-7, p. IV-12; and table C-3, p. C-6.

[490] USITC Final Determination,(Exhibit US-1), pp. 22 and 36; table IV-7, p. IV-12; and table C-3, p. C-6.

[491] USITC Final Determination,(Exhibit US-1), pp. 22 and 36; table IV-7, p. IV-12; and table C-3, p. C-6.

[492] USITC Final Determination,(Exhibit US-1), p. 39.

[493] USITC Final Determination, (Exhibit US-1), p. 27 and table C-3.

[494] USITC Final Determination, (Exhibit US-1), pp. 22, 23, and 39, and table C-3.

[495] Indonesia's opening statement at the first meeting of the Panel, para. 70; second written submission, para. 72 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), table C-3).

shipments and of non-subject imports declined over this period.[496] Indonesia's argument focuses on the single year of the POI in which subject imports decreased, without acknowledging the USITC's overall conclusion regarding the evolution of subject import volume over the entire POI.[497] As indicated above, despite the decrease in the first year of the POI, the USITC found that, during 2007-2009, subject imports increased and that the increase was significant.[498] In contrast, the domestic industry's shipment volumes declined throughout this period. We also note that, in the last part of the POI, namely interim 2010, when subject imports' volume declined, the domestic industry's shipments and non-subject import volume increased.

7.282. In light of the foregoing, in our view, the movements in market share throughout the POI, especially in the interim period, do not support Indonesia's allegation that subject imports and the domestic industry did not compete for market share during the POI, or that the changes in their respective market shares showed no correlation during the POI. Nor do we read the USITC determination as reflecting a finding that subject imports competed only with non-subject imports for market share during the POI, as Indonesia suggests.[499] The relative changes in volumes and market shares of the domestic industry, subject imports and non-subject imports during the entirety of the POI suggest, on the contrary, that these three groups of suppliers competed in the US market to a large extent. Thus, in our view, this aspect of the USITC's findings is not contradicted by the evidence before it.

7.283. Indonesia submits that trends during the interim period are not indicative of how subject imports would compete for market share with the domestic industry if orders were not imposed because subject imports left the market due to the pendency of the investigations. According to Indonesia, this was not a market share gain in the traditional sense of competing for customers.[500] Indonesia, in addition, faults the USITC for finding that the removal of preliminary duties was a key change in circumstances justifying the imposition of duties.[501]

7.284. In our view, Indonesia's arguments imply that the decline in subject imports and their withdrawal from the US market as a result of the investigations should have been viewed as meaning that those imports would not compete with or take market share from the domestic like product and non-subject imports in the future if no duties were imposed. We see no basis for such a conclusion. More relevant than the reason underlying foreign suppliers' decision to participate, and when to participate, in the US market, is how the market responds to that participation. In the case at issue, the USITC observed that when subject imports exited the US market, the volumes and market shares of both the domestic industry and non-subject imports increased. The fact that the decrease in the market share of subject imports in the last part of the POI coincided with a gain in market share by the domestic industry supports the USITC's finding that a likely increase in subject imports would come at the expense of current suppliers, including the domestic industry. Moreover, we do not understand the determination to be predicated on the lifting of provisional measures and the subsequent shifts in volumes and market shares as the relevant change in circumstances that would bring about an increase in subject imports. The USITC did take into account the effects of the preliminary duties in determining that subject imports would seek to regain lost sales in the future; however, the USITC's determination primarily focuses on the fact that subject imports were already underselling the domestic industry during the POI and on the ability and incentive of subject producers (in light, notably, of the significant imminent increase in production capacity) to increase their sales volumes to the US market.

7.285. We further note that the USITC did not conclude that the likely subject import increase would take sales and market share exclusively from the domestic industry, as Indonesia

[496] USITC Final Determination, (Exhibit US-1), pp. 26-27. The domestic industry's US shipments declined from 1,737,222 short tons in 2007, to 1,648,972 short tons in 2008 and 1,477,233 short tons in 2009, and non-subject imports volume declined from 727,306 short tons in 2007, to 611,626 short tons in 2008 and 363,472 short tons in 2009. While subject imports volume declined from 398,309 short tons in 2007 to 382,245 short tons in 2008, subject imports increased "sharply" to 413,593 short tons in 2009, for an overall increase of 3.8% during the period 2007-2009.
[497] USITC Final Determination, (Exhibit US-1), p. 27.
[498] USITC Final Determination, (Exhibit US-1), pp. 26-27. See also ibid. table C-3.
[499] Indonesia's opening statement at the first meeting of the Panel, para. 67.
[500] Indonesia's opening statement at the first meeting of the Panel, para. 67; second written submission, para. 68.
[501] Indonesia's opening statement at the second meeting of the Panel, para. 44.

suggests.[502] Rather, the USITC found that subject imports would compete on price to regain the market share that they lost "both to the domestic industry and to non-subject imports" in interim 2010 and would take sales "from current suppliers such as the domestic industry"[503], which clearly refers to both the domestic industry and non-subject imports. This being the case, we also reject as inconsistent with the facts Indonesia's contention that the USITC did not address the fact that subject imports were likely to gain market share from non-subject imports rather than the domestic industry and that the USITC's threat of injury determination is devoid of any analysis that accounts for the fact that subject imports would not have taken market share exclusively from the domestic industry.[504]

7.286. Indonesia also argues that the subject imports were not responsible for the decline in domestic industry US sales volumes during the POI.[505] Indonesia submits that the USITC found that declining consumption and the economic downturn were responsible for that decline.[506] In our view, however, it was appropriate for the USITC to take into account changes in subject import volumes, the domestic like product sales, and non-subject imports in the context of declining US demand, in determining the likely impact of subject imports volume on the domestic industry. We note that the USITC also took the projected decline in apparent US consumption into account in its conclusion that subject imports would gain market share at the expense of the domestic industry.[507]

7.287. Indonesia also submits that it was unreasonable for the USITC to conclude that subject imports would gain anything approaching the "twelve percentage points" of market share that they lost in the interim period.[508] Indonesia further submits that the USITC failed to explain how subject imports' market share could expand beyond the share that they held in 2009; Indonesia argues in this respect that the only support for the USITC's finding concerning the projected increase in market share of subject imports was the attractiveness of the US market.[509] We are not convinced by these arguments. In our view, the USITC provided a reasonable explanation for its conclusion that subject imports' market share would increase significantly in the imminent future. In particular, we note that, as indicated above, the USITC principally based this conclusion on (a) the increase in subject imports during the POI, and (b) its findings regarding the likely increased production capacity in China and subject producers' export intentions. Indonesia does not challenge the former, and below, we uphold the latter.[510] In our view, these two sets of findings provide a sufficient basis for the USITC's conclusion regarding the likely imminent increase in subject imports' market share.[511]

[502] Indonesia's first written submission, para. 128; response to Panel question No. 48(b).
[503] USITC Final Determination, (Exhibit US-1), pp. 38-39.
[504] Indonesia's response to Panel question No. 48(b).
[505] See for instance Indonesia's opening statement at the second meeting of the Panel, para. 48.
[506] Indonesia's first written submission, para. 121 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), pp. 37-38); response to Panel question No. 41; and second written submission, para. 72 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 37). Indonesia also argues that there was no correlation between movements of subject import volumes and the condition of the domestic industry. (Indonesia's opening statement at the first meeting of the Panel, para. 70; second written submission, paras. 64 and 72; and opening statement at the second meeting of the Panel, para. 47). These arguments pertain to the causal relationship between subject imports and the threat of injury to the domestic industry, and are not directly relevant to our consideration of the USITC's findings concerning likely future increases in subject imports volumes and market share.
[507] USITC Final Determination, (Exhibit US-1), p. 38, quoted above para. 7.270.
[508] Indonesia's first written submission, para. 126 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 38).
[509] Indonesia's opening statement at the second meeting of the Panel, para. 52.
[510] See below, paras. 7.297 and 7.307.
[511] In addition, contrary to Indonesia's suggestion, reading the determination as a whole suggests that the USITC's finding was not that subject imports would regain the 12.9 percentage points of market share lost in interim 2010, but rather that subject import volumes would increase significantly in the imminent future to levels higher than those recorded during the POI. (See for instance USITC Final Determination, (Exhibit US-1), pp. 27, 29, and 30-31). Moreover, we note that the USITC considered that the decrease in subject imports' volume in interim 2010 resulted from the investigations, and that absent these investigations, the volume of subject imports would likely have been greater in interim 2010. (USITC Final Determination, (Exhibit US-1), p. 27). Indonesia appears to agree that this decrease was caused by the pendency of the investigations. (Indonesia's opening statement at the first meeting of the Panel, para. 72; second written submission, para. 78).

7.288. For the foregoing reasons, based on the explanations provided by the USITC in light of the evidence that was on the record, we find that Indonesia has not demonstrated that, in the context of its threat of injury analysis, the USITC based its conclusion that future volumes of subject imports would gain market share at the expense of the domestic industry by taking sales from the domestic producers in the imminent future on conjecture or remote possibility.

7.6.3.3.2 The likely increase in production capacity in China

7.289. Indonesia argues that the USITC's findings regarding new capacity in China were based on conjecture and do not support a determination of likely increase in subject imports. Indonesia makes this argument in reaction to the United States' argument that the USITC's finding concerning the likely gains in market share by subject imports was supported by an intermediate finding that subject imports would likely increase significantly, which in turn was supported by the fact that there would be substantial new capacity in China that was not projected to be absorbed by Chinese producers' home market and other markets in Asia.[512]

7.290. As indicated above, the USITC considered that subject producers had the ability to increase their shipments to the United States based, in particular, on the projected growth of production capacity in China between 2009 and 2011.

7.291. Regarding new capacity in China, the USITC started by noting that the parties disagreed about the amount of new capacity coming on-line in China in 2011. The USITC noted that, based on estimates from a paper industry consultancy (EMGE & Co.), the petitioners contended that projected capacity in China would increase by 2.9 million short tons by 2011, and that this increased capacity would not be absorbed by the Chinese home market or by other markets in Asia. The USITC also observed that, based on questionnaire responses, respondents claimed that Chinese producers' increase in capacity in 2010 and 2011 would be lower, at 1.5 million short tons, and that increases in capacity were necessary to keep up with increased demand in China and regional markets and were not intended for export to the US market.[513] The USITC found that even this lower amount of increased capacity posited by the respondents was substantial, given that it was equivalent to approximately 75% of total 2009 US consumption of over 2 million tons. The USITC also found that, even assuming that the additional Chinese capacity was being brought on-line with the intention of supplying the growing Chinese home market, projected consumption growth in China would not be sufficient to absorb the new Chinese capacity because, according to projections by another paper industry consultancy (RISI), growth in Chinese production capacity from 2009 to 2011 would be "approximately double" the growth of Chinese consumption. The USITC also noted that, according to RISI projections, consumption growth in the rest of Asia would be "well below" the excess of projected Chinese capacity growth over projected Chinese consumption growth.[514]

[512] Indonesia's opening statement at the first meeting of the Panel, para. 74. Indonesia does not challenge the USITC's findings regarding the projected capacity of Indonesian producers.

[513] USITC Final Determination, (Exhibit US-1), p. 28. The actual amount is redacted from the non-confidential version of the determination submitted to the Panel. (USITC Final Determination, (Exhibit US-1), p. 28). In its submissions to the Panel, the United States indicates that the new Chinese capacity suggested by respondents, and redacted from the USITC's non-confidential version of the determination, amounted to 1.5 million short tons. Indonesia does not take issue with the amount the United States indicates.

[514] USITC Final Determination, (Exhibit US-1), p. 28 and fn 181. The USITC noted that:

> RISI projects that capacity to produce coated woodfree and coated mechanical paper in China will grow from 7.2 million metric tons in 2009 to 9.0 million metric tons in 2011, or by 1.8 million metric tons. RISI projects that Chinese consumption of these products will grow from 5.4 million metric tons in 2009 to 6.3 million metric tons in 2011, or by 900,000 metric tons. The excess of capacity growth over consumption growth is 900,000 metric tons. Respondents' Prehearing Brief at Ex. 28.
>
> Although the combination of the RISI categories of coated woodfree and coated mechanical paper is likely to be somewhat broader than the paper defined by Commerce's scope, we consider the data to be probative of the likely relative growth of China's capacity and consumption of in-scope products.
>
> Consumption growth in the rest of Asia is not projected to absorb the excess of Chinese capacity over consumption. Excluding Japan (which is projected to shed some capacity but increase its production), RISI projects consumption growth from 2009 to 2011 to exceed capacity growth in the rest of Asia by 160,000 tons, well below the excess of projected Chinese capacity growth

7.292. Thus, it is clear from the determination that the USITC relied, in its finding of likely increase in production capacity in China, on record evidence from two sources, i.e. the 1.5 million short tons increase in capacity projected by the respondents (which, we recall, the USITC considered would still be a substantial increase in production capacity), and RISI's projections on consumption growth in China and other Asian markets (which the USITC relied upon as an indicator of the magnitude of the increase in capacity and the ability of these markets to absorb it).

7.293. In this dispute, Indonesia submits that the USITC ignored actual data submitted by the Chinese exporters in their questionnaire responses, suggesting that the RISI data should not have been used over more precise questionnaire data. In this respect, Indonesia faults the USITC for relying on a "third party source" that the USITC admitted covered a broader array of products than those subject to the investigation.[515] Indonesia refers the Panel to table VII-2 in the determination, which contains Chinese producers' data for the POI, as well as their projections for 2010 and 2011, regarding capacity, production, and shipments to China and third markets: the United States, the European Union, Asia and "all other markets". Indonesia submits that table VII-2 shows that Chinese producers had excess capacity in every year of the POI which, in its view, disproves the USITC's theory of likely increase of subject imports to the United States, as it shows that Chinese producers were not fully utilizing their existing capacity to export to the US market during the POI. We note, however, that according to the data submitted by the respondents, Chinese producers were operating at high capacity utilization levels during the POI.[516] Indonesia also argues that, despite the projected additional new capacity, Chinese producers projected very little excess capacity in 2011.[517] We understand Indonesia's argument to be that, according to Chinese producers' sales projections, the additional production capacity would be absorbed such that they would not need, or have the ability, to significantly increase their sales to the US market. We understand Indonesia's arguments as suggesting that these projections constituted a more appropriate basis for assessing the ability of other markets to absorb additional Chinese production capacity than the RISI data on projected consumption growth in China and the rest of Asia and, therefore, that the USITC should have relied on this data in its analysis of the likelihood of substantially increased Chinese exports to the US market.[518]

7.294. The USITC noted that RISI was a source that both petitioners and respondents relied upon as support for their allegations throughout the underlying investigation.[519] The RISI data the USITC considered as evidence of the likely relative increase of capacity and consumption in China was relied upon by respondents in their arguments before the USITC[520], and respondents characterized that source as "independent".[521] APP even characterized the RISI data as "the best available for assessing consumption growth in Asia".[522] Moreover, we note that the RISI information contains data concerning projected increases in production capacity in China and

over projected Chinese consumption growth of 900,000 metric tons. Respondents' Prehearing Brief at Ex. 28.

(USITC Final Determination, (Exhibit US-1), fn 181)

[515] Indonesia's opening statement at the second meeting of the Panel, paras. 41 and 52.

[516] According to the data contained in table VII-2 of the USITC Final Determination, Chinese producers were operating at the following capacity utilization rates during the POI: 90.7% in 2007; 92.5% in 2008; and 95.9% in 2009.

[517] Indonesia's second written submission, para. 70; opening statement at the second meeting of the Panel, para. 41; and comments on the United States' response to Panel question No. 97(a).

[518] In addition, we note that the United States submits that the RISI data was comprehensive, with capacity projections covering the entire Chinese industry and consumption projections covering every major market in Asia, including China, whereas, by contrast, foreign producer questionnaire responses covered only a subset of the Chinese industry. (United States' response to Panel question No. 99, fn 183). Indonesia disagrees that the foreign producer questionnaire responses before the USITC did not provide a complete coverage of the Chinese exporters to the United States. (Indonesia's comments on the United States' response to Panel question No. 97(a), fn 57).

[519] USITC Final Determination, (Exhibit US-1), p. 28. APP referred to the RISI data in, for instance, APP Post-hearing Brief to USITC, (Exhibit US-104), p. 12, in which it referred to the "growth in apparent consumption within China and the rest of Asia as reflected in the RISI data" (referring to exhibit 28 to APP Pre-hearing Brief).

[520] USITC Final Determination, (Exhibit US-1), fn 181 (referring to exhibit 28 to APP Pre-hearing Brief). Thus it appears that exhibit 28 to APP Pre-hearing Brief was actually submitted by APP to the USITC. Exhibit 28 to APP Pre-hearing Brief has been submitted in this dispute as Exhibit IDN-52. See also APP Pre-hearing Brief to USITC, (Exhibit IDN-45), pp. 136 and 139.

[521] APP Pre-hearing Brief to USITC, (Exhibit IDN-45), pp. 122, 134, and 136.

[522] APP Post-hearing Brief to USITC, (Exhibit US-104), p. 13.

consumption growth for the Chinese and Asian markets, whereas the data reported in table VII contains self-reported projections regarding capacity in China and sales in various markets. In our view, it was reasonable for the USITC to rely on data from an independent source such as RISI in considering whether other available markets could absorb Chinese exports, rather than relying exclusively on investigated producers' projections concerning their future sales, as Indonesia apparently suggests it should have done. This is particularly the case here, where the independent source, RISI, had been relied upon by respondents themselves in their submissions to the USITC, and respondents had characterized RISI as an independent source. In addition, we note that Article 3.7(ii) and Article 15.7(iii), which provide guidelines for the examination of new capacity in the context of the threat of injury analysis, provide that in examining this factor account should be taken of the availability of other export markets to absorb any additional exports. In light of this, it appears to us that the RISI data was an appropriate basis for the analysis of additional capacity.

7.295. Indonesia faults the USITC for not having explained how the overbroad RISI data was probative.[523] The USITC did note that the scope of products covered by the RISI data was "somewhat broader" than the product scope of the investigation. The USITC explained that although the combination of the RISI categories of coated woodfree and coated mechanical paper was likely to be somewhat broader than the coated paper defined in the investigation, it considered the RISI data "to be probative of the likely relative growth of China's capacity and consumption of in-scope products".[524] Thus, we do not understand the USITC to have relied on the exact figures in the RISI data to predict the likelihood of increased subject imports but, rather, to have used the RISI data as an indicator of the order of magnitude of the relative increase in new capacity in China in relation to consumption growth in China and other Asian markets.[525] In light of the foregoing, even though it did not exactly match the investigated product, we do not consider it was improper for the USITC to have considered and relied on the RISI data. Indonesia also faults the USITC for having concluded that the Chinese industry would export all of its excess in capacity to the United States during the period 2009-2011.[526] However, the USITC made no such finding. Nor do we read the USITC's discussion of this issue as reflecting an assumption that this would be the case. Rather, as indicated above, the USITC found that consumption growth in the rest of Asia would be well below the excess of projected Chinese capacity growth over projected Chinese consumption growth[527] and, in light of this, concluded that subject producers had the ability to significantly increase shipments to the United States. Nothing in this conclusion implies that the USITC considered that Chinese producers would export all production from excess capacity to the United States.

7.296. Indonesia also faults the USITC for not having undertaken an analysis of other markets to which the Chinese industry might export. However, the USITC did consider whether there were other destinations, in addition to the Chinese producers' principal destination, i.e. their home market, that could absorb production from their projected new capacity. We recall that the USITC examined whether other Asian markets could absorb shipments from the additional capacity, and concluded that they could not. The USITC did not conduct a detailed analysis of projected demand in other markets. The USITC did, however, note that the European Union had initiated anti-dumping and countervailing duty investigations on coated paper from China in 2010, and considered that this might make the EU market less attractive to Chinese exports in the imminent future.[528] That the USITC focused on Asia and the EU as possible destinations for Chinese exports in the imminent future was in our view reasonable given the respondents' statements in the underlying investigation; in its submissions in the underlying investigation, APP principally identified the Chinese market, other Asian markets, and the EU as the export markets of Chinese exports.[529] Moreover, the USITC's analysis reflects the existing sales patterns of the Chinese

[523] Indonesia's opening statement at the second meeting of the Panel, fn 63.
[524] USITC Final Determination, (Exhibit US-1), fn 181.
[525] This is particularly clear from the USITC's statement that RISI projected that the growth in capacity would be "approximately double the growth of Chinese consumption". (USITC Final Determination, (Exhibit US-1), p. 28).
[526] Indonesia's opening statement at the first meeting of the Panel, paras. 68 and 71; second written submission, paras. 70 and 73.
[527] USITC Final Determination, (Exhibit US-1), p. 28.
[528] USITC Final Determination, (Exhibit US-1), fn 188.
[529] APP Pre-hearing Brief to USITC, (Exhibit IDN-45), p. 121, where APP states that "[t]here can be little dispute that China is the most important global market for subject coated paper suppliers. RISI flat out proclaims that the resurgence in the coated paper market will be driven by China". See also APP Post-hearing Brief to USITC, (Exhibit US-104), p. 13, where APP states that "[t]he Chinese industry has explained that these

producers, covering 93% of Chinese export sales during the POI.[530] Overall, we consider the USITC's analysis of other export markets was based on relevant facts, and not on speculation.[531]

7.297. For the foregoing reasons, based on the explanations given by the USITC in light of the evidence that was on the record, we find that Indonesia has not demonstrated that the USITC based its findings regarding the projected increase in production capacity in China on conjecture rather than on facts.

7.6.3.3.3 The Unisource affidavit and the establishment of Eagle Ridge

7.298. Indonesia takes issue with the USITC's reliance on the Unisource affidavit and the establishment of Eagle Ridge. Indonesia makes this argument in response to the United States' arguments that the USITC reasonably relied on the Unisource affidavit as positive evidence of APP's intentions to significantly increase shipments to the US market and that the USITC properly found that APP established Eagle Ridge in furtherance of its goal of doubling exports to the United States.[532]

7.299. The USITC found that subject producers had a strong interest in increasing shipments to the United States.[533] In reaching this conclusion, the USITC relied, among other evidence, on the statements of a Unisource representative, reflected in the Unisource affidavit, concerning his interactions with APP. The USITC indicated that, according to the affidavit, APP stated that it wanted to double its shipments to Unisource and that it was willing to lower its prices. In addition, the USITC noted the fact that APP, after losing Unisource as a distributor, had established its own distributor for the US market, Eagle Ridge:

> Chinese producers have been motivated to increase subject exports for quite some time. In particular, we note the behavior of APP, whose affiliated companies accounted for [[]] of reported subject imports in 2009. In late 2008, as U.S. CCP demand and the U.S. economy were falling into a deep recession, APP informed Unisource, a leading distributor of CCP in the United States, that "it was exporting 30,000 metric tons of CCP to the United States each month and that it wanted to increase that volume to 60,000 metric tons per month". APP also stated that it wanted to double its shipments to Unisource immediately and that it was willing to lower its prices by between two and five percent for the increase in purchases, prices that were already 15 percent below what domestic supplier NewPage was quoting at that time for its economy sheets. Moreover, soon after APP lost the Unisource account in 2009, it

additional tons will be spread across primarily the Chinese market, next to other Asian markets, and finally other emerging markets outside Asia"; and APP Pre-hearing Brief to USITC, (Exhibit IDN-45), pp. 123-125, where APP refers to Asia as "other export markets". In APP Post-hearing Brief to USITC, (Exhibit US-104), p. 12, APP states that "any increase in Chinese capacity will be absorbed entirely in Asian markets". In APP Pre-hearing Brief to USITC, (Exhibit IDN-45), p. 125, APP refers to the EU market as another possible destination for its exports when it indicates that "the ongoing EU trade case will not cause diversion of large volumes to the United States". See also table VII-2 of the USITC Final Determination, which reports Chinese producers' shipments to China, the United States, the European Union, Asia, and "all other markets" during the POI.

[530] On the basis of the data contained in the USITC determination, it appears that the USITC considered markets accounting for the vast majority of current Chinese sales. From table VII-2 and from figure II-1, p. 9, of the USITC Final Determination, it appears that in 2009, 61.5% of Chinese producers' sales were on the Chinese market, 9.3% on the US market, 7.6% on the EU market, 13.9% to other Asian markets, and 7.6% on "all other markets", the only market not considered by the USITC. In other words, the USITC considered markets accounting for approximately 93% of Chinese producers' sales in 2009.

[531] We also note that Indonesia argues that the 2009-2011 period identified by the USITC calls into question the imminence of the alleged increase. (Indonesia's opening statement at the first meeting of the Panel, para. 68; second written submission, para. 69). Indonesia has not, however, developed its argument in this respect or explained why this period is not "imminent" in light of the time-frame examined by the USITC (2011).

[532] Indonesia's opening statement at the second meeting of the Panel, paras. 37-39 (referring to United States' second written submission, paras. 112-113).

[533] USITC Final Determination, (Exhibit US-1), p. 28.

> made an investment to establish Eagle Ridge, an ecommerce U.S. distribution network for APP's products to retain and grow its U.S. market presence.[534]

7.300. The United States argues that the affidavit was made by Unisource's Vice President of Strategic Development and Sourcing under penalty of perjury and that its content was confirmed by other testimonies that were in the record.[535] Indonesia alleged at the second meeting of the Panel that APP never expressed its intention to double exports to the US market and that the proper characterization of the Unisource affidavit is as a domestic industry allegation and not a statement by APP.[536] However, in its last submission to the Panel, Indonesia indicated that it does not know "every statement ever made by an APP representative".[537] In the same submission, Indonesia argued that there were other testimonies on the record that conflict with the statements in the Unisource affidavit.[538] In view of these statements, we understand Indonesia to be taking the position that the content of the Unisource affidavit was untrue or inaccurate and therefore that the USITC could not have relied on it in reaching its determination.

7.301. Indonesia also argues that the respondents never had an opportunity to rebut the Unisource affidavit. In this regard, Indonesia argues that the petitioners filed the Unisource affidavit with their post-hearing brief, which is the final opportunity the USITC gives parties to submit new information. According to Indonesia, because the deadline for submitting post-hearing briefs for the domestic industry and respondents was the same, respondents were not able to rebut the information in the Unisource affidavit before the USITC. The United States contends that APP had the opportunity to address the Unisource affidavit in its final comments to the USITC, filed after the post-hearing briefs, and that APP actually did so.[539] Indonesia responds that, while final comments are permitted to address the accuracy, reliability or probative value of information on the record, the submission of evidence to counter the accuracy, reliability, or probative value of such information is not permitted at this stage of the USITC investigation.[540]

7.302. In addition, Indonesia argues that the establishment of Eagle Ridge does not constitute evidence of an increase of subject imports but, at most, of an attempt to recoup lost sales given APP's loss of business with Unisource and that, in fact, subject imports decreased after the establishment of Eagle Ridge.[541]

7.303. We recall that the question before us is whether the USITC acted inconsistently with Article 3.7 and Article 15.7 by basing its determination of the existence of threat of injury by reason of subject imports on conjecture rather than facts or evidence. We also recall that in a threat of injury analysis an investigating authority is permitted to make projections about the future provided that they are based on facts or evidence. We recall that the Panel must not undertake a *de novo* review of the evidence nor substitute its judgement for that of the investigating authority.[542] Given these considerations, and in light of the evidence in the record that has been presented by the parties to this dispute, we are of the view that, contrary to Indonesia's allegation, the USITC did not base its finding in relation to APP's interest in the US market and the establishment of Eagle Ridge merely on conjecture.

7.304. In our view, the USITC relied on record evidence in reaching its conclusion regarding APP's interest in increasing exports to the United States. This evidence comprised, *inter alia*, the statements contained in the Unisource affidavit, to the effect that APP intended to increase its sales to Unisource and to the US market in general, and the fact that, in response to losing its

[534] USITC Final Determination, (Exhibit US-1), pp. 28-29; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), p. 1. (fns omitted)
[535] United States' response to Panel question No. 95.
[536] Indonesia's opening statement at the second meeting of the Panel, para. 39.
[537] Indonesia's comments on the United States' response to Panel question No. 95.
[538] Indonesia's comments on the United States' response to Panel question No. 95.
[539] United States' response to Panel question No. 95.
[540] In Indonesia's view, even if APP possessed emails and other information refuting what was said in the Unisource affidavit, it could not have submitted that information, nor could it have submitted its own affidavit challenging what was said in the Unisource affidavit. (Indonesia's response to Panel question No. 94).
[541] Indonesia's opening statement at the first meeting of the Panel, para. 66; second written submission, para. 65; and opening statement at the second meeting of the Panel, paras. 38 and 52.
[542] See above, para. 7.7.

principal distributor in the US market (Unisource)[543] in May 2009, APP established its own distribution network for the US market (Eagle Ridge) in October 2009.[544] This occurred at a time when subject imports were increasing their presence in the US market.[545] We consider that this evidence reasonably supported the USITC's conclusion that subject producers had a strong interest in increasing shipments to the United States.

7.305. Although Indonesia argues that respondents never had an opportunity to rebut the Unisource affidavit, we note that in its final comments to the USITC in the underlying investigation, APP referred to the Unisource affidavit but did not challenge the validity of the statements contained therein.[546] Even assuming new evidence could not be submitted after the filing of pre-hearing briefs, as Indonesia alleges[547], it seems clear that, at a minimum, APP could have challenged the veracity of the statements contained in the affidavit. In the absence of such an objection to the Unisource affidavit during the investigation, we see no basis to conclude that the USITC erred in relying on it in reaching its conclusion that Chinese producers had a strong interest in the US market.[548]

7.306. Regarding Eagle Ridge, Indonesia's central argument is that trends in subject imports before APP lost the Unisource account and after the establishment of Eagle Ridge contradict any alleged intention on the part of APP to double its exports to the US market.[549] As indicated above, while the Unisource affidavit refers to APP's alleged intention to double its exports to the US market, we do not read the USITC's determination as suggesting that the determination of the

[543] Unisource changed suppliers from APP to New Page, a US producer. (APP Pre-hearing Brief to USITC, (Exhibit IDN-45), p. 116). APP indicated that it "had no choice but to open [Eagle Ridge] as a way to attempt to recover from the Unisource loss".

[544] USITC Final Determination, (Exhibit US-1), pp. 29 and IV-2; Indonesia's response to Panel question No. 93; and United States' response to Panel question No. 93. Evidence on the record indicates that the first two Eagle Ridge Paper locations in the United States opened in October 2009, and that APP opened eight additional locations during the following three months. (APP Pre-hearing Brief to USITC, (Exhibit IDN-45), p. 116; see also United States' response to Panel question No. 93).

[545] As indicated before, subject imports were at their peak in the period 2008-2009.

[546] In its final comments APP stated that:

> Petitioners try to rely on statements by large national distributors, but these statements − and more importantly, the actions by these distributors − contradict Petitioners' theory. Petitioners cite statement by Unisource, but leave out the important detail that Unisource was describing 2007-2008, not 2009, and was describing small shifts in volume. In early 2009, Unisource switched from APP to NewPage. Subject imports cannot explain low NewPage pricing to Unisource, when APP had been eliminated as a supplier for non-price reasons.

(APP Final Comments to USITC, (Exhibit US-105), pp. 16-17; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), pp. 2-3 (fn omitted))

[547] The parties differ on whether interested parties are allowed to submit new evidence after the filing of the post-hearing briefs before the USITC. (Indonesia's response to Panel question No. 94; United States' comments to Indonesia response to Panel question No. 94). In the circumstances of this case, we need not decide this question.

[548] We further note that the United States argues that the content of the Unisource affidavit was confirmed by other testimonies at the USITC's hearing: those of the same Unisource Vice President of Strategic Development and Sourcing (Mr Hederick) and of APP's own witness (Mr Hunley). (United States' response to Panel question No. 95 (referring to Excerpt from USITC Conference Transcript, pp. 45-48 and 179-180, (Exhibit US-108), pp. 47 and 180)). Indonesia disagrees that the testimony of APP's witness (Mr Hunley) confirms the statements in the Unisource affidavit. In Indonesia's view, the testimony of APP's witness presented a conflicting version of the reasons why the relationship of APP with Unisource soured − Indonesia argues that it was a disagreement over commercial terms and that APP wanted to initiate a price increase while Unisource wanted lower prices. (Indonesia's comments on the United States' response to question No. 95 (referring to Excerpt from USITC Conference Transcript, pp. 45-48 and 179-180, (Exhibit US-108), pp. 48 and 180; and Excerpt from USITC Conference Transcript, pp. 181-182, (Exhibit IDN-51), pp. 181-182)). In our view, these testimonies neither directly confirm nor directly contradict the central element of the Unisource affidavit on which the USITC relied, i.e. that in late 2008, APP expressed its intention to double its sales to Unisource and the US market and offered to lower its prices. In addition, the reasons why APP lost the Unisource account are not germane to the question of whether the USITC based its conclusion that subject producers had a strong interest in the US market on conjecture rather than facts. It is not in dispute that APP lost the Unisource account and, in response to that event, established Eagle Ridge to at least maintain its share in the market. In any event, as noted above, APP could have challenged the veracity of the affidavit in its Final Comments to the USITC but did not do so.

[549] Indonesia argues that before losing Unisource as a customer, from 2008 to 2009 imports from China increased by 7% and imports from Indonesia increased by 15% − hardly doubling, and that after Eagle Ridge was established subject import volumes decreased. (Indonesia's opening statement at the second meeting of the Panel, paras. 38 and 52).

threat of injury was based on a conclusion that APP would in fact double its exports to the United States. Rather, as we have indicated above, the USITC concluded that subject producers had the ability and the incentive to increase significantly shipments to the US market.[550]

7.307. For the foregoing reasons, based on the explanations given by the USITC in light of the evidence that was on the record concerning the Unisource affidavit and the establishment of Eagle Ridge, we find that Indonesia has not demonstrated that the USITC based its conclusion regarding subject producers' interest in the US market merely on conjecture or speculation.

7.308. We now address Indonesia's allegation regarding the USITC's price effects analysis.

7.6.3.4 The USITC's finding that subject imports would have adverse effects on domestic prices

7.309. Indonesia argues that the USITC's finding that subject imports would have adverse effects on domestic prices in the imminent future was based on conjecture or speculation regarding events which were not clearly foreseen and imminent.[551] The United States submits that, on the contrary, the USITC had sufficient factual evidence to conclude that the future significant increase in subject import volume, driven by the underselling by those imports found during the POI, would pressure domestic producers to lower their prices, thereby depressing or suppressing them.[552]

7.310. In finding that subject imports were likely to have significant adverse effects on domestic producers' prices in the imminent future by causing price depression, the USITC first noted that subject imports undersold domestically-produced coated paper to a significant degree throughout the POI, particularly in 2009 when demand was depressed.[553] The average margin of underselling for all types of product was 12.3% in 2009, when the volume of subject imports was at its peak.[554] Moreover, the USITC found that pricing trends, particularly from the first quarter of 2009, together with the significant underselling by subject imports, showed that subject imports depressed domestic prices "at least to some extent" for part of the POI.[555] The USITC did not make a finding

[550] Whereas Indonesia asserts that the volume of subject imports declined after Eagle Ridge was established (Indonesia's opening statement at the second meeting, paras. 38 and 52), record evidence shows that subject imports increased in the months following the establishment of Eagle Ridge. We recall that, the parties agree before this Panel, and record evidence submitted to the Panel shows, that APP lost the Unisource account in May 2009 and Eagle Ridge started operating in the United States in October 2009 (Excerpt from USITC Conference Transcript, pp. 45-48 and 179-180, (Exhibit US-108), p. 179; Indonesia's response to Panel question No. 93; and United States' response to Panel question No. 93). The USITC noted that APP's loss of business with Unisource did not result in a substantial reduction in the volume of overall subject imports in 2009 or the first two months of 2010. (USITC Final Determination, (Exhibit US-1), pp. 29-30 and fn 193). Moreover, subject imports volume was relatively stable from April 2009 – the month before APP's loss of the Unisource account – to October 2009 – when APP opened Eagle Ridge (33,084 short tons in April; 35,575 short tons in May; 32,972 short tons in June; 36,198 short tons in July; 36,698 short tons in August; 36,227 short tons in September; and 29,323 short tons in October). From October 2009 until January 2010, subject import volumes increased – from 29,323 short tons in October, to 31,542 short tons in November, and to 33,099 short tons in December of 2009; in January 2010, subject imports were 34,326 short tons. From February 2010, subject imports started decreasing, and this decrease was accentuated from March 2010 when preliminary countervailing duties were applied: 29,837 short tons in February; 5,365 short tons in March; 6,318 short tons in April; 3,852 short tons in May; and 5,334 short tons in June. (Monthly Import Statistics, (Exhibit US-102), p. 2).

[551] Indonesia's first written submission, paras. 124-126.

[552] United States' first written submission, para. 273.

[553] USITC Final Determination, (Exhibit US-1), p. 34.

[554] USITC Final Determination, (Exhibit US-1), p. 31. The USITC collected pricing data for five products. The data showed that prices of cumulated imports undersold the domestic like product in 48 out of 58 quarterly comparisons by margins ranging from 1.5% to 25.2%.

[555] In this regard, the USITC considered, in particular, movements in the prices of the domestic product and of subject imports from China for two types of coated paper over the POI (Product 1 – which accounted for the majority of the sales of Chinese subject imports for which prices were reported, and accounted for a significant quantity of sales of the domestic product – and Product 4 – for which reported prices represented a significant volume of subject imports from China). The USITC found that the prices of subject imports from China for Products 1 and 4 began to fall in the fourth quarter of 2008, when domestic prices for these products were rising (modestly, in the case of Product 1), which led to an increase in the underselling margins in the first quarter of 2009, as subject import prices continued to decline. For Product 1, domestic prices continued to decline in the second quarter of 2009 and the price of subject imports from China levelled off; for Product 4, both domestic prices and the price of subject imports continued to decline in the second and third quarters of 2009. The USITC considered that there was an indication that the drop in domestic prices starting in the first

of significant price depression, however, because other factors that were occurring in the US market "likely also contributed importantly to lower prices" and thus the USITC concluded that it was unable "to gauge whether there [were] significant effects attributable to subject imports". The USITC did not find evidence that subject imports prevented price increases which otherwise would have occurred to a significant degree (i.e. the USITC did not make a finding of "price suppression" by reason of subject imports).[556]

7.311. The USITC next considered the likely price effects of subject imports in the imminent future. The USITC concluded that significant underselling would continue and was likely to be significant in the imminent future.[557] In addition, the USITC found that subject imports were likely to have significant adverse effects on domestic producers' prices in the imminent future. Specifically, the USITC found that subject imports were likely to put pressure on domestic producers to lower prices, i.e. subject imports would cause price depression in the imminent future. The USITC considered that the other factors that placed negative pressure on domestic prices during the POI, namely falling consumption and increased pulp production due to black liquor subsidies, would not play the same role in the imminent future.[558] The USITC also noted that domestic producers' prices were relatively flat in interim 2010. The USITC found that any increase in subject imports would not be absorbed by an increase in US demand, because while in interim 2010 demand was higher than in interim 2009, demand was nonetheless depressed compared to its earlier levels and was projected to decline moderately over the next two years. In light of this, the USITC anticipated that a key driver of domestic market prices would be the significant volumes of subject imports. The USITC also noted that subject imports led domestic prices downward in late 2008 and early 2009. The USITC further noted that the domestic product and subject imports had moderately high interchangeability and that price was an important consideration in purchasing decisions.[559] The USITC concluded that:

> [I]n the imminent future, the aggressive price competition and underselling by subject imports during the bulk of the period examined will continue, and the introduction of increased quantities of subject imports, priced aggressively in an effort to gain market share, will put pressure on domestic producers to lower prices in a market recovering from severely depressed demand. As subject imports cause domestic sales volumes and prices to deteriorate, the domestic industry will likely experience significant price depression or suppression.
>
> In sum, we conclude that subject imports are likely to have significant adverse effects on domestic producers' prices in the imminent future.[560]

7.312. Indonesia's central allegation is that the USITC's conclusion that subject imports would depress domestic prices in the imminent future was speculative because, despite significant underselling, the USITC did not reach that conclusion with respect to the POI.

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quarter of 2009 was not only subsequent to, but was in response to, the decline in subject import prices. It noted that domestic producers had testified that they lowered prices to compete with falling prices of subject imports from China, and that numerous purchasers had confirmed that domestic producers lowered prices over the POI to meet the prices of subject imports. (USITC Final Determination, (Exhibit US-1), pp. 32-33).

[556] USITC Final Determination, (Exhibit US-1), p. 33.

[557] The USITC found that underselling by subject imports was likely to increase the attractiveness of those imports to domestic purchasers compared with domestic production, and that the underselling was likely to increase demand for further subject imports. (USITC Final Determination, (Exhibit US-1), p. 34).

[558] USITC Final Determination, (Exhibit US-1), p. 34.

[559] USITC Final Determination, (Exhibit US-1), p. 31.

[560] USITC Final Determination, (Exhibit US-1), p. 35 (emphasis added). The USITC also relied on the following considerations: (a) absent anti-dumping or countervailing duty orders, the likely increasing and significant volumes of subject imports would need to enter the US market priced aggressively in an effort to regain market share lost in interim 2010; (b) subject producers had substantial new capacity coming on-line in the imminent future that could not be absorbed by home market demand; (c) subject producers were likely to find the United States an attractive market; (d) Chinese producers had shown a willingness to cut their already low prices further in order to greatly increase their shipments to an already depressed US market; (e) with the establishment of Eagle Ridge in 2009, subject producers would have added ability and incentive to increase shipments to the US market quickly; and (f) given that many of the coated paper sales were on a spot basis, and purchasers had a history of quickly switching suppliers, subject imports would put pressure on domestic producers to lower prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share. (USITC Final Determination, (Exhibit US-1), pp. 34-35; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), p. 2).

7.313. We see nothing in Article 3.7 and Article 15.7 that would require an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future. Indeed, it is the essence of a threat determination that the situation existing during the POI is predicted to change such that there will be injury in the imminent future, if measures are not imposed. The lack of present material injury caused by subject imports may be a consequence of their volumes during the POI, their price effects, their impact during the POI or the injurious effects of other factors. What is important in a determination of threat of injury is that the investigating authority adequately explains, based on the evidence before it, why the situation it predicts can be projected to occur.

7.314. We recall that, in the present case, the USITC found that subject imports had some negative effects on domestic prices during the POI. The USITC noted that subject imports depressed domestic prices "to some extent" for part of the POI, particularly from the first quarter of 2009, which it found, *inter alia*, on the basis of a certain correlation in the pricing trends for subject imports and the domestic product.[561] While the USITC did not make a finding of significant price depression by reason of subject imports because it found that, during the POI, factors other than subject imports, namely decreasing demand and the black liquor tax credit, had likely placed negative pressure on domestic prices, the USITC went on to explain why these factors would not have the same consequences in the future. The USITC explained that the black liquor tax credit had ended in 2009 and that the decline in demand was expected to be less in the near future than it had been during the POI. In other words, whereas the decline in demand and the black liquor tax credit were factors that affected the USITC's analysis of price effects in the context of present injury, in the context of its threat of injury analysis, the USITC had to predict how subject imports would perform in a market where these factors were not operating to lower prices. The USITC determined that these other factors would not play the same role in the imminent future and that, absent these factors in the same magnitude as during the POI, a "key driver" of domestic market prices would be the significant volumes of subject imports. We find that the USITC's explanations, viewed in their totality, sufficiently support its conclusion with respect to the future price effects of subject imports.[562]

7.315. Indonesia also takes issue with the USITC's finding in the context of its threat analysis that subject imports would attempt to "regain market share lost in interim 2010" and would lower prices "aggressively" to do so.[563] Indonesia considers that it was speculative to conclude that "such a small portion of the market" would drive prices in the remaining market.[564] While the statements referred to by Indonesia are part of the considerations underlying the USITC's conclusion of adverse price effects, as we have indicated above[565], a more comprehensive reading of the determination shows that the USITC's central finding was not that subject imports would attempt to regain the market share lost in interim 2010 (i.e. 12.9 percentage points), but that subject import volume would increase significantly in the imminent future to levels higher than those in the POI. The USITC took into account the situation that existed during the POI, when subject imports increased significantly in absolute and relative terms, in a context of substantial decline in demand, and concluded that subject producers would continue to increase their penetration of the US market despite sluggish apparent US consumption because they had both the ability and the incentive to increase shipments to the United States.[566] Moreover, we note that the USITC's conclusion that significant volumes of subject imports would be a "key driver" of domestic prices did not stem from the magnitude of subject imports' market share at any specific point in time during the POI, but from the fact that the "other factors" that it considered had likely placed negative pressure on domestic prices during the POI were no longer present or would not be as relevant in the imminent future as they had been during the POI.[567] Finally, we consider that the

[561] USITC Final Determination, (Exhibit US-1), pp. 32-33. See also fn 555.

[562] For the same reasons, we disagree with Indonesia that the USITC speculated when it found that other factors would no longer obscure the adverse effects of subject imports on domestic prices, and that the USITC lacked any basis to make a projection about how subject imports would perform in a market where such other factors were not operating to lower prices. (Indonesia's opening statement at the first meeting of the Panel, para. 69).

[563] USITC Final Determination, (Exhibit US-1), p. 34.

[564] Indonesia's first written submission, paras. 125-129.

[565] See above, para. 7.287.

[566] USITC Final Determination, (Exhibit US-1), pp. 27, 28, and 34.

[567] It is not clear whether the "small portion" referred to by Indonesia refers to the market share that subject imports occupied in interim 2010 (6.8%), the market share lost from interim 2009 to interim 2010, or the levels that they would reach if they regained all the market share lost (19.7% if the first half of 2009 is the

USITC's conclusion that subject imports would be "priced aggressively" in the imminent future was reasonable given the significant price underselling determined to exist by the USITC throughout the POI.[568]

7.316. In light of the above, we consider that the USITC provided adequate explanations for its determination that subject imports would, in the imminent future, be a key driver of domestic prices and would cause significant price depression or suppression.

7.317. Finally, we note that Indonesia initially challenged what it regarded as a USITC's finding of likely price suppression, on the basis that the USITC made no finding of price suppression with respect to the POI.[569] The United States has indicated that the USITC only made reference to "significant price depression *or* suppression" to couch its likely-price-effects finding in terms of the US statute, and that likely price suppression was not a basis for the USITC's final determination of threat of material injury.[570] Indonesia did not, in subsequent submissions to the Panel, refer to the USITC's purported finding of price suppression. In any event, the United States' explanations are in line with our reading of the USITC's determination − although the determination concludes by stating that the domestic industry would be likely experiencing significant price depression or suppression in the future, the preceding analysis focuses on price depression, and there is no suggestion in the determination that the USITC considered or made a finding of likely future price suppression.

7.318. In sum, we find the USITC's finding of future price effects of subject imports to be reasonable and adequately explained in light of the evidence that was on the record. Indonesia has not presented any arguments or pointed to evidence in the record that undermines the reasonableness of these conclusions so as to demonstrate that an unbiased investigating authority could not have reached the conclusions or made the determination at issue before us. Therefore, we find that Indonesia has not demonstrated that the USITC's findings regarding the future price effects of subject imports were based on conjecture or speculation.

7.6.3.5 Overall conclusion concerning Indonesia's claims under Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement

7.319. We conclude that Indonesia has failed to establish that the USITC's findings that in the imminent future subject imports would gain market share at the expense of the domestic industry and would have adverse effects on US prices were based on conjecture and remote possibility. In light of the foregoing, we find that Indonesia has not demonstrated that, in reaching these findings, the USITC acted inconsistently with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

7.6.4 Claims under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement ("special care")

7.6.4.1 Introduction

7.320. Indonesia claims that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise "special care".[571]

7.321. The United States requests that we reject Indonesia's claims.[572]

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baseline, or 18.3% if the whole of 2009 is the baseline). In any event, Indonesia has not made a convincing argument that it would have been unreasonable for the USITC to consider that import prices lowered to regain even a "small" portion of market share would have a negative impact on domestic prices.

[568] USITC Final Determination, (Exhibit US-1), pp. 34-35.

[569] Indonesia's first written submission, para. 127.

[570] United States' first written submission, para. 285 (referring to USITC Final Determination, (Exhibit US-1), pp. 35 and 39). (emphasis added)

[571] Indonesia's first written submission, para. 130; second written submission, para. 76.

[572] United States' first written submission, para. 353; second written submission, para. 176.

7.6.4.2 Legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement

7.322. With respect to the relevant legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, we refer to our interpretation of these provisions below in the section of this Report addressing Indonesia's "as such" claims. As explained in that section, we understand these provisions to require an investigating authority to apply a heightened level of attention in considering whether the domestic industry is threatened with injury.[573]

7.6.4.3 Whether the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement

7.323. Indonesia considers that arguments made under other Articles of the Anti-Dumping and SCM Agreements can also demonstrate a violation of Articles 3.8 and 15.8. Indonesia submits that the deficiencies it identified in the context of its claims under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement and of its claims under Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement equally and independently render the USITC's threat of injury determination inconsistent with Articles 3.8 and 15.8.[574]

7.324. The United States argues that Indonesia's "as applied" claims under Articles 3.8 and 15.8 are largely derivative of, and indistinguishable from, its claims under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement and its claims under Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement. Consequently, for the United States, as Indonesia fails to establish a *prima facie* case of violation under the latter provisions, Indonesia also fails to establish a *prima facie* case of violation under Articles 3.8 and 15.8.[575]

7.325. We have, in the preceding sections of this Report, found that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement or with Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement. In doing so, we rejected Indonesia's arguments challenging aspects of the USITC's determination that Indonesia considered were inconsistent with these provisions. Indonesia has not presented any different or additional arguments in support of its contention that the same alleged inconsistencies are also, independently, inconsistent with the "special care" requirement in Articles 3.8 and 15.8. Thus, to the extent that Indonesia's claims under Articles 3.8 and 15.8 are premised on its claims of violation of the other provisions enumerated above, we find that Indonesia has failed to establish that the United States acted inconsistently with Articles 3.8 and 15.8.[576]

7.326. In addition, Indonesia argues that the USITC failed to exercise special care because of the cumulative effect of the alleged deficiencies it identified in its claims under the other provisions cited above. In essence, we understand Indonesia to assert that, cumulatively, the alleged deficiencies it identified in its other Article 3 and Article 15 claims resulted in a more robust and rigorous or precise and thorough present injury analysis by the USITC than threat of injury analysis, and that the USITC resolved the issues identified by Indonesia in its Article 3.5, 3.7,

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[573] See below, para. 7.346.

[574] Indonesia's first written submission, paras. 131-132; response to Panel question No. 56; and second written submission, para. 76.

[575] United States' first written submission, paras. 310-311; opening statement at the first meeting of the Panel, para. 56; second written submission, paras. 147-148 (referring to Panel Report, *US – Softwood Lumber VI*, para. 7.34); and response to Panel question Nos. 56 and 99.

[576] Our conclusion is consistent with the approach of the panel in *US – Softwood Lumber VI*:

> While we do not consider that a violation of the special care obligation **could** not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe *such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations*[.]

(Panel Report, *US – Softwood Lumber VI*, paras. 7.34 (bold original; italics added))

15.5, and 15.7 claims against the Indonesian exporters, and for these reasons acted inconsistently with Articles 3.8 and 15.8.[577]

7.327. The United States argues that the Agreements require that an investigating authority resolve all issues before it based on an objective analysis of positive evidence, applying the relevant standards.[578] The United States considers that there is no basis for suggesting that Articles 3.8 and 15.8 require an investigating authority to resolve some percentage of issues, or "key" issues, in favour of respondents instead of resolving each based on an analysis of the facts and application of the applicable legal standards.[579]

7.328. We agree that the Anti-Dumping and SCM Agreements require an investigating authority's threat of injury determination to be based on an objective analysis of positive evidence and to be consistent with the relevant obligations under the applicable provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, including Articles 3.5 and 15.5 and 3.7 and 15.7. Hence, the consistency of an investigating authority's threat of injury determination must be considered on its own terms, and not by comparison to the investigating authority's evaluation of the impact of dumped or subsidized imports on the domestic industry during the POI.[580] Thus, Indonesia's view that Articles 3.8 and 15.8 require that, in a given investigation, the investigating authority's threat of injury analysis be at least as "robust" or "rigorous" as its analysis of the situation of the domestic industry during the POI is without support in the text of the Agreements.[581]

7.329. Nor has Indonesia advanced any basis, in Articles 3.8 and 15.8 or any other applicable provision of the Agreements, for the proposition that Articles 3.8 and 15.8 require an investigating authority to resolve some issues, or "key" issues, in favour of respondents. Again, the relevant question is whether the USITC resolved each "issue" consistently with its obligations under the provisions at issue. Consequently, whether the investigating authority resolved some, or all, of the relevant "issues" in favour of foreign producers/exporters, or in favour of domestic producers, is not a relevant consideration. An investigating authority may well resolve all the "issues" before it in favour of either the domestic producers or in favour of foreign producers/exporters, so long as in doing so, it acts consistently with the provisions of the covered agreements. In the present case, we have found above that Indonesia has not established that the USITC's threat of injury determination is inconsistent with Articles 3.5 and 3.7 of the Anti-Dumping Agreement and with Articles 15.5 and 15.7 of the SCM Agreement.

7.330. On the basis of the foregoing, we find that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

[577] Indonesia's first written submission, paras. 130-132; opening statement at the first meeting of the Panel, para. 75; response to Panel question No. 56; and second written submission, para. 76.

[578] United States' second written submission, para. 148.

[579] United States' second written submission, para. 148; response to Panel questions No. 99 and 103; and comments on Indonesia's response to Panel question No. 103.

[580] Indonesia's position is also problematic in that it assumes that an investigating authority will, in all instances, make a fully analysed determination regarding both present injury and threat of injury. However, while an investigating authority considering the question of threat of injury would be expected to consider the present condition of the domestic industry in that context (see above, para. 7.231), we see no reason why that investigating authority would necessarily be required to consider all aspects required for a present injury determination. An investigating authority could, for instance, conclude that the domestic industry is not presently injured and may therefore go on to consider the question of threat of material injury without addressing the question of causation or non-attribution in the context of present (non)injury.

[581] In paragraph 7.210 above, we reject a similar argument advanced by Indonesia to the effect that, in assessing consistency with the non-attribution requirement under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, a panel should compare the investigating authority's threat of injury analysis to its present injury analysis and determine whether the former is as robust as the latter. In our findings above, we also note that present injury determinations require consideration of actual data for the POI, whereas threat of injury determinations by definition in addition involve consideration of projections for an imminent future period.

7.7 "As such" claims alleging inconsistency of Section 771(11)(B) of the US Tariff Act of 1930 ("tie vote" provision) with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement ("special care")

7.7.1 Introduction

7.331. Indonesia challenges Section 771(11)(B) of the US Tariff Act of 1930 "as such" – i.e. independently of its application in specific instances – as it applies to threat of injury determinations, asserting that this provision is inconsistent with the "special care" obligation under Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement in threat of injury determinations.[582]

7.332. The United States requests that we reject Indonesia's claim.[583]

7.333. It is well established in WTO dispute settlement practice that a complaining party may challenge another Member's measures of general and prospective application "as such", i.e. independently of their application in specific instances.[584] Indonesia's claims concerning the "tie vote" provision are independent of its claims concerning the US measures on coated paper from Indonesia. The tie vote provision did not come into play in the coated paper investigation – all Commissioners cast an affirmative vote (five found that the domestic industry was threatened with injury, one found that it had suffered present injury).

7.334. There is no substantial disagreement between the parties concerning the interpretation and operation of Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)). This provision of US law provides that if there is an evenly split vote between the USITC Commissioners on whether dumped or subsidized imports are causing injury (whether present injury, threat of injury, or material retardation) in an anti-dumping or countervailing duty investigation, the USITC shall be considered to have made an affirmative determination:

> If the Commissioners voting on a determination by the Commission, including a determination under section 1675 of this title, are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is
>
> (A) material injury to an industry in the United States,
>
> (B) threat of material injury to such an industry, or
>
> (C) material retardation of the establishment of an industry in the United States,
>
> by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.[585]

7.335. Moreover, we note that pursuant to this provision, a vote that any of the three "types" of injury (present material injury, threat of material injury, or material retardation) exists is considered to be an "affirmative" vote when compiling the votes of individual Commissioners. Indonesia's claim is, however, limited to instances in which an equal number of Commissioners[586] cast an affirmative vote of "threat of injury" by reason of subject imports and cast a negative vote (i.e. a vote finding no form of injury by reason of subject imports).[587]

7.336. Moreover, the parties agree that, under US law, the imposition of anti-dumping or countervailing measures automatically follows affirmative determinations by both the USDOC (on

[582] Indonesia's first written submission, paras. 3 and 133-165.
[583] United States' first written submission, para. 353.
[584] See, e.g. Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.94.
[585] 19 U.S.C., Section 1677, (Exhibit US-12), Section 1677(11)(B).
[586] The parties agree that in some instances, fewer than six Commissioners will participate in the vote. (United States' response to Panel question No. 100 (referring to 18 U.S.C., Section 208, (Exhibit US-110))).
[587] Indonesia's first written submission, para. 135.

the existence and a non-*de minimis* amount of dumping and/or subsidization) and the USITC (on the existence of injury, in any of its forms, by reason of subject imports). When both agencies have made an affirmative determination, the USDOC is required, under US law, to issue an anti-dumping or countervailing duty order imposing duties.[588]

7.337. We first address our understanding of the "special care" requirement in Articles 3.8 and 15.8, before considering Indonesia's claims of inconsistency of the US tie vote provision.

7.7.2 Legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement

7.338. Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement read as follows:

> With respect to cases where injury is threatened by [dumped/subsidized] imports, the application of [anti-dumping/countervailing] measures shall be considered and decided with special care.

7.339. The parties disagree on the interpretation of Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, in terms of both the scope of application of the "special care" obligation, and the content of that obligation.

7.340. Concerning the scope of application of Articles 3.8 and 15.8, Indonesia considers that the "special care" provision applies to all steps leading to the imposition of duties, and thus to both an investigating authority's consideration of the substantive requirements for the imposition of anti-dumping or countervailing measures and to the decision to apply duties that follows, including the decision-making or voting procedures pursuant to which that decision is made. In this respect, Indonesia argues that, pursuant to the principle of effective treaty interpretation (*effet utile*) and Article 31(1) of the Vienna Convention, meaning must be given to both the terms "considered" and "decided" in Articles 3.8 and 15.8. In Indonesia's view, if "considered" may refer to or even be limited to the USITC's substantive consideration of the requirements under the Agreements, the term "decided" unequivocally includes the way an investigating authority brings the question of applying or not applying measures in threat of injury situations "to a resolution or conclusion", including the way in which the investigating authority resolves a tie vote in those situations.[589] In addition, Indonesia considers that the use of the term "application" in Articles 3.8 and 15.8 results in the "special care" obligation applying to all steps leading up to the actual imposition of the duties.[590] Indonesia also argues that where the drafters wanted to refer to the final step of actually charging duties, they used the terms "impose", "imposition", "levying" or "collection" of duties, not the broader terms "application" of "measures".[591] Indonesia contends that the Appellate Body Report in *US – Line Pipe* does not stand for the general proposition that Members' internal-decision making processes are always within the discretion of Members.[592]

7.341. The United States, for its part, argues that the "special care" obligation in Articles 3.8 and 15.8 applies to an investigating authority's substantive analysis, i.e. its consideration of threat factors and other requirements concerning whether the domestic industry is threatened with injury by subject imports and its ultimate decision of whether such a threat exists.[593] The special care obligation does not, in the United States' view, discipline a Member's voting system or decision-making procedures.[594] The United States finds support for its interpretation of Articles 3.8 and 15.8 in the placement of these Articles as part of the provisions concerning the substantive requirements applicable to injury (including threat of injury) determinations, and argues that it is in the satisfaction of those obligations that investigating authorities exercise special care under

[588] United States' response to Panel question No. 102(a); 19 U.S.C., Section 1671d, (Exhibit US-56), Section 1671d(c)(2); and 19 U.S.C., Section 1673d, (Exhibit US-60), Section 1673d(c)(2).
[589] Indonesia's opening statement at the first meeting of the Panel, para. 79; response to Panel question Nos. 58 and 59(c); and second written submission, para. 81.
[590] Indonesia's response to Panel question Nos. 59 (a), (b), and (c).
[591] Indonesia's response to Panel question No. 59(c).
[592] Indonesia's opening statement at the first meeting of the Panel, para. 80; response to Panel question No. 60; and second written submission, para. 83.
[593] United States' second written submission, paras. 155-156.
[594] United States' first written submission, para. 319.

Articles 3.8 and 15.8.[595] The United States also finds support for its position in Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement, concerning the imposition of duties. The United States notes that these Articles provide that it is desirable − but not required − for the imposition of duties to be permissive and that these Articles do not distinguish between cases involving present injury and those involving threat of injury. The United States also argues that interpreting "application" in Articles 3.8 and 15.8 as referring to a decision on whether to impose measures following a determination that the prerequisites for application have been met may prevent the automatic application of measures in cases involving threat of injury, contrary to the statement in Articles 9 and 19 that discretion is merely desirable.[596]

7.342. The United States further submits that where the Anti-Dumping and SCM Agreements discuss procedural matters, they do so explicitly, and nothing in the Anti-Dumping and SCM Agreements curbs Members' discretion regarding their framework for assigning responsibility for conducting injury investigations and for counting votes. The United States notes in this respect that the Appellate Body in *US − Line Pipe* held that panels and the Appellate Body are "concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement", and that a Member's internal decision-making process is entirely within the discretion of that Member.[597] The United States also asserts that Indonesia's interpretation of Articles 3.8 and 15.8 would imply structural requirements for investigating authorities and would require intrusive examination of their decision-making process.[598] Finally, the United States submits that the negotiating history of Articles 3.8 and 15.8 confirms that the "special care" language evolved from text about the forecasted level of effect of dumped imports on the domestic industry, demonstrating that the concept of special care relates to the substantive standards used to assess whether a threat of injury exists.[599]

7.343. With respect to the scope of application of the "special care" provision, we note that Articles 3.8 and 15.8 refer to the "application" of measures, which shall be "considered and decided" with special care. The use of the term "application", combined with the use of the term "decided"[600], might, at first glance, suggest that the "special care" obligation concerns a Member's decision to apply duties once it has determined that all the substantive requirements for doing so have been met. We recall, however, that the provisions of the covered agreements are to be interpreted in accordance with the ordinary meaning of their terms, read in context and in light of the object and purpose of the relevant agreements.[601] Here, the context of both Articles 3.8 and 15.8 strongly suggests that they concern the *substantive requirements* for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports. In our view, Articles 3.7 and 15.7, which immediately precede Articles 3.8 and 15.8, provide the most relevant context for their interpretation. The fact that the two sets of provisions apply to determinations of threat of injury and the placement of Articles 3.8 and 15.8 immediately following Articles 3.7 and 15.7 suggests that the "special care" requirement relates to the obligations set out in those preceding provisions. In this respect, we agree with the

[595] United States' first written submission, paras. 322 and 327-329 (quoting Panel Report, *US − Softwood Lumber VI*, paras. 7.33-7.34); second written submission, paras. 150 and 158; and response to Panel question No. 58 (referring to Panel Report, *US − Softwood Lumber VI*, para. 7.34).

[596] United States' response to Panel question No. 59(a).

[597] United States' first written submission, paras. 312-353; opening statement at the first meeting of the Panel, para. 58; and second written submission, paras. 150-151 (in both instances referring to Appellate Body Report, *US − Line Pipe*, para. 158).

[598] United States' second written submission, paras. 164-165.

[599] United States' first written submission, para. 330; second written submission, paras. 159-163 (referring to Group on Anti-Dumping Policies, Anti-Dumping Code draft (August 1966), (Exhibit US-26); Anti-Dumping Code (July 1967), (Exhibit US-27); and Group on Anti-Dumping Policies, Anti-Dumping Code draft (December 1966), (Exhibit US-30)).

[600] In the Anti-Dumping and SCM Agreements, the concept of "application" generally refers to a Member's imposition of duties, not including their final collection. See, e.g. Articles 7.1, 10.1, 10.2, and 15 of the Anti-Dumping Agreement and the corresponding provisions of the SCM Agreement. The ordinary meaning of the term "decided" suggests that it can be interpreted to refer to the overall conclusion reached, as a result of an investigating authority's "consideration" of a matter. The Shorter Oxford Dictionary, defines "decide" as, *inter alia*, "[s]ettle (a question, dispute, etc.) by finding in favour of one side; bring to a settlement, resolve" "[b]ring (a person) to a determination or resolution (against, in favour of, to do)", "[c]ome to a determination or resolution". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, pp. 618-619). We also note that there is no notable difference between the English, the French, and the Spanish texts of Articles 3.8 and 15.8.

[601] Vienna Convention, Article 31(1).

United States that the negotiating history of Articles 3.8 and 15.8 suggests that the "special care" requirement was originally linked to the nature of the information − predictions about the future − that authorities must rely on in making threat of injury determinations.[602] The apparent reason for the inclusion of what became the "special care" requirement supports our understanding that the obligation applies to an investigating authority's consideration of the substantive requirements for a determination of threat of injury. In addition, Articles 3.8 and 15.8 form part of, respectively, Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. The focus of these two Articles, both of which are entitled "Determination of Injury", is "on the *substantive* obligations that a Member must fulfil in making an injury determination".[603] The placement of the "special care" language in Articles 3 and 15 thus suggests that, in line with all the other provisions of those Articles, the "special care" provision concerns the substantive requirements for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports.[604] By contrast, disciplines on the procedural and evidentiary aspects of anti-dumping and countervailing duty investigations are found primarily in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement, and the imposition and collection of duties is addressed in Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement.

7.344. We find further support in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement for our view that Articles 3.8 and 15.8 concern an investigating authority's consideration of the substantive requirements for a determination of threat of injury. Articles 6.9 and 12.8 impose a procedural obligation to disclose the "essential facts under consideration which form the basis *for the decision whether to apply definitive measures*".[605] This obligation applies to the facts underlying an authority's *substantive* consideration of the existence of dumping or subsidization, of injury, and of a causal link between the dumped or subsidized imports and the injury.[606] The fact that Articles 6.9 and 12.8 are, like Articles 3.8 and 15.8, formulated in terms of the *decision to apply anti-dumping or countervailing measures* even though they apply to substantive requirements lends support to our view that Articles 3.8 and 15.8 concern the substantive requirements applicable in determining whether a threat of injury exists.

7.345. In any event, even if the special care requirement could apply to something else than an investigating authority's consideration of the substantive requirements under Articles 3 and 15, we agree with the United States and the European Union[607] that the Anti-Dumping and SCM Agreements generally do not discipline Members' voting procedures or the manner in which decisions to apply duties are made. There is nothing in either the Anti-Dumping or SCM Agreements concerning the structure or responsibilities of the decision-making for investigations beyond the statement in footnote 3 of the Anti-Dumping Agreement that the term "authorities"

[602] Group on Anti-Dumping Policies, Anti-Dumping Code draft (August 1966), (Exhibit US-26); Anti-Dumping Code (July 1967), (Exhibit US-27); and Group on Anti-Dumping Policies, Anti-Dumping Code draft (December 1966), (Exhibit US-30).

[603] Appellate Body Report, *Thailand − H-Beams*, para. 106. (emphasis original)

[604] Our understanding of Articles 3.8 and 15.8 is consistent with that of the panel in *US − Softwood Lumber VI*, which took the view that Articles 3.8 and 15.8 reinforce the fundamental obligation under Articles 3.7 and 15.7 that an investigating authority base a threat of injury determination on facts and not allegation, conjecture, or remote possibility. The panel also was of the view that Articles 3.8 and 15.8 "apply during the process of investigation and determination of threat of material injury", that is, "in the establishment of whether the prerequisites for application of a measure exist", and not merely afterward when final decisions whether to apply a measure are taken. (Panel Report, *US − Softwood Lumber VI*, para. 7.33). We note that in its report in the compliance proceedings in the same dispute, the Appellate Body included Articles 3.8 and 15.8 in a list of the *substantive* provisions of Articles 3 and 15 informing the standard of review to be applied by a panel considering claims concerning these provisions and, in this context, referred to the above discussion of Articles 3.8 and 15.8 by the *US − Softwood Lumber VI* panel. (Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, paras. 95-96). See also Appellate Body Report, *China − GOES*, fn 213: "Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement* set out the requirements regarding the determination of a threat of material injury".

[605] Article 6.9 of Anti-Dumping Agreement and Article 12.8 of the SCM Agreement read, in relevant part:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form *the basis for the decision whether to apply definitive measures*.

(emphasis added)

[606] See, e.g. Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.130.

[607] United States first written submission, paras. 320-325; second written submission, para 153; and European Union's third-party response to Panel question No. 14.

used in the Agreement "shall be interpreted as meaning authorities at an appropriate senior level". Had the drafters intended for the Anti-Dumping and the SCM Agreements to subject to review the manner in which Members structure their investigating authorities and the manner in which decisions to apply duties are made, they would, we believe, have done so explicitly, particularly in view of the wide variety of ways in which Members have organized and structured their investigating authorities.[608] We see no basis in the texts of the Anti-Dumping or SCM Agreements that would support Indonesia's argument that those Agreements impose procedural disciplines on how determinations are made.[609]

7.346. In light of our conclusion concerning the scope of application of Articles 3.8 and 15.8, we do not consider it necessary to go on to consider further the meaning of the term "special care". Nonetheless, we make the following observations in this regard. First, the ordinary meaning of the "special care" language implies an obligation on Members to apply a high degree of attention in threat of injury determinations.[610] Second, we note that Indonesia refers to the following as relevant context for the interpretation of the term "special care": (a) Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement requiring that an injury determination be based on an "objective examination" of "positive evidence"; (b) Article X:3(a) of the GATT 1994 requiring that measures be administered in a "uniform, *impartial* and *reasonable* manner"; (c) the principle of good faith as a "relevant rule of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the Vienna Convention; (d) a general standard of even-handedness, which, Indonesia argues, underlies the WTO covered agreements; and (e) Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement, which set out special rules concerning developing country Members.[611] With the exception of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, we do not see, and Indonesia has not persuaded us of, the relevance for the interpretation of the special care requirement of the provisions and concepts that it refers to. As indicated above, in our view, Articles 3.7 and 15.7, which immediately precede Articles 3.8 and 15.8, provide the most relevant context for the interpretation of Articles 3.8 and 15.8, and this context suggests that the "special care" requirement relates to the obligations set out in those preceding provisions.

7.347. Finally, we note Indonesia's argument that the fact that the laws of certain other Members and the Statutes of the International Court of Justice provide for either an odd number of

[608] Members have adopted a variety of different structures for the administration of their trade remedy systems. In some systems, the decision-maker is formally part of the government, while in others it is a separate, often quasi-judicial, body outside the formal government hierarchy. In some systems, there is a dual system in which one authority determines whether imports are dumped or subsidized, and another determines whether the domestic industry is injured by such imports. The ultimate decision whether to impose measures may rest with one or the other of these authorities, or with a separate authority. We recall that in the US system, while the USITC makes determinations regarding injury, the USDOC makes determinations regarding dumping and subsidization and the imposition of measures; the latter is required under US law if the USDOC and the USITC both make affirmative determinations of, respectively, dumping or subsidization, and injury. In some systems, the investigation and evaluation of the substantive requirements for the imposition of measures (i.e. dumping, subsidy, injury, and causation) is undertaken by one authority, which recommends a determination to another authority, which makes the ultimate determination whether to apply measures, and may accept, reject, or modify the recommendation.

[609] We also note the Appellate Body's statement in *US – Line Pipe* that the Agreement on Safeguards is not:

> [C]oncerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.

(Appellate Body Report, *US – Line Pipe*, para. 158)

[610] The Shorter Oxford Dictionary defines "care" as "[s]erious attention, heed; caution, pains; regard, inclination (to, for)" (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 348), and "special", (as an adjective), as "[e]xceptional in quality or degree; unusual; out of the ordinary". (Ibid. Vol. 2, p. 2942).

[611] Indonesia's first written submission, paras. 140-153; response to Panel question No. 63(b); opening statement at the first meeting of the Panel, paras. 79, 82; and second written submission, para. 85. (emphasis original)

decision-makers or for the presiding member to have a deciding vote are "circumstances surrounding the conclusion of a treaty" within the meaning of Article 32 of the Vienna Convention, which indicate that the special care requirement is generally perceived to entail a greater degree of diligence than that afforded by the US tie vote provision, thus showing that the provision is inconsistent with Articles 3.8 and 15.8.[612] Indonesia fails to explain how other Members' procedures could properly be regarded as circumstances surrounding the conclusion of the Anti-Dumping and SCM Agreements in this regard, given that the conclusion of these Agreements preceded the adoption of at least some of those procedures; legislation enacted subsequent to the conclusion of a treaty cannot be considered "circumstances of its conclusion".[613] Nor has Indonesia explained how tie-breaking provisions in other Members' trade remedy legislation could have been of relevance to, informed, or impacted, the negotiation of Articles 3.8 and 15.8, particularly as these Articles apply only in threat of injury determinations, and on their face have nothing to do with voting procedures.[614]

7.348. In its first written submission, Indonesia also argued that these same laws constituted "subsequent practice" within the meaning of "Article 31(1)(b) (sic)" of the Vienna Convention.[615] Indonesia later asserted, in its opening statement at the second meeting with the Panel, that it had not invoked Article 31(3)(b) or sought to rely on the subsequent practice of Members. In light of Indonesia's repudiation of its own argument, it is unnecessary to address this question. Nonetheless, we again note that there is no obvious connection between the tie-breaking provisions in other Members' legislation and the special care provision, and that Indonesia refers to the practice of only a handful of WTO Members. Thus, Indonesia in any event failed to demonstrate "a common, consistent, discernible pattern of acts or pronouncements" that "imply *agreement* on the interpretation of the relevant provision".[616] Indonesia also refers to the fact that in safeguards cases, under US law, the US president (who determines whether a measure will be applied and if so what measure) may deem a tied vote by the USITC to be affirmative.[617] However, Indonesia again fails explain the relevance of this decision-making procedure to the interpretation of Articles 3.8 and 15.8.

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[612] Indonesia's first written submission, paras. 160-165 (referring to Other Members' Laws on Tie Voting, (Exhibit IDN-20); and ICJ Statute, (Exhibit IDN-47)); opening statement at the second meeting of the Panel, para. 62.

[613] In *EC – Chicken Cuts*, the Appellate Body upheld the panel's view that the ''circumstances of the conclusion should be ascertained over a period of time *ending on the date of the conclusion of the WTO Agreement*''. (Appellate Body Report, *EC – Chicken Cuts*, para. 293 (emphasis added)). Canada's legislation appears to pre-date the entry into force of the Uruguay Round Agreements, whereas Argentina, South Africa, and Turkey's legislation appear to post-date it. Of course, it may well be that these Members had similar legislation in place prior to the conclusion of the Uruguay Round, but we cannot assume this to be the case in the absence of evidence to this effect and Indonesia has not submitted evidence that would demonstrate that the laws were enacted prior to the conclusion of the Uruguay Round. Moreover, in the present case, the language of Articles 3.8 and 15.8 originates in the Kennedy Round Anti-Dumping Code, and in our view, the laws would have to pre-date the conclusion of that agreement to qualify under Article 32 of the Vienna Convention in the manner argued by Indonesia.

[614] In addition, Indonesia invokes the practice of only four Members, and fails to mention that at least one other Member, Korea, has a provision similar to the US tie vote provision. (South Korea, Act on the Investigation of Unfair International Trade Practices, (Exhibit US-29), Article 32 (referred to in United States' first written submission, para. 343)).

[615] Indonesia's first written submission, para. 161. Indonesia explained that:

> The Appellate Body has defined 'subsequent practice as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation', see *Appellate Body Report, Japan – Alcoholic Beverages II*, p.13. Indonesia can rely on laws enacted after the entry into force of the WTO agreements as an indication of how states perceive 'special care' to be correctly interpreted.

(Ibid. fn 216)

The language of the Appellate Body Report in *Japan – Alcoholic Beverages* II cited by Indonesia concerns the use of subsequent practice under Article 31.3(b) of the Vienna Convention, which provides that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[616] Appellate Body Reports, *US – Gambling*, para. 192; *EC – Chicken Cuts*, paras. 258-259. (emphasis original)

[617] Indonesia's first written submission, para. 164; response to Panel question No. 60 (referring to Safeguard Tie Vote, (Exhibit IDN-37)).

7.7.3 Whether the US "tie vote" provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement

7.349. Indonesia's argument that the US tie vote provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement is premised on its interpretation of the "special care" obligation. We have rejected Indonesia's interpretation of Articles 3.8 and 15.8, concluding that these provisions establish no disciplines on Members' decision-making procedures in determining whether a domestic industry is threatened with injury and whether to apply measures. The US tie vote provision is a procedural mechanism to establish an outcome based on the votes of individual Commissioners in the event of a tied vote on whether there is injury caused by subject imports. Consequently, we conclude that Indonesia has failed to establish the inconsistency of the US tie vote provision with the special care requirement under Articles 3.8 and 15.8.

7.350. Finally, we note that the parties also disagree as to the significance, for Indonesia's claims, of the fact that under US law[618] the USDOC has no discretion not to issue an anti-dumping or countervailing duty order following affirmative determinations by the USDOC and the USITC. In particular, the parties disagree whether this means that under US law, an affirmative USITC decision constitutes a decision to apply duties.[619] In light of our conclusions regarding the scope of application of Articles 3.8 and 15.8, we see no need to address the parties' arguments in this respect.

7.351. In light of the foregoing, we find that Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement and reject Indonesia's "as such" claims under these provisions.

8 CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to Indonesia's claims concerning the USDOC's subsidy determination:

i. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for standing timber in Indonesia as the basis for establishing the benchmark for the provision of standing timber;

ii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for logs in Indonesia as the basis for establishing the benchmark for the log export ban;

iii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in its determination that Orleans was affiliated with APP/SMG;

iv. Indonesia has failed to establish that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to determine or identify the relevant subsidy programmes in connection with the provision of standing timber, the log export ban, or the debt forgiveness;

v. Indonesia has failed to establish that the USDOC acted inconsistently with the chapeau of Article 2.1 of the SCM Agreement by failing to identify the granting authority that forgave debt in favour of APP/SMG or the jurisdiction of that granting authority.

[618] See above, para. 7.336.
[619] United States' first written submission, paras. 319 and 333-336; second written submission, para. 153; response to Panel question No. 102(a); Indonesia's response to Panel question Nos. 59 (a), (b), and (c); and comments on the United States' response to Panel question No. 102(a).

b. With respect to Indonesia's claims concerning the USITC's threat of injury determination:

   i. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors;

   ii. Indonesia has failed to establish that the USITC's findings that in the imminent future subject imports would gain market share at the expense of the domestic industry and would have adverse effects on US prices are based on conjecture and remote possibility, and therefore that the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement;

   iii. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

c. With respect to Indonesia's "as such" claims concerning Section 771(11)(B) of the US Tariff Act of 1930 (the "tie vote" provision):

   i. Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

8.2. In light of these conclusions, the Panel makes no recommendation under Article 19.1 of the DSU.

WORLD TRADE ORGANIZATION

WT/DS491/R/Add.1

6 December 2017

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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS491/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 29 July 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The Additional Working Procedures of the Panel Concerning Business Confidential Information shall, once adopted, be a part of these Working Procedures.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Indonesia requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Indonesia shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Indonesia or the United States could be numbered IDN-1 and US-1, IDN-2 and US-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5 and US-5, the first exhibit of the next submission thus would be numbered IDN-6 and US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, as well as its closing statement if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Indonesia. If the United States chooses not to avail itself of that right, the

Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submission, first opening and closing oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions following the first substantive meeting. In addition, each party shall also submit a separate integrated executive summary of its written rebuttal, second opening and closing oral statements, which may include a summary of its responses to questions following the second substantive meeting and comments thereon. Each integrated executive summary shall be limited to no more than 20 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents (incl. submissions and exhibits) it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, in the form of an e-mail attachment or in the form of 5 CD-ROMs, 5 DVDs or 5 USB keys. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and xxxxx.xxxxx@wto.org. If a CD-ROM or a USB key is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 29 July 2016

1. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the U.S. Department of Commerce or the United States International Trade Commission as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned proceedings agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in any of the proceedings at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Indonesia and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of any of the proceedings. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party, or an outside advisor to a party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceedings at issue in this dispute, or an officer or employee of an association of such enterprises.

4. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

5. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)).

6. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

7. In the case of an oral statement containing BCI, the party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure

that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 5.

8. Where a party submits a document containing BCI to the Panel, the other party, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5.

9. If a party considers that information submitted by the other party should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel and the other party, together with the reasons for the objection. Similarly, if a party considers that the other party submitted information designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF INDONESIA

I. INTRODUCTION

1. The Government of the Republic of Indonesia (Indonesia or GOI) brought this dispute to challenge the United States' unjustified imposition of anti-dumping and countervailing duties on coated paper from Indonesia. The United States' actions are inconsistent with a number of obligations set out in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and GATT 1994.

2. In addition, the United States' disregard for its obligations is made more acute by its failure to accord any special regard pursuant to Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement towards Indonesia, a developing country Member.

II. UNITED STATES' REQUEST FOR A PRELIMINARY RULING

3. As part of its challenge to the United States' log export ban findings, Indonesia cited to the panel's decision in *US – Export Restraints*.[1] The United States asked the Panel to make a preliminary ruling that Indonesia was making a backdoor attempt to bring a claim under Article 1.1(a) of the SCM Agreement.[2] But as we informed the Panel, Indonesia may rely on any appropriate authority and that does not change the claims into something different.[3] Indonesia has not asked the Panel to make a finding under Article 1.1(a) of the SCM Agreement and for that reason, the United States' request should be rejected.

4. The United States has made a separate request for a preliminary ruling in relation to Indonesia's challenges to USDOC's findings as inconsistent with Articles 2.1, 2.1(c), and Article 14 of the SCM Agreement.[4] According to the United States, these claims should have been made under Article 22.3 of the SCM Agreement.[5] The Panel should reject this reasoning for three reasons. First, the fact that the US may also have violated Article 22.3 of the SCM Agreement does not mean it has not also violated Articles 2.1, 2.1(c), and Article 14 of the SCM Agreement. Second, the Appellate Body in *US – Countervailing Measures (China)* confirmed that Article 22.3 of the SCM Agreement does not have to be included for there to be violations of the nature Indonesia has asserted under Articles 2.1, 2.1(c), and Article 14. Third, Indonesia's claims were set forth clearly in the request for a panel which the Appellate Body has explained is sufficient.[6]

III. USDOC'S FLAWED SUBSIDY DETERMINATION

5. The GOI's challenge to the United States' subsidy determination concerns the following programs that USDOC found to be countervailable: 1) the alleged provision by the GOI of standing timber for less than adequate remuneration, 2) government prohibition of log exports and 3) debt forgiveness through alleged debtors' buyback of its own debt from the GOI at a discounted rate.

[1] See Indonesia' First Written Submission (Indonesia's FWS), pp. 11-12, 22-23 (citing Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767).

[2] See US FWS, p. 11.

[3] See Indonesia's Response to the US Request for a Preliminary Ruling, p. 1.

[4] See US FWS, pp. 11-12.

[5] See US FWS, p. 12.

[6] See Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 141.

A. USDOC's Finding of Lack of Adequate Remuneration Is Flawed Because USDOC Made an Improper *Per Se* Determination of Price Distortion Based Solely on the Predominant Market Share of Standing Timber from Public Forests

6. USDOC improperly made a *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests and failed to determine the adequacy of remuneration in relation to prevailing market conditions in Indonesia. Instead of using Indonesian prices for pulpwood, USDOC resorted to aberrationally high out-of-country benchmarks for Malaysian exports of acacia pulpwood and mixed tropical hardwood as reported in the World Trade Atlas.

7. Article 14(d) of the SCM Agreement states that a government provision of goods or services is considered to confer a benefit when it is made for less than adequate remuneration. The second sentence of Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question *in the country of provision or purchase*." (emphasis added)

8. In *US – Carbon Steel (India)*, the Appellate Body explained that the benchmark price would normally be found in the market for the good in question in the country of provision, and that these in-country prices could be from private or government-related entities.[7]

9. The Appellate Body further stated that the issue of "whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."[8]

10. The Appellate Body has made clear that just because the government may be the predominant supplier of a good, a *per se* rule of price distortion is impermissible. In *US – Countervailing Measures (China)*, the Appellate Body noted that, in previous cases, "the Appellate Body has cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one."[9]

1. USDOC's finding that the GOI provided standing timber for less than adequate remuneration relies on an improper *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests

11. The USDOC investigated whether the GOI provided standing timber to companies harvesting it such that a benefit was passed through to producers of coated paper who use the pulpwood as an input to making the paper. However, USDOC made it clear from the outset of the investigation that it was not interested in revisiting the benchmarks or calculation methodology it had used in the 2006/2007 investigation of coated paper from Indonesia. USDOC instructed the parties to provide new information only with respect to "changed circumstances in the GOI's *administration*" of the program. Given USDOC's clear instruction not to provide information on anything other than changes to the GOI's administration of the program, Indonesia and APP/SMG focused on USDOC's numerous other requests, including providing out-of-country benchmarks.

12. The GOI requires that any entity that wants to harvest wood forest products from the State Forest must obtain a license and pay fees for the forest products that are harvested. In addition to the fees a licensee must pay, the licensee must perform a number of services at its own expense, including: forest management planning, seed and seedling procurement and planting, maintenance, fire and forest protection, social and environmental obligations, and infrastructure development. In other words, the licensee pays for the use of public land, not the provision of standing timber.

13. Private forests also exist in Indonesia. In 2008, over 2 million cubic meters of logs were harvested from private forest land. The GOI does not control how private forest land is used and it

[7] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.515.
[8] Ibid., para. 4.154.
[9] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.51.

does not charge a fee for harvesting timber on such land. Consequently, the licensing system, fee payment, and forest management system described above only applies to entities who harvest from the State Forest. The only information the GOI maintains about private forest land is the volume of logs that are harvested.

14. USDOC's finding of price distortion rested entirely on the predominant market share of standing timber from public forests, which the USDOC (wrongly) equated with the fact that the GOI was the predominant supplier of standing timber. Almost all of the "standing timber" for which USDOC calculated a benefit was planted, grown, and harvested from a plantation and was not "pre-standing." In short, nearly all of the "standing timber" the USDOC countervailed was *not* provided by the GOI. Rather, it was planted, grown, and harvested by the plantation owners.

15. USDOC had data on in-country prices available but chose not to examine it. In addition, USDOC had information on timber purchase prices and sales prices. Finally, USDOC had the names and addresses of log suppliers in Indonesia. USDOC did not use any of this information to analyze price distortion or to seek to obtain additional information on that question.

16. Contrary to the clear line of Appellate Body decisions on the subject, USDOC made no evidentiary finding of price distortion, neither for standing timber from public forests, nor in the substantial private market that existed in Indonesia. Indonesia has demonstrated that none of the other factors USDOC allegedly relied on are persuasive. Hence, in resorting to an external benchmark, USDOC acted inconsistently with Article 14(d) of the SCM Agreement.

2. USDOC's finding that the GOI log export ban provides a benefit relies on an improper *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests

17. The USDOC investigated whether the GOI's log export ban provided a benefit. As part of its benefit analysis, USDOC relied on the same aberrational Malaysian export data rather than Indonesian prices.

18. As the GOI explained, to confront the growing problem of deforestation in Indonesia, the Minister of Forestry and the Minister of Industry and Trade issued a decree in 2001 to prohibit the export of logs and chipwood, but wood chips (that is, logs cut in smaller pieces, the way they are normally exported so as to facilitate transportation) have never been subject to the export ban. Nor was there ever a ban on the export of pulp. In other words, there was no ban on exports of the downstream products used to make paper. USDOC found, however, without support, that a purpose of the log export ban was to develop downstream industries. USDOC relied on its view of the purpose of the log export ban in deciding whether there was a benefit.

19. Even if the effect (but not the purpose) of the log export ban were an increased domestic supply of logs potentially benefitting downstream industries in Indonesia, the panel on *US – Export Restraints* found that export restraints including export bans do not constitute countervailable subsidies as defined in the SCM Agreement.[10] This finding was confirmed by the panel on *China – GOES*,[11] as well as the panel on *US – Countervailing Measures (China)*.[12]

20. In *US – Export Restraints*, Canada did not contest the fact that its export restraints reduced domestic input prices, thereby conferring a benefit to local producers. In the present case, the GOI disagrees with the very starting point that domestic input prices decreased because of an export ban limited to logs (and not preventing the export of wood chips and pulp, the products that matter). In addition, even if the Panel were to find reduced input prices (quod non), the alleged financial contribution in this case (i.e., the "provision of goods … by a government") cannot be "considered as conferring a benefit" as, following the finding in *US – Export Restraints* export restraints do not constitute a financial contribution. In other words, if the log export ban does not constitute a financial contribution neither can it bestow or "confer" a benefit under Article 14(d) of the SCM Agreement. The causal link required in Article 14(d) -- between the "provision of goods …

[10] *US – Export Restraints*, para. 8.75.
[11] *China – GOES*, para. 7.90.
[12] Panel Report, *US – Countervailing Measures (China)*, para. 7.401.

by a government" and any "benefit" -- is missing. As a result, any benefit that the Panel may find is not "conferred by" a financial contribution by the GOI.

21. After errantly determining the GOI law's purpose was to develop downstream industries, USDOC found the existence of a countervailable subsidy without any analysis of Indonesian prices. USDOC's calculation of the benefit, however, suffers from the same WTO inconsistency as the calculation of the benefit for stumpage. USDOC used the same second tier benchmark it had used for stumpage. Consequently, USDOC's benefit finding with respect to the log export ban is inconsistent with Article 14(d) of the SCM Agreement for the same reasons as the findings on standing timber discussed above.

B. USDOC Improperly Applied an Adverse Inference to Find the GOI Knowingly Sold Debt to an Affiliate of the Debtor in Contravention of Indonesian Law

22. USDOC investigated whether the GOI provided a benefit to Indonesian coated paper producers by permitting the sale of debt to an alleged affiliate of the debtor in contravention of Indonesian law. USDOC found a benefit had been conferred and supported its finding by taking an adverse inference based on the GOI's purported lack of cooperation.

23. In the aftermath of the Asian financial crisis, the GOI created the Indonesian Bank Restructuring Agency ("IBRA") in January 1998 whose purpose was to manage the financial restructuring of the Indonesian economy. In May 2003, the GOI established a special program operating within IBRA known as the Strategic Asset Sales Program (its Bahasa acronym is "PPAS") to sell the GOI-owned assets involving large amounts of debt. Because of its size, the debt of the Asia Pulp and Paper/Sinar Mas Group (APP/SMG) was designated to be sold as part of the PPAS.

24. The only reason USDOC found the existence of a benefit was based on an adverse inference of affiliation between Orleans (the company purchasing the debt) and APP/SMG. USDOC reasoned that this meant the GOI provided a benefit to APP/SMG by selling APP/SMG debt to an affiliate in contravention of Indonesian law. USDOC reasoned that this constituted debt forgiveness equal to the difference between the value of the outstanding debt and the amount the alleged affiliate paid for it. USDOC took an adverse inference because of Indonesia's purported lack of cooperation. In reality, what happened was that USDOC set a constantly moving target and then used it as a pretext for taking an adverse inference.

1. Indonesia acted to the best of its ability and provided "necessary" information within a "reasonable period"

25. Article 12.7 of the SCM Agreement states that where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period . . ., preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

26. Article 6.8 of the Anti-Dumping Agreement is identical to Article 12.7 of the SCM Agreement with the addition of a reference to Annex II of the Anti-Dumping Agreement. Annex II:5 to the Anti-Dumping Agreement provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." In *Mexico – Anti-dumping Measures on Rice*, the Appellate Body noted that the conditions in Annex II of the Anti-Dumping Agreement existed in the SCM Agreement[13] and that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations. . . ."[14] Hence, the conditions in Annex II apply in the context of USDOC's countervailing duty investigation.

27. USDOC issued the original CVD questionnaire to Indonesia on November 3, 2009. USDOC's original questionnaire included a single specific question on the purchase of debt by an alleged affiliate. The GOI initially responded that it did not have new information or evidence of changed

[13] Appellate Body Report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice, Complaint with Respect to Rice,* WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853, para. 291.

[14] Ibid., para. 295.

circumstances but that it was continuing to review archived documents and would provide any new information that it located.

28. USDOC issued a supplemental questionnaire to the GOI on January 29, 2010 asking for additional information. The GOI submitted all of the documents USDOC requested concerning Orleans, consisting of articles of association, certificate of incorporation, power of attorney, letter of compliance, and a statement letter. The GOI also submitted documentation on IBRA's internal procedures and a narrative explanation of the same. Finally, the GOI submitted addition information it located concerning the APP/SMG sale, including a letter notifying Orleans that it was the winning bidder, correspondence confirming Orleans' payment, an asset and sale purchase agreement, and an opinion letter from outside counsel that Orleans complied with the conditions necessary to purchase the debt.

29. USDOC issued a third supplemental questionnaire to the GOI on April 29, 2010. USDOC's third supplemental questionnaire contained twenty-nine questions, most of which had multiple subparts. USDOC asked about documentation the GOI had provided and about how IBRA satisfied itself that the bidders were not affiliated with the debtor. The GOI responded to that portion of USDOC's third supplemental questionnaire in full, providing both a narrative response and the requested additional documents.

30. But USDOC's third supplemental questionnaire contained a demand for documents designed to make it impossible for the GOI to respond. Prior to the request, the GOI had no reason to expect USDOC would need documents from other sales. With respect to this new demand for documents that USDOC knew about from the beginning of the investigation but waited to request nearly six months after issuing the original questionnaire, the GOI responded that the documents were not available but explained that they were standard forms and would be substantially identical to those documents used in the APP/SMG transaction. The GOI further explained that the articles of association would be unique but that all of the winning bidders were offshore companies.

31. Importantly, what was on the record were all of the records concerning Orleans' purchase of the APP/SMG debt that USDOC requested. None of those records suggested an affiliation between Orleans and APP/SMG. In essence, USDOC said those records were irrelevant to the question of whether the GOI acted to the best of its ability because the GOI could not provide documents on all of the other PPAS sales within the short period of time USDOC provided and then based the adverse inference on two sentences from a newspaper article stating APP/SMG may have purchased its own debt. Even the unnamed "expert" USDOC purportedly relied on stated he was merely speculating that APP/SMG purchased its own debt.

32. As the Appellate Body found in *US – Hot-Rolled Steel from Japan*, Annex II of the Anti-Dumping Agreement (which, as referred to earlier, applies also in the context of Article 12.7 of the SCM Agreement) is an expression of "the organic principle of good faith" which "restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable".[15] At no stage in the proceedings did the GOI "refuse access to" information it had in its possession, nor did it fail to "provide necessary information" (information relating to other PPAS debt sales was not "necessary" to assess the APP/SMG sale) or "significantly impede the investigation". Instead, throughout, the GOI acted "to the best of its ability", considering, in particular, that Indonesia is a developing country member of the WTO, the special interests of which Article 27 of the SCM Agreement and Article 15 of the Anti-Dumping Agreement recognize. For the USDOC, in these circumstances, to rely on "facts available" violates Article 12.7 of the SCM Agreement.

2. The facts available do not "reasonably replace" the missing information

33. USDOC's determination is also inconsistent with Article 12.7 of the SCM Agreement because the facts available on the record that USDOC resorted to do not "reasonably replace" the information that Indonesia allegedly failed to provide.

[15] *US – Hot-Rolled Steel from Japan*, para. 101 (referring specifically to paragraph 2 of the Annex II to the Anti-Dumping Agreement).

34. In *US – Countervailing Measures (China)*, the Appellate Body recalled its previous decisions in *Mexico – Anti-dumping Measures on Rice*[16] and *US – Carbon Steel (India)*[17] in stating that "an investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination."[18] The Appellate Body stated that, under the standard of review, the Panel was to examine whether USDOC's determination was "reasoned and adequate."[19] In *US – Carbon Steel (India)*, the Appellate Body stated that "where there are several 'facts available' from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison. . . ."[20]

35. The facts available that USDOC applied in this case did not "reasonably replace" the information that USDOC alleged the GOI failed to provide. The GOI provided all of the information that USDOC requested on the APP/SMG transaction. USDOC cannot deny that those documents do not show an affiliation. Likewise, the records USDOC sought for other debt sales would not have shed light on whether Orleans was an affiliate because those other transactions involved different companies. In other words, while records from the other transactions might have shown differences in how the sales were conducted, they would not have established the central fact of whether there was an affiliation between Orleans and APP/SMG. Indeed, the newspaper article and expert report USDOC were speculative and merely "suggested" an affiliation.

36. USDOC erred by giving more weight to speculative newspaper articles and rumor than the actual documents from the transaction leaving its determination inconsistent with Article 12.7 of the SCM Agreement.

C. USDOC Did Not Demonstrate the Existence of a Subsidy Program

37. The USDOC relied on *de facto* specificity as referred to in Article 2.1(c). "Article 2.1(c) identifies factors that investigating authorities and panels are to evaluate in assessing whether, despite not seemingly *de jure* specific, a subsidy may still be specific in fact."[21]

38. The second sentence of Article 2.1(c) provides a list of particular factors regarding the use of the subsidy.[22] In *US – Countervailing Measures (China)*, the Appellate Body determined that the mere fact that financial contributions have been provided to certain enterprises is not sufficient and rather the investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[23]

39. As the Appellate Body noted[24], Article 2.1(c) of the SCM Agreement requires that there be "a plan or scheme" and "systematic series of actions" that confer a benefit. USDOC did not cite to evidence that the GOI or any regional or local government entity had in place a plan, scheme, or *systematic* series of actions to confer a benefit. None of the programs in question confer a benefit. As Indonesia noted in its First Written submission, the so-called provision of standing timber benefits the GOI because the GOI receives revenues from the use of the land.[25] Notably, because GOI is not providing timber, it is not reasonable to characterize the fees as payments for timber. In addition, the GOI receives services from the entities who hold licenses.[26] Because there is no written plan that confers a benefit, USDOC needed to look at whether a systematic series of actions conferred a benefit.

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[16] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*.
[17] Appellate Body Report, *US – Carbon Steel (India)*.
[18] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 (footnotes omitted) (emphasis added).
[19] Ibid., para. 4.187.
[20] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[21] 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. 4.373.
[22] Ibid.
[23] Ibid., para. 4.143 (emphasis original).
[24] Ibid.
[25] See Indonesia FWS, para. 77.
[26] See Indonesia FWS, paras. 76-77.

40. The log export ban, similarly, does not confer a benefit. Indonesia enacted the log export ban in 2001 to protect against deforestation.[27] The export ban never applied to pulp or wood chips. Under those circumstances, where the law does not confer a benefit, USDOC needs to find a systematic series of actions that confer a benefit.

41. The alleged debt buy back is perhaps the most extraordinary finding by USDOC of the existence of a subsidy program. All of the written materials suggested no benefit was conferred. In fact, Indonesian law made it illegal for an affiliate to purchase its own debt.[28] USDOC found the existence of a subsidy program based on an alleged violation of the law. Put differently, the Indonesian law, itself, was not the subsidy program. Instead, it was the violation of the law that USDOC found was a subsidy program. But in the absence of a written law, USDOC needed to find a systematic series of actions that conferred a benefit which it did not do. Rather, USDOC found a single illegal act (based on newspaper speculation) made it specific.

D. USDOC Did Not Identify the Relevant Jurisdiction

42. Article 2.1 of the SCM Agreement sets forth the principles for determining whether a subsidy is specific to certain enterprises "within the jurisdiction of the granting authority."[29] In *US – Countervailing Measures (China)*, the Appellate Body stated that an essential part of the specificity analysis us identifying the relevant jurisdiction.[30]

1. USDOC did not identify the government entity that allegedly forgave debt

43. USDOC found that the "GOI" was the entity that provided a benefit to APP/SMG by allegedly forgiving debt. But USDOC knew that the GOI's law prohibited the sale of debt to an affiliate of the debtor. USDOC's theory of how the GOI conferred a benefit was that, in the APP/SMG asset sale, IBRA's procedures were violated and APP/SMG debt was sold to an affiliate of the debtor against the explicit rules imposed by the GOI. By allegedly allowing debt to be sold to an affiliate, the GOI forgave debt to the extent of the difference between the outstanding debt and the purchase price.

44. For USDOC's theory of how a benefit was conferred to work, the GOI had to know APP/SMG and Orleans were affiliated, otherwise there could not be a countervailable act. The GOI established that the bid package met the law's requirements. In other words, USDOC could not point to anything on the face of the transaction that violated IBRA's procedures. Instead, USDOC believed that an individual or individuals with authority to act on behalf of the GOI knew that Orleans was affiliated with APP/SMG and allowed the sale to proceed. The record, however, contained no evidence of this.

45. Admittedly, this is an unusual situation because USDOC's theory of a benefit being conferred is through the alleged violation of a law. In other words, GOI's law is not what conferred a benefit. Rather, it was the purported action of an individual or individuals who broke the law that conferred a benefit. Under these circumstances, it is imperative for USDOC to identify the government entity and the individual or individuals who allegedly forgave debt and thereby knowingly violated Indonesian law. By failing to do so, USDOC acted inconsistently with its obligations under Article 2.1 of the SCM Agreement.

IV. USITC'S FLAWED THREAT OF INJURY DETERMINATION

46. The USITC is the agency charged with determining whether a US industry is materially injured or threatened with such injury. In the underlying investigation, the USITC examined the 2007 to 2009 period and also looked at the first six months of 2009 and 2010 (the interim periods). The USITC found that the US industry was *not* materially injured by subject imports. The USITC found declining demand and the presence of non-subject imports broke the causal link between subject imports and the US industry's poor performance during the period of investigation. However, the USITC determined that those same factors made the US industry vulnerable and, within that context, subject imports *threatened* injury.

[27] See Indonesia FWS, para. 13.
[28] See Indonesia FWS, para. 83.
[29] Article 2.1, SCM Agreement.
[30] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.166.

47. The GOI challenges the consistency of the USITC's threat of injury determination with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors. The USITC's determination is also inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, because the USITC based its threat findings on conjecture and remote possibility. Finally, the USITC failed to exercise special care which is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

A. The USITC Did Not Establish a Causal Relationship Between the Subject Imports and the Alleged Threat to the Domestic Industry

48. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement contain three principles for establishing causation that the USITC's determination violates: 1) non-attribution, 2) a concrete examination of other factors using economic models or constructs, and 3) isolation of factors other than subject imports that caused injury.

1. The USITC Improperly Attributed the Effects of Other Factors to Subject Imports

49. Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement state that "[t]he injuries caused by [...] other factors must not be attributed to the dumped [or subsidized] imports." Investigating authorities must, in other words, ensure that the injurious effects of other factors are not "attributed" to dumped/subsidized imports.

50. The USITC improperly attributed the effects of three factors other than subject imports to the subject imports in the threat of injury analysis. Those three other factors were (i) declining demand, (ii) non-subject imports, and (iii) the expiration of a subsidy to US producers in the form of a tax credit, the so-called "Black Liquor" tax credit, provided to US producers for reusing by-products of pulp production ("black liquor") considered, from 2007 to 2009, as an alternative fuel derived from biomass benefitting from excise and income tax credits under the US Internal Revenue Code.

51. On the effects of declining demand for the material injury analysis, the USITC stated that the deterioration in the domestic industry's performance was caused by an economic downturn and a decline in demand.

52. On the effects of non-subject imports for the material injury analysis, the USITC found the increases in market share by the domestic industry and subject imports from 2007-2009 came at the expense of nonsubject imports.

53. On the effects of the tax credit for the material injury analysis, the USITC found it was a factor mitigating the significance of price depression by the subject imports because it spurred greater pulp production by domestic producers in 2009 and contributed to lower prices for fiber/pulp which is a key input to production of coated paper. The USITC also found that the tax credit benefited the domestic producers' costs and production-related activities.

54. To summarize, the USITC found that the economic downturn, declining consumption, non-subject imports, and the tax credit were all crucial factors breaking causation and mitigating the significance of subject imports in various ways during the period of investigation.

55. In its threat analysis, the USITC found that the US industry was "vulnerable" because consumption was likely to continue declining and a subsidy to the US industry in the form of a tax credit was expiring.

56. Recalling that the USITC determined declining demand and not subject imports was responsible for the trends described above, a prime reason the US industry was found to be vulnerable is declining demand, not subject imports. Likewise, another contributing factor to the US industry's vulnerability was expiration of the US tax credit for "black liquor", a factor unrelated to subject imports. Here, the USITC basically found that there is threat of injury not because of subject imports being subsidized by the GOI, but because of the expiry of a US subsidy to US paper producers. Effects on US paper producers caused by the US government itself can hardly be

attributed to paper exports from Indonesia. Indeed, the USITC candidly acknowledges that the condition of the US industry which was caused by other factors weighs heavily in its threat analysis. The USITC's threat analysis is, thus, riddled with non-attribution issues, in violation of Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

57. The USITC also failed to account for the role non-subject imports played in the US market. There was no question that subject imports gained market share at the expense of non-subject imports during the investigation period. Equally, there was no question that non-subject imports regained market share when subject imports declined in the first half of 2010. Despite those facts showing subject imports were swapping market share with non-subject imports, the USITC found that subject imports would gain share from the domestic industry. The USITC made no meaningful attempt at analyzing the degree to which market share would come from current suppliers that were non-subject imports. But the USITC made no attempt at analyzing the significance of this other factor which renders its determination inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

2. The USITC did not examine factors other than the allegedly dumped/subsidized products in concrete terms

58. As the Panel in *EC – Countervailing Measures on DRAM Chips* reasoned, Article 15.5 of the SCM Agreement requires the administering authority to make a "better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models."[31] Consequently, investigating authorities must be concrete in their analysis of other factors that cause injury apart from subject imports, and a mere listing of factors without further justification is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

59. The USITC applied a less rigorous and less concrete analysis in its threat analysis than it applied to evaluate material injury. In its material injury analysis, the USITC identifies the "black liquor" tax credit as a factor having an effect on US prices in 2007 – 2009. The USITC concludes that the significant price undercutting in that period is primarily because of the tax credit and not the subject imports. In other words, the USITC applied economic constructs and found US producers were using the existence of the tax credit to drive down prices. But in the context of the threat of injury analysis the USITC merely states that the loss of the credit in 2010 will have significant price diminishing effects in the future as a factor favoring an affirmative threat of injury determination. In contrast to its finding in the context of material injury, the USITC does not attempt to estimate what price effects expiration of the credit is likely to have, nor does it offer a quantitative analysis of the likely impact on the US industry.

60. The same deficiencies exist in the USITC's analysis of the role of declining consumption and the presence of non-subject imports. Despite undertaking a concrete examination of them in the present injury analysis, which led to the conclusion that those other factors broke the causal link between subject imports and the domestic industry's performance, the USITC does not engage in a meaningful examination of either factor in its threat analysis. The USITC devoted a single sentence to the likely imminent impact of a decline in demand. There is no way to evaluate whether the USITC's explanation is reasonable because its statement is altogether lacking analysis. Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement require more.

61. The USITC's discussion of non-subject imports is no more concrete. The USITC recognizes that non-subject imports gained market share from interim 2009 to interim 2010 and that non-subject imports were higher priced than subject imports. But the USITC concludes that subject imports will compete on price to regain the market share that they lost both to the domestic industry and to non-subject imports in interim 2010. This conclusory finding cannot be reconciled with the USITC's earlier finding about subject imports taking market share from nonsubject imports but not the domestic industry.

[31] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

3. The USITC did not isolate the injurious effects of allegedly subsidized/dumped imports from other factors

62. The Appellate Body stated in *US – Hot-Rolled Steel* that the "investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors."[32]

63. For purposes of its present injury analysis, the USITC isolated factors other than subject imports, including the economic downturn and declining demand. As a consequence, the USITC concluded there was not a sufficient causal nexus necessary to make a determination that subject imports are currently having a significant adverse impact on the domestic industry.

64. In its threat analysis the USITC, collapsed, rather than isolated factors other than subject imports with the likely effects of subject imports. The way the USITC did this was through its vulnerability finding. The USITC begins its vulnerability analysis by noting the downwards trends in virtually all of the domestic industry's performance indicators weighed heavily in its consideration of the impact of subject imports in the imminent future. But in its present injury analysis, the USITC had just found subject imports were not the cause of those downwards performance trends, rather it was the economic downturn and declining demand. The USITC also found that the expiration of the black liquor tax credit, another factor unrelated to subject imports, made the domestic industry vulnerable.

65. To comply with the non-attribution requirement, the USITC needed to do the opposite of what it did. Rather than finding the domestic industry's vulnerability made it more likely that subject imports threatened injury, the USITC should have analyzed the impact of just the subject imports on the domestic industry during the period of investigation, after isolating out the other factors and, based on that analysis, determined whether a threat of injury was likely.

B. The Findings of the USITC Were Improperly Based on Conjecture and Remote Possibility and Future Changes Were Not Clearly Foreseen and Imminent

66. Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement require an investigating authority (i) not to base its threat of injury findings on allegation, conjecture and remote possibility and (ii) to demonstrate that a change in circumstances, which will injure the industry in the future, is clearly foreseen and imminent.

67. The Appellate Body has explained what Article 3.7 of the Anti-Dumping Agreement requires. In *Mexico – HFCS*, the Appellate Body reasoned that investigating authorities must proceed to a "*proper establishment*" of the "clearly foreseen and imminent" events.[33] The Appellate Body reached a similar holding in *Mexico – Anti-Dumping Duties on Rice*.[34]

68. The USITC made two central findings that were based on conjecture or speculation regarding events which were not clearly foreseen and imminent: (i) subject imports would have adverse effects on US prices and (ii) subject imports would gain market share at the expense of the domestic industry.

C. The USITC Did Not Exercise "Special Care" in its Threat of Injury Determination

69. Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement provide that "with respect to cases where injury is threatened by dumped [or subsidized] imports, the application of anti-dumping [or countervailing] measures shall be considered and decided with special care . . . ."

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[32] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001: X, 4697, para. 226.

[33] See Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001: XIII, 6675, para. 85.

[34] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* para. 205 (emphasis added).

70. Indonesia claims that each of the above-identified deficiencies in the USITC's threat of injury determination renders that determination inconsistent with the United States' WTO obligations under Articles 3.5 and 3.7 of the Anti-Dumping Agreement and Articles 15.5 and 15.7 of the SCM Agreement. Equally, and independently of these other violations, those deficiencies render the USITC threat of injury determination inconsistent with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

71. In addition, the cumulative effect of the inconsistencies in the USITC's analysis resulted in a more robust and rigorous material injury analysis than threat analysis, which demonstrates the USITC did not exercise special care pursuant to Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement. By resolving all issues of what the future held against the exporters, the USITC failed to exercise special care and the threat of injury determination rested on a lower threshold than the material injury determination; thus, turning the duty to exercise special care on its head.

V. THE PROVISION OF US LAW THAT DEEMS A TIE USITC VOTE ON THREAT OF INJURY - THREE AFFIRMATIVE VOTES, THREE NEGATIVE VOTES – TO BE AN AFFIRMATIVE FINDING IS INCONSISTENT WITH US WTO OBLIGATIONS

72. *Section 771 of the Tariff Act of 1930*, as amended, mandates that if the six USITC Commissioners are evenly divided as to whether a determination on threat of injury should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. Whereas domestic petitioners only need three votes in favor of threat of injury, foreign exporters always need four votes to win. In other words, a tie or "divided Commission" consistently favors domestic petitioners. Besides contravening basic fairness principles, this provision of United States law is inconsistent with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement which specifically require that in threat of injury cases the application of AD or CVD measures "shall be considered *and decided* with *special care*". (emphasis added)

73. A law stating that a tie or "evenly divided" threat of injury decision means, in all cases, an affirmative determination that there is threat of injury is not a decision-making rule that exercises "special care". On the contrary, threat of injury cases are thereby "decided" in an openly biased manner that, rather than offering "special care" to the interests of all affected parties, consistently favors the interests of the domestic industry over those of exporters.

74. Importantly, Indonesia challenges the US law "as such" (not its application in a specific investigation). Moreover, Indonesia only challenges the tie vote provision in US law as it applies to threat of injury cases, not other USITC decisions. Last, Indonesia's claim is made within the context of Indonesia being a developing country Member.

A. "Deciding" Threat of Injury Cases With "Special Care" Requires, At a Minimum, Basic Protection of Interests, Even-Handedness and Reasonableness

75. Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement read as follows:

> With respect to cases where injury is threatened by dumped [or subsidized] imports, the application of anti-dumping [or countervailing] measures shall be considered and decided with special care.

76. "Consider" is defined as "*To view or contemplate attentively, to survey, examine, inspect, scrutinize*".[35] "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".[36] Hence, even if "considered" may refer to (or even be limited to) the ITC's substantive consideration of the requirements under the SCM Agreement, the term "decided" unequivocally includes the way the ITC as a body brings the question of applying or not applying countervailing measures in threat of injury situations "to a resolution or conclusion", that is, including the way the ITC resolves a tie vote in those situations. By limiting Articles 3.8 and 15.8 to "substantive

[35] Oxford English Dictionary, online at http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid.

[36] Oxford English Dictionary, online at http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid.

analysis"[37] the United States reads the word "decided" out of the Anti-Dumping and the SCM agreements.

77. The ordinary meaning of "shall be decided" with "special care" ("sera … décidée avec un soin particulier" in French; "decidirá con especial cuidado" in Spanish) in Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement suggests, at a minimum, the following inherent corollary principles: basic "protection of interests", "even-handedness" and "reasonableness." "Care" is defined as "oversight with a view to protection, preservation, or guidance",[38] "attention accompanied by protectiveness and responsibility,"[39]; "protective", in turn, is defined as "[h]aving the quality, character, or effect of protecting someone or something; preservative; defensive", "[o]f an association or organized group: formed to safeguard the rights and interests of its members"[40]; "responsibility," in turn, is defined as "[a] moral obligation to behave correctly towards or in respect of a person or thing"[41] and synonymous with "reasonableness."[42] When coupled with the term "special," the term "care" requires one to demonstrate a high level of protectiveness, responsibility and reasonableness. Further, "special care" needs to be interpreted in its immediate textual context: it must be exercised when considering and deciding the application of anti-dumping or countervailing measures, *particularly in threat of injury cases*.

78. By consistently favoring the interests of domestic petitioners over and above those of exporters -- domestic petitioners only need three votes in favor of threat of injury, foreign exporters always need four votes to win – the tie vote provision is not a "careful" decision-making rule, "protective" of the "rights and interests" of all those affected.

79. To consider and decide with special care "the application of [anti-dumping or countervailing] measures" in threat of injury cases includes all the steps required or leading up to the actual imposition of duties in threat of injury cases. What precise steps this includes may vary depending on the domestic laws of the investigating country in question. In some countries, the decision that substantive requirements are met may be "separate" from a decision to actually levy anti-dumping and countervailing duties. Under US AD/CVD law, however, once the ITC decides there is threat of injury (including by a split 3 to 3 vote), anti-dumping and countervailing measures must automatically be imposed. No discretion exists under US law not to impose anti-dumping and countervailing measures once the substantive requirements for such measures are found to be fulfilled. In other words, under US law, the decision that substantive requirements are met and the decision to impose duties are one and the same, and it is this ITC decision in a situation of a tie vote that the GOI challenges in this dispute.

80. Moreover, even if the Panel were to find that the "special care" requirement in Articles 3.8 and 15.8 applies only to what must be a separate decision of "application" of anti-dumping and countervailing duties *after* an earlier determination that the substantive requirements for such duties have been fulfilled then US law would *a fortiori* be in breach. Under US law no such separate decision even exists. As a result, such decision is not, nor can it ever, be taken with "special care" and a breach of Article 15.8 must be found. Put differently, "application of [anti-dumping and countervailing] measures" thus (narrowly) defined would then, under US law (including in a tie vote situation), be automatic and never leave any room for "special care" (that is, an assessment of whether or not to actually impose the duties) and, therefore, by definition, the US tie vote rule, leaving no scope for any "special care" in a separate decision on whether or not to apply AD/CVD duties, would violate Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

81. The treaty context of Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement confirms the need for basic protection of all affected interests, reasonableness and even-handedness in threat of injury determinations.

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[37] US FWS, para. 313.

[38] Oxford English Dictionary, <http://www.oed.com/view/Entry/27899?rskey=6I7Lh0&result=1#eid>.

[39] Merriam Webster's Collegiate Dictionary (11th ed. 2003), available at <http://www.merriam-webster.com/thesaurus/care>.

[40] Oxford English Dictionary, <http://www.oed.com/view/Entry/153138?redirectedFrom=protective#eid>.

[41] Oxford English Dictionary, <http://www.oed.com/view/Entry/163862?redirectedFrom=responsibility#eid>.

[42] Shorter Oxford English Dictionary (6th ed. 2007), available at <http://www.oxforddictionaries.com/definition/english-thesaurus/responsibility>.

82. The Appellate Body enunciated the concept of even-handed administration of discretion in the *US – Hot-Rolled Steel* case, brought on the basis of the Anti-Dumping Agreement; facing a claim against the 99.5 percent test of USDOC for determining when sales are in the ordinary course of trade.

83. In *US – Hot-Rolled Steel*, the Appellate Body examined Articles 2.1 and 2.2 of the Anti-Dumping Agreement, which list the circumstances under which an investigating authority can "consider" products as being dumped. "Consider" also appears in Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement, whereby "the application of anti-dumping [or countervailing] measures shall be *considered* and decided with special care."[43] The Appellate Body's decision recognizes that the standard of even-handedness generally underlies the WTO covered agreements and applies especially where members are given discretion to act in certain ways (here, to make a determination on the existence of threat of injury).

84. Applying the "even-handedness" requirement to the tie vote provision in threat of injury cases, there is a disadvantage imposed on exporters under the tie vote provision that is similar to that under the 99.5 percent test. In particular, the balance is tilted against exporters by requiring them to win a 2/3 majority in the USITC vote. That is, exporters must gain the votes of four Commissioners, whereas petitioners need only convince three of them. The tie vote provision therefore does not meet the standard of "even-handedness" established by the Appellate Body.

85. Contextual support can also be found in Article 3.1 of the Anti-Dumping Agreement which requires that "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on *positive evidence* … " (emphasis added). The counterpart provision in the SCM Agreement is in Article 15.1. Deeming a tie vote by the USITC to be an affirmative determination does not constitute a determination "based on positive evidence"; a balanced 3-3 result is basically restated as a 4-2 win for petitioners. Similarly, Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement require that investigating authorities conduct "an objective examination". In *US – Hot-Rolled Steel*, the Appellate Body explained that "[i]f an examination is to be 'objective', the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[44]

86. Article X:3(a) of the GATT 1994 provides additional contextual guidance supporting the interpretation that Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement require threat of injury determinations to be made in a reasonable, even-handed and impartial manner. Article X:3(a) requires that measures be administered in a "uniform, *impartial* and *reasonable* manner."[45] "Impartial" is defined as "favoring no one side or party more than another; without prejudice or bias; fair; just."[46]

87. Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) further requires that "[t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties." One such rule of international law is the principle of good faith. In this regard, the Appellate Body has said that the principle of good faith is "a general principle of law and a principle of general international law" and "informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements."[47] Applying the principle of good faith here, it cannot be acting in "good faith" to set up rules that are biased against foreign interests by "deeming" a determination to be affirmative when it is not. That is, the "divided Commission" rule tilts USITC determinations in petitioners' interests by deeming a tie vote result to be an affirmative determination.

88. Finally, as noted earlier, Article 15 of the Anti-Dumping Agreement provides additional support for Indonesia's claim as it relates specifically to threat of injury determination by a

[43] (Emphasis added).
[44] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[45] (Emphasis added).
[46] *Webster's New World Dictionary*, p. 703, available at <http://www.yourdictionary.com/impartial#websters.
[47] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 101.

developed country WTO Member (the United States) in respect of exports from a *developing* country WTO Member (Indonesia). Article 15 reads: "It is recognized that *special regard* must be given by developed country Members to the *special situation* of developing country Members when considering the application of anti-dumping measures under this Agreement."[48] Consequently, the "special care" requirement for threat of injury cases in Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement read in conjunction with Article 15 of the Anti-Dumping Agreement requires a degree of diligence higher than that displayed in threat of injury determinations involving developed countries.

B. "Special Care" Requires a Degree of Protection and Attention Over and Above that Required in Material Injury Cases

89. The Panel in *US – Softwood Lumber VI,* clarified the ordinary meaning of "special care" to mean investigating authorities must display greater care in threat of injury determinations, when compared to material injury findings.[49]

90. US law mandates that a tie vote in the material injury context is an affirmative determination.[50] By having the same forced result in material injury and threat of injury investigations when there is a tie vote, US law does not permit, indeed prohibits, a degree of attention in threat of injury cases over and above what is required in material injury cases.

91. The treaty context also suggests that the exercise of special care requires the exercise of additional diligence in threat of injury cases. Specifically, according to Article 7, Annex II to the Anti-Dumping Agreement investigating authorities must exercise special circumspection**.**[51]

92. "Special circumspection" bears obvious textual and linguistic similarities with "special care" in addition to finding itself in the same agreement, thus serving as interpretative context.[52] An analogy can thus be drawn between obtaining information from secondary sources and determining threat of injury: in both situations, the authorities face an empirical uncertainty and need further tools for clarification. In the case of "special circumspection," these tools are set out in the provision itself. They consist of additional steps for the verification of the information, such as crosschecking with other independent sources. Similarly, a degree of attention *over and above* that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury.[53]

93. Instead of embodying a degree of heightened caution in the face of uncertainty (*i.e.*, three reasonable minds who disagree), the "divided commission" provision forces a decision that is not based on employing additional tools for clarification.

C. Other Members' Practice Supports the Inconsistency of the USITC's Approach

94. Indonesia understands the Republic of Korea is the only other Member with a provision of law similar to the United States' in a threat of injury context (*i.e.* that a tie vote must be an affirmative determination). Indeed, a number of Members have adopted positions fundamentally different from that of the United States, which highlights the discordance of the measure at issue from other Members' practice and its inconsistency with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

95. Article 32 of the VCLT provides for recourse to the "circumstances of [a treaty's] conclusion." Therefore, it is appropriate for the Panel to rely on the laws of other WTO members as "factual circumstances"[54] and aids in interpreting the covered agreements.[55] Domestic laws

[48] (Emphasis added).
[49] Panel Report, *US – Softwood Lumber VI* , para. 7.33.
[50] See *19 U.S.C. § 1677(11)(A)*.
[51] (Emphasis added).
[52] Article 31(1) VCLT.
[53] Panel Report, *US – Softwood Lumber VI*, para. 7.33 (emphasis added).
[54] Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006: IX, 3915, para. 7.130, fn. 267.

providing for different approaches to the "special care" requirement by other Members should provide interpretative guidance to the Panel. Additionally, a Panel may look into laws that were enacted after the entry into force of the WTO Agreements as subsequent practice of Members by virtue of Article 31(1)(b) of the VCLT.

96. Domestic laws of other WTO members indicate that the "special care" requirement under Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement respectively, is generally perceived to entail a greater degree of diligence than that designated by the "divided Commission" provision of the measure at issue. Certain WTO Members have ensured against a tie by providing for an odd number of decision makers. For example, Canada's International Trade Tribunal consists of 7 members.[56] Having an odd number of decision makers ensures that the collective decision is taken in the exercise of higher diligence and in a reasonable and even-handed manner. South Africa's International Trade Administration Commission decides by majority, but in case of a tie, the presiding Commissioner's vote counts double.[57] Likewise, in Turkey, where the Board of Evaluation of Unfair Competition in Importation is faced with a tie vote, the Head of the Board has a double vote.[58] Argentina's National Commission for Foreign Trade is composed of five members but if all members do not participate and there is a tie, the Chairman has a casting vote.[59]

97. The same approach is embodied in the Statute of the International Court of Justice:[60] Article 55(2) provides that "[i]n the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote."

98. It is not protective of all affected interests nor reasonable or even-handed to appoint an even number of Commissioners and not provide for a proper, neutral mechanism to resolve tie votes. In the context of US safeguard investigations, if there is a tie vote, the US President may review the USITC's determination and deem it to be affirmative if he chooses. In effect, he acts as a tie-breaking vote. By contrast, with anti-dumping and countervailing duties, this approach is not taken even in threat of injury cases which require "special care".

99. By forcing an affirmative determination when there is a tie threat of injury vote, the measure at issue removes all discretion from the USITC and tips the balance in favor of the US industry. The fact that the US measure also appears to be unique among those of WTO Members further supports its inconsistency with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

VI. CONCLUSION

100. Indonesia asks the Panel to find that the United States' measures, as set out above, are inconsistent with the United States' obligations under the GATT 1994, SCM Agreement, and Anti-Dumping Agreement. Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with the GATT 1994, SCM Agreement, and Anti-Dumping Agreement.

[55] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998: I, 9, para. 65; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998: V, 1851, para. 94; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005: XIX, 9157, paras. 308, 317.

[56] Canadian International Trade Tribunal Act (R.S.C., 1985, c. 47 (4th Supp.) § 3(1)).

[57] International Trade Administration Act (No. 71) 2002 § 12(6), Government Gazette Vol. 451, No. 24287.

[58] Regulation on the Prevention of Unfair Competition in Imports (1999), Government Gazette, No. 23861, Article 44.

[59] Presidential Decree No. 766/94, 12 May 1994, Article 11.

[60] Statute of the International Court of Justice, 33 U.N.T.S. 993.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

1. The findings of the United States Department of Commerce ("Commerce" or "USDOC") and the U.S. International Trade Commission ("the USITC", "the Commission" or the "ITC") in the antidumping and countervailing duty proceedings at issue in this dispute were well reasoned, amply supported, and fully consistent with the relevant provisions of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement" or "SCMA") and the *WTO Agreement in the Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Agreement" or "ADA"). Indonesia's challenge to the statutory provision governing tie votes in the Commission, moreover, reflects a fundamental misunderstanding of the special care obligation in ADA Article 3.8 and SCMA Article 15.8.

I. PRELIMINARY RULING REQUEST

2. In its first written submission, Indonesia raises an argument under the auspices of its SCM Article 2.1(c) and Article 14(d) claims, with respect to the log export ban, that in fact is a legal analysis of Article 1.1(a) of SCM Agreement. Article 1.1(a), which constitutes the "financial contribution" prong of defining a subsidy, is not one of the provisions enumerated in Indonesia's panel request – i.e. it is not the basis of any of Indonesia's claims.

3. Articles 6 and 7 of the DSU provide that the "request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," and that panels the matter referred to the DSB, make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Finally, "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

4. The Appellate Body has explained that 1) "it is well settled that the terms of reference of a panel define the scope of the dispute and that the claims identified in the request for the establishment of a panel establish the panel's terms of reference under Article 7 of the DSU"; and 2) "Article 6.2 of the DSU requires that the claims … must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint." The Appellate Body further stated in *EC – Bananas III*, "[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission."

5. Indonesia argues that the log export ban is a type of export restraint that is not a subsidy. Indonesia's argument and its heavy reliance on the panel report from *US – Export Restraints* pertains to whether an export restraint is a financial contribution within the meaning of Article 1.1(a), not, as Indonesia claims in the panel request, whether "USDOC improperly found that Indonesia conferred a benefit by banning log exports using a per se determination of price distortion based on purported government intervention [or] failed to determine the adequacy of remuneration 'in relation to prevailing market conditions for the good . . . in question in the country of provision.'" Similarly, Indonesia repeats the same in its first written submission with respect to SCM Article 2.1(c)'s "subsidy programme" requirement as it applies to the log export ban. An export ban cannot constitute a "government-entrusted or government-directed provision of goods" (i.e. a financial contribution), ergo, Indonesia argues, it is not a subsidy program within the meaning of Article 2.1(c). However, pleading an Article 2.1(c) claim in Indonesia's panel request does not satisfy the requirement to plead an Article 1.1(a) claim.

II. INDONESIA'S CLAIMS UNDER THE SCM AGREEMENT ARE WITHOUT MERIT

A. USDOC's Rejection of In-Country Prices As Benchmarks for Indonesia's Provision of Standing Timber for Less Than Adequate Remuneration Was Consistent With Article 14(d) Of The SCM Agreement

6. The chapeau of Article 14 refers to "any method" used by an investigating authority "to calculate the benefit to the recipient," and describes the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that the reference to "any" method implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit. The second sentence of Article 14(d) specifies that "adequacy of remuneration" must be determined "in relation to prevailing market conditions ... in the county of provision."

7. Although an investigating authority should first consider proposed in-country prices for the good in question, it should not rely on such prices if they are not market-determined as a result of governmental intervention in the market. Government intervention "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align." Although there is no market share threshold above which an investigating authority may conclude per se price distortion, the more predominant a government's role in the market, the more likely that role results in the distortion of private prices. The Appellate Body has explained that "[t]here may be cases … where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."

8. To evaluate the viability of an in-country price, USDOC considered the GOI's market share. Indonesia reported that in 2008, nearly all standing timber was harvested on public lands, with private forests accounting for only about 6 percent of the harvest. In addition, USDOC observed that the GOI controls approximately 99.5% of the harvestable forest land in Indonesia, *i.e.*, all but 233,811 of 57 million hectares. USDOC also examined whether the principal fees at issue, PDSH for plantation timber, were market-driven.

9. Clearly, private transactions in the relevant market are nominal. This is not a situation in which an investigating authority could be expected to find and cite to significant market determined activity or other factors that undercut the likelihood of price distortion. This is a situation in which the government is overwhelmingly predominant, and, for all intents and purposes, the sole provider of the input. Thus, Indonesia's imposition of a putative requirement to explain "how … market shares held by … [the government] … resulted in the government's possession and exercise of market power, such that … price distortion occurred [and] … private suppliers aligned their prices with those of the government-provided goods [or] … were market determined," is inapposite to the factual situation in this dispute.

10. USDOC's rejection of in-country price information was based on an analysis of the relevant facts before the agency. USDOC examined the GOI's predominant role in the standing timber, or stumpage, market during the period of investigation, accounting for almost 94 percent of the total supply. USDOC considered other relevant information submitted in the course of its investigation and identified additional grounds to support its finding of distortion of in-country prices for standing timber. The GOI's overwhelming market share was, justifiably, a major factor in that analysis, but USDOC assessed all of the evidence and identified other features of the market for standing timber that rendered it distorted. These included the GOI's ownership of virtually all harvestable forest land, the presence of a log export ban, the negligible level of pulp log imports, and Indonesia's low prices for logs relative to the surrounding region. Indonesia fails to identify what other record information was relevant to the distortion analysis, but not considered by USDOC. USDOC based its rejection of in-country benchmark data "on positive evidence on the record," and adequately explained and supported its conclusion.

B. Indonesia Fails to Prove Any WTO Breach With Respect to USDOC's Finding That the Log Export Ban Confers a Benefit at Less Than Adequate Remuneration

11. Indonesia has failed to establish any breach of the SCM agreement with respect to USDOC's finding that the log export ban conferred a benefit (timber inputs at less than adequate

remuneration). Indonesia argues that (1) the ban's ostensible purpose (conservation) and scope (downstream carve-out) reveal that it is not a subsidy; and (2) export restraints as a rule cannot constitute a subsidy. Nothing in the substance of these arguments has an actual connection with the obligations set out in Article 14(d).

12. USDOC was correct in its decision to determine that the benefit resulting from the log export ban to be the provision of inputs at less than adequate remuneration, measured by comparing the price APP/SMG paid for logs purchased from unaffiliated logging companies to what they would have been expected to pay under normal market conditions.

13. USDOC's analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in- country prices for logs. The sole in-country prices urged by the respondents were certain import data from Sabah, Malaysia into Indonesia, which were offered for both the stumpage and log export ban programs.

14. In addition, during the investigation, Respondents urged that the supply of logs in Indonesia was insufficient to meet demand, and thus, even without a ban, all domestic production would be consumed internally. USDOC explained that such reasoning ignored the essential fact "that without the ban domestic consumers would have to compete with foreign consumers." Furthermore, USDOC explained that the empirical evidence on the record rebutted the respondents' claim, and demonstrated distortion in the Indonesian market. Specifically, in the Malaysian export data available from the World Trade Atlas and as provided by the respondents' consultant, a large disparity existed between timber prices paid from within Indonesia and the prices paid by others purchasing from Malaysia. Thus, the World Trade Atlas data that USDOC relied on was not "aberrational," as Indonesia claims, but rather is consistent with the Malaysian export data, once imports to Indonesia are subtracted, that Indonesia provided in the underlying investigation.

C. In Applying Adverse Facts Available With Regard To The Debt Buy-Back, USDOC Acted Consistently With Article 12.7 Of The SCM Agreement

15. Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization ... and injury." Overall, Article 12.7 "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation." Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement. Article 6.8 of the AD Agreement states that: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

16. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within "a reasonable period." "[I]f information is, in fact, supplied 'within a reasonable period,' the investigating authorities cannot use facts available, but must use the information submitted by the interested party." The SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. The Appellate Body has "recognize[d] that it is fully consistent with the Anti-Dumping Agreement for investigating authorities to impose time-limits for the submission of questionnaire responses."

17. In resorting to "facts available" under Article 12.7 of the SCM Agreement, the missing information also must be "necessary." This term "is meant to ensure that Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but rather is concerned with overcoming the absence of information required to complete a determination." If such "necessary" information is absent, "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record." An investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination. Moreover, all substantiated facts on the record must be taken into account and a determination cannot be made on the basis of non-factual assumptions or speculation.

18. Finally, an interested party or Member's lack of cooperation is relevant to the investigating authority's selection of particular "facts available" under Article 12.7. ADA Annex II, paragraph 7, acknowledges that non-cooperation could lead to an outcome that is less favorable for the non-cooperating party. Non-cooperation creates a situation in which a less favorable result becomes possible due to the selection of a replacement of an unknown fact.

19. The domestic petitioners alleged that the GOI provided countervailable debt forgiveness when it sold approximately $880 million worth of APP/SMG debt for $214 million to Orleans, and petitioners also alleged that those two companies were affiliated, rendering the debt buy-back program as it pertained to APP/SMG constituted a financial contribution in the form of debt forgiveness.

20. USDOC had explained that "during verification, the Department met with an independent expert knowledgeable about the debt and the banking crisis in Indonesia," and that it was likely that Orleans was related to SMG/APP because "it [was] not uncommon for hedge funds to set up special purpose vehicles (SPVs) for the purpose of participating in one particular deal and that these SPVs could easily be established in a way that would make their ultimate ownership unknowable. USDOC also identified record evidence, including a World Bank report indicating that "some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency."

21. USDOC requested that, if the GOI disagreed with USDOC's prior CFS determination that Orleans was affiliated with APP/SMG, then the GOI must "provide documentation demonstrating that Orleans had no affiliation with APP/SMG or any of APP/SMG's other affiliated companies, or with any owners, family members or legal representatives of APP/SMG." In addition, USDOC asked the GOI to provide Orleans' registration and bid package, including Orleans' articles of association, and documentation regarding IBRA's internal procedures for reviewing and evaluating bids in general, and specifically under the PPAS.

22. The GOI provided the documents pertaining to the Orleans transaction, which "could not be located during the previous investigation." However, the GOI explained that the articles of association, as with the other documents submitted, did not disclose, or contain any information about, Orleans' ownership. In that same questionnaire response, the GOI explained how the PPAS bidding process functioned, including that "[t]he mechanisms implemented by IBRA – the required certificate of compliance, the buyers specific representation of non-affiliation in the asset sale and purchase agreement, and the opinion letter by outside counsel – all represent the procedures implemented by IBRA to ensure the prohibition against sale of debt to the original debtor was not happening."

23. USDOC requested information concerning other debt sales conducted under the PPAS and any guidance provided to IBRA officials when evaluating the bidders. USDOC highlighted that "failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available." In response, the GOI articulated that the "IBRA did not have any written internal due diligence guidelines for evaluating the documentation and other information submitted by potential bidders," but that "IBRA staff used the same basic approach to due diligence for all of the PPAS sales." However, with regard to USDOC's document request pertaining to other PPAS debt sales, the GOI explained: "These documents are not available at this time. Since those documents are unrelated to the APP/SMG transaction at issue in this investigation … the GOI is not sure of the relevance of these documents."

24. The GOI's statement did not allow USDOC to confirm the extent to which IBRA staff had endeavored in other transactions to ensure debtors were not allowed to buy back their own debt or to determine the owners of debt purchasers. This information was "necessary" within the meaning of Article 12.7 of the SCM Agreement because, without such PPAS transaction documents, USDOC could not determine whether claims that such efforts (beyond the requirement of certified statements) were not taken in the APG/SMG transaction were plausible or whether the lack of such an effort was typical.

25. Despite two requests, the GOI failed to provide necessary information within a reasonable period of time that would have assisted USDOC in evaluating whether the "IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders

are not affiliated with the debtor companies." The GOI had ample opportunity to provide the requested information, within USDOC's deadlines, for which the GOI could have requested an extension. But the GOI failed to provide this information.

26. Finally, in selecting from the facts available, USDOC determined that an adverse inference was warranted because when USDOC specifically sought documents pertaining to other PPAS transactions, which the investigating authority could "compare with the information [it] had for the Orleans transaction," the GOI twice failed to provide that necessary information. The GOI failed to cooperate by not acting to the best of its ability considering it had seven weeks' notice and still failed to provide it.

27. Indonesia faults USDOC for canceling a portion of the on-the-spot verification pertaining to the debt buy-back program. However, verification took place from June 28, 2010, through July 8, 2010, six days after the fifth supplemental questionnaire response deadline. USDOC had placed the GOI on notice in its verification outline that if the fifth supplemental questionnaire response specifically was "deemed unresponsive on some issues, those issues may be deleted from the verification agenda." That GOI response was non-responsive with regard to the bidding documents. It was entirely appropriate that USDOC canceled verification of the debt buy-back. Indeed, USDOC reasoned that "[p]roviding the opportunity to review the information at verification is not a substitute for providing the information for review beforehand." USDOC also explained that "verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted." Finally, USDOC articulated that "[b]esides the fact that neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions, the resources available at verification are completely different from those available at Department headquarters" in that there are substantially less personnel at on-the-spot verifications to "examine the information firsthand."

28. In addition, Indonesia claims that the "facts available" USDOC relied on in finding affiliation did not "reasonably replace" the missing information under Article 12.7. Underpinning Indonesia's argument is that USDOC unreasonably relied on "speculative" "newspaper articles and reports." The "facts available" refer "to those facts that are in the possession of the investigating authority and on its written record." An Article 12.7 determination "'cannot be made on the basis of non-factual assumptions or speculation.'" In this investigation, USDOC relied on "newspaper articles and reports suggesting that APP/SMG may have purchased its own debt, and that Orleans was an affiliate of APP/SMG." These documents were "on the record."

29. Indonesia opines that USDOC failed to employ a comparative approach to selecting facts available. Indonesia accuses USDOC of giving more weight to "speculative newspaper articles and rumor than the actual documents from the transaction," yet the documents from the APP/SMG debt sale provided no information on Orleans' ownership in the first place. Here, it would not have been practicable to comparatively evaluate record information to determine the "best" facts available. The question of whether APP/SMG and Orleans were affiliated was necessarily binary. Although the GOI placed information on the record to support that they were not affiliated, the GOI failed to satisfy that evidentiary burden through its repeated failure to provide all the information necessary to allow USDOC to make a determination.

D. The United States Acted Consistently with Article 2.1 of the SCM Agreement In Making Its *De Facto* Specificity Findings

30. The chapeau and paragraph (c) of Article 2.1 of the SCM Agreement state that "[i]n order to determine whether a subsidy … is specific to an enterprise or industry or group of enterprises or industries … within the jurisdiction of the granting authority, … other factors may be considered [notwithstanding the appearance of non-specificity]. Such factors include "use of a subsidy programme by a limited number of certain enterprises."

31. Article 2.1(c) addresses the principles for finding that a subsidy is *de facto* specific. Thus, where an investigating authority clearly substantiates, on the basis of positive evidence, that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement. This dispute solely involves Article 2.1(c) specificity determinations.

32. *Standing timber*. In *US – Countervailing Measures (China)*, the Appellate Body considered the significance of "programme" in paragraph (c) of Article 2.1, following "subsidy," and whether a "subsidy programme" (as distinct from a "subsidy") thus required the formalities of being reduced to writing or pronounced in some manner. In that case, SOEs consistently provided inputs at what USDOC found were less than adequate remuneration, pursuant to "unwritten measures." The Appellate Body underlined that, generally, "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy" or by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.

33. Here, the record supports that the provision of standing timber for less than adequate remuneration is a "subsidy program" in the form of "a plan or scheme." Indonesia explained to USDOC that "[t]o harvest wood products from the State Forest, a harvester must obtain a license," and that a Ministry of Forestry regulation sets forth the application requirements to obtain a stumpage license. This also constitutes a systematic series of actions.

34. Indonesia does not otherwise contest USDOC's de facto specificity finding and USDOC's finding that "the provision of stumpage is specific …because it is limited to a group of industries," is sound. Indonesia provided a listing of harvesting license approvals for a three-year period. USDOC had asked Indonesia to "identify each company, and its industry, that were approved for harvesting licenses in each year from 2005 through 2008." In response to another question concerning Indonesia's industrial classifications, Indonesia explained that "[w]ithin the category of large and medium companies, there are a total of 23 separate industry groupings," of which "the five industry groupings making use of timber account roughly [sic] 22 percent of the number of industry groupings, and approximately 23 percent of the output of all such groups." Paper production, in turn, constitutes two of the five users of timber, along with wood products, chemicals, and furniture. This evidence supports USDOC's de facto specificity finding.

35. *Log export ban*. Indonesia claims that USDOC failed to explain how the log export ban constituted a "a plan or scheme and systematic series of actions that confer a benefit." Indonesia argues that because the GOI discontinued the ban on chipwood exports before the start of USDOC's POI, the "downstream input for making pulp, including pulp itself, could be freely exported." During the investigation Indonesia informed USDOC that, pursuant to Government Regulation No. 6 of 2007, Indonesia had "begun the process of legalizing the export of forest products," but that authority had "not to date been exercised to formally implement this regulation." Indonesia also stated that Minister of Trade Decree No. 20/M-DAG/Per/5/2008, which referenced Regulation No. 6 of 2007, provided that "chipwood" may be exported, but that "logs (including pulpwood)" may not be exported. USDOC confirmed during its on-the-spot verification of Indonesia that "neither of these laws have been implemented."

36. Here, the "plan or scheme" is evinced by the log export ban itself. Having identified the "subsidy program," the existence of which was also demonstrated by, *inter alia*, USDOC's questions to the GOI during the investigation, USDOC then examined whether the log export ban was de facto specific. The Panel should reject Indonesia's argument that a subsidy program can only be demonstrated both by "a plan or scheme and systematic series of actions that confer a benefit." The latter is simply one way of demonstrating the existence of a plan or scheme.

37. *Debt buyback*. As discussed above, USDOC applied facts available on the issue of whether APP/SMG and Orleans were "affiliated." USDOC determined that "[b]ecause the debt was sold to an APP/SMG affiliate, in violation of the GOI's own prohibition against selling debt to affiliated companies … the sale was company-specific."

38. Indonesia claims that USDOC acted inconsistently with Article 2.1(c). The Panel should reject Indonesia's argument that an investigating authority must identify both "a plan or scheme and systematic series of actions that confer a benefit" for an Article 2.1(c) de facto specificity analysis. As the Appellate Body has explained, "the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1." Here, that "starting point" is the identified subsidy, namely, "debt forgiveness through APP/SMG's buyback of its own debt from the Indonesian Government." The APP/SMG debt buy-back constituted a plan or scheme as contemplated by the Appellate Body, and thereby constitutes a subsidy program consistent with Article 2.1 of the SCM Agreement.

39. Collectively, the documents on the record and findings of the investigating authority demonstrate that Indonesia was aware of Orleans' affiliation and obviously had knowledge of its own laws prohibiting the sale to an affiliated buyer. Therefore, Indonesia had in place "a plan or scheme" to provide a financial contribution, which resulted in a company-specific subsidy. This finding is consistent with Article 2.1 (c) and the Appellate Body's findings concerning the existence of a "plan or scheme." Indeed, the subsidy that USDOC identified is company-specific because only the specific company debtor is "eligible to receive that same subsidy."

40. *2.1 chapeau claims*. Indonesia claims that USDOC failed to identify the "relevant jurisdiction" of the granting authority with regard to the provision of standing timber for less than adequate remuneration, the log export ban, and the debt buy-back.

41. In *US – Countervailing Measures (China)*, the Appellate Body stated that: "an essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant jurisdiction is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level." However, if the investigating authority properly identifies the jurisdiction of the granting authority when analyzing the nature of a financial contribution, such a finding would satisfy the analysis contemplated under Article 2.1's chapeau. The Appellate Body also noted that the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination.

42. The jurisdiction of the granting authority for each subsidy is "discernible from the determination." More specifically, this was identified through USDOC's questionnaires to Indonesia, read in light of the coated paper final determination. With respect to the provision of standing timber for less than adequate remuneration, the jurisdiction of the granting authority is the Government of Indonesia. First, Indonesia's argument that USDOC failed to define "GOI" is simply false. USDOC defined the acronym "GOI" as an abbreviation for the Government of Indonesia. USDOC also identified the jurisdiction of the granting authority as Indonesia, evidenced by several statements in the final determination.

43. Indonesia likewise argues that USDOC failed to identify the granting authority as it pertained to the log export ban. Indonesia is incorrect for several reasons. First, Indonesia concedes in its first written submission that "the log export ban was enacted at the national level." Second, that finding is implicit in USDOC's final determination. Thus, it is readily "discernible from the determination" that USDOC understood the "granting authority" to be the national government of Indonesia, i.e., "the GOI."

44. Indonesia's argument that USDOC failed to "identify the government entity that allegedly forgave debt" is largely repetitive of arguments made under Indonesia's Article 12.7 claim. Indonesia failed to provide information pertaining to other PPAS debt sales, which USDOC determined was "necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities." Because USDOC could not determine whether the IBRA made further inquiries in this regard, USDOC resorted to facts available with adverse inferences in finding affiliation. Contrary to Indonesia's arguments, the granting authority was "discernible from the determination." USDOC found that "the GOI's sale of APP/SMG's debt to Orleans constituted a financial contribution, in the form of debt forgiveness." Despite the fact it had no obligation to do so, USDOC also identified the particular agency within Indonesia that provided the financial contribution, the IBRA, a national banking authority.

III. THE INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

A. Overview of the USITC Determination

45. In its determination, the Commission separately discussed the volume, price effects, and impact of the subject imports, first considering present material injury and then threat. In finding no present material injury, the Commission found that the increase in subject imports during the POI was significant both on an absolute basis and relative to apparent U.S. production and consumption. Analyzing threat, the Commission found that absent antidumping and countervailing

duty orders, a continuation of the increases in subject import volume that occurred during the POI was likely. The Commission noted the historic increase in the volume and market penetration of the subject imports from 2007 to 2009, in spite of the 21.3 percent decline in apparent U.S. consumption; found that capacity and production in the subject countries would likely increase imminently; and found that the subject producers were likely to utilize the additional capacity to increase shipments to the United States.

46. Throughout the POI, APP, the predominant producer and exporter of subject merchandise in China and Indonesia, had attempted aggressively to increase exports to the United States. In late 2008 − while U.S. demand was declining − APP informed Unisource, a leading U.S. distributor, that it desired to double its coated paper exports to the United States and was willing to cut prices to increase volume. When this attempt failed and APP lost the Unisource account, APP invested in its own distributor, Eagle Ridge, to retain and increase its presence in the U.S. market. Additionally, despite declining demand, the U.S. market was relatively large, and offered higher prices than China or other Asian markets. Exporters could easily increase their presence in the U.S. market due to their familiarity with the distribution network and the prevalence of spot market sales. Given the importance of price in purchasing decisions, aggressively priced subject imports would be able to quickly gain market share, or alternatively, force domestic producers to lower their prices substantially to retain volume.

47. Regarding price effects, the Commission found that there was predominant underselling by the subject imports during the POI. The Commission observed an apparent relationship between price declines for the subject imports beginning in the fourth quarter of 2008 and price declines for the domestic like product in early 2009 for products 1 and 4, which accounted for a majority of Chinese imports for which pricing data were reported. Domestic producers testified that they lowered their prices to compete with declining subject import prices, and numerous responding purchasers confirmed as much. The Commission concluded that these trends, together with the significant underselling, "show that subject imports depressed domestic prices at least to some extent for part of the period under examination," but did not find significant price depression, as it could not ascertain whether subject imports contributed significantly to the price depression in light of two other factors that contributed to the price depression: significant declines in consumption and the "black liquor" tax credit, which effectively served to lower domestic producers' input costs.

48. The Commission found that, as subject producers likely attempted to increase exports to the United States, they were likely to continue to use underselling and aggressive pricing to increase market share in the imminent future. Given projections that demand would decline moderately, there would not be increased demand that could absorb the increased volume. Factors other than subject imports that contributed to price depression and suppression during the POI would not play the same role in the imminent future. The Commission concluded that continued underselling by subject producers, combined with increased volumes of subject imports, would likely cause the domestic industry to experience significant price depression in the imminent future.

49. After analyzing the domestic industry's declining performance according to most measures during the POI, the Commission found an insufficient causal nexus between the declines and subject imports to conclude that subject imports had a current significant adverse impact on the industry. The record, however, indicated an imminent threat of material injury. The Commission found the domestic industry to be vulnerable to material injury, and that this vulnerable state made it likely that the industry would continue to experience declining performance in the imminent future as subject imports continued underselling the domestic like product to significantly increase their sales and market share. As the Commission explained, subject producers had demonstrated the ability and willingness to lower their prices to increase exports to the U.S. market, and would likely continue such behavior in the imminent future. The U.S. market could not accommodate the likely increase in subject import volume without subject imports taking sales from current suppliers including domestic producers, and causing material injury to the domestic industry.

50. The Commission considered whether other factors would likely have an imminent impact on domestic industry, in particular: declining demand for CCP and nonsubject imports. The Commission found that the modest decline in demand projected for 2011would limit sales opportunities and restrain prices, but was not of a magnitude that would render insignificant the likely impact of subject imports. Similarly, it found that nonsubject imports would not render

insignificant the likely impact of subject imports, as nonsubject import market share declined from 25.4 percent in 2007 to 16.1 percent in 2009 and nonsubject import prices were generally higher than subject import prices. The Commission observed that the domestic industry also gained 6.8 percentage points of market share during the interim period, and found it likely that, if preliminary duties were lifted, subject producers would seek to regain market share lost to both the domestic industry and nonsubject imports using low prices. The Commission concluded that, in light of the domestic industry's vulnerability and its findings that subject import volume would likely increase significantly at prices likely to depress and suppress domestic prices to a significant degree, material injury by reason of subject imports was likely to occur in the imminent future absent antidumping and countervailing duties.

B. The Commission Complied With ADA Article 3.7 and SCMA Article 15.7

51. Indonesia has failed to make a *prima facie* case that the United States breached ADA Article 3.7 and SCMA Article 15.7 obligations. Indonesia's arguments are based on the mistaken assumption that certain trends and factors during the POI, which influenced the Commission's negative present material injury determination, would continue. Yet several changes in circumstances made it likely that subject import volume would increase substantially in the imminent future: the projected increase in Chinese capacity of at least 1.5 million short tons during the 2009-11 period and APP's avowed determination to use low prices to increase substantially its exports of coated paper to the United States and establishment of Eagle Ridge as a means of doing so. Factors other than subject imports that had adversely affected domestic prices during the POI would not have the same effect in the imminent future, as the steep decline in coated paper demand during the POI moderated and the black liquor tax credit expired.

52. There is ample support for the Commission's finding that cumulated subject imports were likely to increase significantly in the imminent future, taking sales from existing suppliers such as the domestic industry. Indonesia does not challenge the Commission's finding that subject import volume and market share was likely to increase significantly, or the Commission's finding that subject producers possessed both the ability and the incentive to increase their exports to the United States significantly in the imminent future. Chinese producers would have at least 750,000 short tons of coated paper capacity available for export to the United States in 2011, equivalent to 38 percent of apparent U.S. consumption in 2009. Further, the record contained direct, unrebutted evidence concerning the dominant subject exporter's desire to increase sharply its presence in the U.S. market by reducing its already low prices.

53. The Commission reasonably explained that the increase in subject import volume and market share would likely take sales from current suppliers including the domestic industry. The Commission found that the significant increase in subject import volume between 2007 and 2009 came partly at the domestic industry's expense. Moreover, of the decline in subject import market share between interim 2009 and interim 2010 due to the investigations, the domestic industry captured 6.8 percentage points and nonsubject imports captured 6.0 percent. Clearly foreseen and imminent changes in circumstances placed subject producers in an even better position to rapidly increase their penetration of the U.S. market than during the POI.

54. The Commission also possessed ample support for its finding that the likely significant increase in subject import volume, driven by significant subject import underselling, would pressure domestic producers to lower their prices. The Commission based the finding in part on evidence that significant subject import underselling had depressed domestic prices during the POI to some extent. The Commission relied upon the relationship between subject import and domestic prices for products 1 and 4 during the period. Further, domestic producers testified that they reduced prices to compete with subject imports during the period, and numerous purchasers reported that domestic producers had lowered prices to meet subject import prices. The Commission also emphasized APP's willingness, evidenced by its late 2008 proposal to Unisource, to cut its already-low prices to increase substantially its exports to the United States.

55. Two factors other than subject imports that depressed domestic prices in 2009, sharply declining demand and the black liquor tax credit, would play a reduced or no role in the imminent future. The projected decline in domestic consumption was modest compared to the drop between 2008 and 2009. Expiration of the black liquor tax credit in 2009 meant that the program would no longer depress domestic prices.

56. There is no basis for Indonesia's assertion that subject import market share was unlikely to increase in the imminent future any more rapidly than during the POI. Indonesia ignores the changes in circumstances identified by the Commission that gave subject producers the ability and incentive to increase their penetration of the U.S. market in the imminent future more rapidly than during the POI. Similarly misplaced is Indonesia's claim that subject import market share would likely remain too low in the imminent future to adversely impact domestic prices. Indonesia does not contest that significant subject import underselling was likely to continue in the imminent future. Nor is there merit to Indonesia's contention that even a 12 percentage point increase in subject import market share in the imminent future (to 22 percent) could have no significant adverse impact on domestic prices, allegedly because such an increase could have no effect on prices in the other 78 percent of the market. Indonesia's argument is based on the fallacy that subject imports could adversely affect domestic prices only by capturing market share. As the Commission explained, however, "subject imports will put pressure on domestic producers to lower prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share." Indeed, the Commission found evidence that subject imports depressed domestic prices to some extent between 2008 and 2009 without taking any market share from the domestic industry. These facts supported the Commission's finding that continued subject import underselling would likely force domestic producers to lower their prices to defend their sales and market share.

C. The Commission Properly Established a Causal Link Between Subject Imports and the Threat of Material Injury to the Domestic Industry, Consistent with ADA Article 3.5 and SCMA Article 15.5

57. In concluding that the domestic industry was vulnerable to material injury, the Commission in no way attributed effects of declining demand or expiration of the black liquor tax credit to subject imports. It was in the next step of the Commission's analysis, considering whether the domestic industry was threatened with material injury by reason of subject imports, that the Commission considered other known causal factors and ensured that any injury caused by such factors was not attributed to subject imports.

58. The Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports by demonstrating that subject imports had injurious effects independent of those factors. The Commission first demonstrated a strong causal link between subject imports and the threat of material injury to the domestic industry, and then explained how other known causal factors did not detract from the link. The Commission found that the modest decline in apparent U.S. consumption between 2010 and 2011 would likely limit domestic producer sales opportunities and restrain potential price increases to some degree, but would not render insignificant the likely effects of subject imports. In drawing this conclusion, the Commission necessarily relied upon its analysis of demand projections and the likely volumes and prices of subject imports in preceding sections of the determination. The Commission also demonstrated that subject imports had injurious effects independent of nonsubject imports. Indeed, the Commission identified no injurious effects caused by nonsubject imports during the POI. The Commission also observed that nonsubject imports were generally priced higher than subject imports. Absent relief, the Commission found, subject imports were likely to compete on price to recoup the market share lost to both the domestic industry and nonsubject imports in interim 2010, resulting in a more price-competitive market. Based on all of these considerations, the Commission concluded that the likely effects of nonsubject imports on the domestic industry were not of a magnitude that would render insignificant the likely effects of subject imports.

59. Indonesia predicates its argument that the Commission's analysis of the projected decline in demand was insufficiently "concrete" on the misapprehension that the analysis consisted of a few sentences in the impact section of the Commission's determination. However, the Commission's analysis distinguishing the effects of subject imports from the effects of the projected decline in demand and nonsubject imports spanned the volume, price, and impact sections of the determination.

60. Similarly unpersuasive is Indonesia's claim that the Commission somehow breached the non-attribution requirement by failing to reconcile its finding that the likely increase in subject imports would take sales from the domestic industry with its alleged recognition that subject imports increased solely at the expense of nonsubject imports during the POI. The Commission did

not find that subject imports increased solely at the expense of nonsubject imports during the POI. Rather, it found that the increase coincided with declining domestic industry U.S. shipments. Indonesia claims that nonsubject imports would have benefitted the domestic industry by serving as a buffer between the industry and the likely increase in subject import volume. Having made no argument that nonsubject imports would injure the domestic industry, Indonesia fails to make a *prima facie* case that the Commission attributed injury from nonsubject imports to subject imports. Indonesia also is mistaken that the Commission somehow attributed injurious effects of the black liquor tax credit's expiration in 2009 to subject imports. Having expired in 2009, the black liquor tax credit was no longer a "known factor" that was "injuring the domestic industry at the same time as the dumped imports" in the imminent future for purposes of the Commission's non-attribution analysis. During the investigations, respondents did not argue that expiration of the credit would likely injure the domestic industry in the imminent future, or even make the industry vulnerable.

D. The Commission Complied With the Special Care Requirements Under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement

61. Indonesia's argument that the Commission's threat analysis was inconsistent with the special care requirement under ADA Article 3.8 and SCMA article 15.8 is purely derivative of its specific claims that certain aspects of the Commission's analysis were inconsistent with ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7. In *US – Softwood Lumber VI*, the Panel recognized that violations of the special care requirements will generally result from violations of the more specific obligations under ADA Article 3.7 and SCMA article 15.7. That panel explained that while it did not consider that a breach of the special care obligation could not be demonstrated in the absence of a breach of the more specific provision of the Agreements governing injury determinations, such a demonstration would require additional or independent arguments beyond the arguments in support of the specific violations. Indonesia made no independent argument that the Commission breached the special care requirements beyond its arguments in support of the specific breaches. Accordingly, for the same reasons that Indonesia fails to establish a *prima facie* case that the Commission breached ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7, Indonesia fails to make a *prima facie* case that the Commission breached the special care requirement.

IV. THE TIE VOTE PROVISION IS NOT INCONSISTENT, AS SUCH, WITH ARTICLE 3.8 OF THE ADA AND ARTICLE 15.8 OF THE SCMA

62. Articles 3 of the ADA and 15 of the SCMA set out substantive obligations that the decision-maker must abide by in conducting injury analysis. Nothing in these provisions curbs the discretion of a Member regarding its framework for assigning these responsibilities and for counting votes. There is accordingly no merit to Indonesia's claim that the "tie vote" provision of the U.S. statute conflicts with the ADA Article 3.8 and SCMA Article 15.8 obligation that investigating authorities consider and decide threat of injury with "special care."

63. The tie vote provision addresses one procedural aspect of the way that decisions are made, not the substance or rationale of any decision. The WTO Agreement does not impose obligations on Members with respect to such internal decision making procedures. The Appellate Body explicitly confirmed this in *US – Line Pipe*, finding that the internal decision making process of a Member is entirely within that Member's discretion, as an exercise of its sovereignty. Neither the ADA nor the SCMA require investigating authorities comprised of multiple decision-makers that decide injury investigations by vote, much less any particular approach to resolving issues arising from differences of opinion between individual members of a multi-member investigating authority. The ADA and SCMA instead prescribe substantive considerations to be examined when making determinations of injury or threat thereof.

64. The "special care" provisions of each agreement, moreover, come at the end of articles – SCMA Article 15 and ADA Article 3 – both of which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof. This placement is informative, showing that each "special care" provision concerns the substantive analysis that must be undertaken. This is confirmed by the fact that, where the ADA and SCMA do discuss procedural matters – in connection with things other than decision-making – they are explicit. Had the drafters wanted to prescribe the way that the

opinions of a multi-member body would be aggregated to ascertain the body's determination, they would have been similarly explicit.

65. The panel's discussion in *Softwood Lumber VI* shows that the special care provisions concern the substantive analysis applied by an investigating authority. Because investigating authorities must comply with the specific obligations under the AD and SCM Agreements in making threat determinations, it is in the satisfaction of those obligations that investigating authorities exercise special care under ADA Article 3.8 and SCMA Article 15.8. Even if an independent breach of the special care obligation were possible, the demonstration of such a violation would require "additional or independent arguments," which would necessarily have to relate to an investigating authority's "establishment of whether the prerequisites for application of a measure exist" in its written determination.

66. The drafting history of the "special care" provisions underscores that they concern the substantive standards for a threat determination, not procedure. The "special care" language evolved from text about the forecasted level of effect of dumping on domestic industry, demonstrating that the concept relates to the substantive standards used to assess whether a threat of injury exists. The ADA and SCMA "special care" language is simply a shorter version of an originally-more-detailed discipline that has always been about the substance of determinations.

67. The tie vote provision applies, if at all, only after the Commission has completed its analysis of threat factors and reached its determination, and the provision could therefore have no effect on the substantive analysis in the Commission's written determinations. Because determinations of threat made by three Commissioners can certainly reflect special care − and because whether such determinations reflect special care is unrelated to the number of Commissioners voting in the affirmative − the provision is certainly not inconsistent as such with the special care provisions.

68. Indonesia's arguments lack merit. Indonesia claims incorrectly that the tie vote provision somehow violates a "concept of even-handed administration of discretion" that the Appellate Body allegedly "enunciated" in *US − Hot-Rolled Steel*. The Appellate Body's finding was expressly limited to how to address sales to affiliates when determining normal value. Unlike Commerce's 99.5 percent test, which the Appellate Body found inconsistent with ADA Article 2.1 because it "systematically" increased margins of dumping published in determinations, the tie vote provision has no effect on the analysis in the Commission's threat determinations.

69. Whether or not other Members with investigating authorities comprised of multiple decision-makers may resolve tie votes differently than the United States in no way suggests that the U.S. approach is invalid. The variety of approaches to resolving or avoiding tie votes taken by different Members reflects that internal decision-making process is not prescribed by the ADA or SCMA. Indonesia's reference to its developing country status makes no sense in the context of its claim about the Commission's tie vote provision. Indonesia's arguments about ADA Article 3.1 and GATT Article X.3 are similarly illogical. Similarly, the principle of "good faith" in no way suggests that a discipline on how investigating authorities comprised of multiple individuals must address tie vote situations can be read into the "special care" provisions of the ADA and SCMA. Whether the Commission has exercised such care is purely a question of the reasoning provided in its affirmative threat determination. The tie vote provision represents a legitimate exercise of the United States' sovereignty over the decision-making process in antidumping and countervailing duty investigations. The Panel should reject Indonesia's claims.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INDONESIA AGREES WITH THE U.S. PRELIMINARY RULING REQUEST AND THE REPORTS IT CITES ARE NOT RELEVANT TO ITS CLAIMS

70. In its response to the U.S. preliminary ruling request, Indonesia highlights paragraphs 44, 45, and 79 of its first written submission, which, instead of clarifying how Indonesia's arguments pertain to benefit and specificity, underscore that Indonesia's arguments relate to an analysis of concerning financial contribution under SCM Agreement Article 1.1(a). The quote from the *US − Export Restraints* panel report excerpted in paragraph 44 references Article 1.1(a) alone. Similarly, paragraph 79 focuses on whether the GOI "directed" or "entrusted" log suppliers to sell at

suppressed prices. "Entrust" and "direct" are terms used in Article 1.1(a) – i.e., with respect to financial contribution – not Articles 1.1(b) or 14(d) on benefit, or Article 2.1 on specificity. While the United States agrees with Indonesia that it is not precluded from citing to any source – including disputes discussing financial contribution – Indonesia is citing to the analysis and conclusions on financial contribution, not benefit or specificity. Thus, these citations are not relevant to the claims that Indonesia has brought in this dispute.

II. INDONESIA'S CLAIMS UNDER ARTICLE 14 OF THE SCM AGREEMENT ARE WITHOUT MERIT

71. The facts attending Indonesia's provision of standing timber align closely with the record in *US – Anti-Dumping and Countervailing Measures (China)* and *US – Softwood Lumber IV.* Through concessions and licensing, the government directly provides standing timber which is used to make coated paper. The government owns virtually all of the harvestable forests in Indonesia and administratively controls the stumpage fees charged. This is a situation in which the facts demonstrate that the government's role as a supplier of the input in question is overwhelmingly predominant, and nearly exclusive. Through its setting of stumpage fees, Indonesia also effectively sets the price for standing timber. As the Appellate Body has noted, circumstances in which fewer elements of a market analysis will be necessary to arrive at a proper benchmark "include where the government is the sole provider of the good in question, and where the government administratively controls all of the prices for the goods at issue."

72. Indonesia asserts that USDOC's selection of an out-of-country benchmark based on Malaysia export data was "aberrational." USDOC selected the same benchmark data – species-specific World Trade Atlas statistics reflecting log exports from Malaysia – as an out-of-country benchmark for similar reasons as in its evaluation of the stumpage benefit. As explained, USDOC's analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in- country prices for logs. USDOC also explained that "without the ban domestic consumers would have to compete with foreign consumers." USDOC explained that a large disparity existed between timber prices paid within Indonesia and the prices paid by purchasers in Malaysia, according to the Malaysian export data available from the World Trade Atlas and as provided by the respondents' own consultant. Thus, the World Trade Atlas data that USDOC relied on was not "aberrational," as Indonesia argues, but rather is consistent with the Malaysian export data that Indonesia provided in the underlying investigation, after removing imports to Indonesia.

III. INDONESIA'S CLAIMS REGARDING ARTICLE 12 OF THE SCM AGREEMENT ARE WITHOUT MERIT

73. The necessity of the information that Indonesia failed to provide in connection with the debt buyback must be considered in light of the facts of this investigation. Indonesia provided Orleans' bidding documents. These documents contained no ownership information for Orleans. Thus, necessary information was missing for USDOC to analyze possible affiliation between APP/SMG and the successful bidder, Orleans. Considering the absence of ownership information, and also that the IBRA was legally prohibited from selling debt back to the original debtor or an affiliated party of the original debtor, USDOC alternatively sought to develop further the record so that it could analyze the due diligence procedures that the IBRA employed under the PPAS, including on affiliation.

74. Evident from Indonesia's reporting to USDOC was the substantial emphasis the IBRA placed on the bidding documents themselves in examining possible affiliation. Indonesia also asserted that the "IBRA did not have any written due diligence procedures for evaluating the documentation and other information submitted by potential bidders other than those listed in the terms of reference." USDOC reasonably requested the bidding documents for other PPAS sales to satisfy itself as to the accuracy of Indonesia's assertion that the IBRA would not sell the debt to an affiliated buyer and that the IBRA followed its own law with a level of diligence typical of other IBRA transactions. That is, with no baseline for comparison, USDOC could not confirm whether IBRA's due diligence procedures were followed, or whether the Orleans transaction was subject to less scrutiny of whether the bidder and debtor were affiliated when the government of Indonesia itself was proposing that USDOC accept that a lack of affiliation had been demonstrated on the basis of those procedures.

75. Instead of providing the information or seeking an extension, Indonesia stalled USDOC's investigatory process and Indonesia's promise to keep searching for the documents did not constitute a response to USDOC's information request. We underline that the decision as to what information was necessary to USDOC's investigation was not Indonesia's to make.

76. USDOC nevertheless provided Indonesia with another opportunity to cure its evidentiary failure. USDOC also reiterated that should Indonesia continue to fail to submit the requested information, it may resort to relying on the facts available. USDOC provided some flexibility to the GOI. Indonesia could have requested an extension. However, Indonesia chose not to. Given the reasonable period that Indonesia had − 7 weeks − "it was reasonable to expect the GOI to be more forthcoming with this information." The Appellate Body has recognized the importance of investigating authorities being able to set deadlines for the submission of information, and the timeline for this limited information request exceeds the 37 days under the "general rule" in Article 12.1.1 for replying to a full initial subsidy questionnaire.

77. USDOC determined that Indonesia had not acted to the best of its ability. Again, Indonesia had multiple opportunities to submit information on ownership and was aware affiliation would be key to the investigation. Indonesia was provided seven weeks to provide information on the other PPAS transactions. From Indonesia's response that the PPAS inquiry was not "relevant," the U.S. determination on the GOI's failure to cooperate is consistent with the Appellate Body's recognition that "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."

78. Indonesia claims that the "facts available" USDOC relied on in finding affiliation did not "reasonably replace" the missing information under Article 12.7. Indonesia's argument is that USDOC unreasonably relied on "speculative" "newspaper articles and reports," while ignoring record evidence that demonstrated the companies' non-affiliation. This was not the case. The bid documents contained no ownership information. In this investigation, USDOC relied on several newspaper articles and reports - including a consultant's report received at verification in CFS - as facts available in finding APP/SMG and Orleans affiliated. This information was placed on the record in this investigation.

IV. INDONESIA'S CLAIMS REGARDING ARTICLE 2 ARE WITHOUT MERIT

79. Indonesia claims that USDOC acted inconsistently with Article 2.1(c) because USDOC cited to no supporting evidence "that the GOI or any regional, or local government entity had in place a plan, scheme, or systematic series of actions to confer a benefit." Indonesia again misunderstands the Appellate Body's analysis in US − Countervailing Measures (China). There, the Appellate Body underlined that, generally, "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms." In that dispute, which involved "unwritten measures," the Appellate Body envisioned that a subsidy program could be evidenced by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises." However, here, the debt buyback constituted a written "plan or scheme." Imputing a requirement that the subsidy must be a "systematic series of actions" in all instances voids the definition of a subsidy under Article 1.1. A "subsidy" under Article 1 is not limited in nature to a series of financial contributions. In the fact-specific context where only the specific company debtor is "eligible to receive that same subsidy," the "limited number of enterprises" factor is relevant. The subsidy that USDOC identified is a company-specific measure, as only the specific company debtor is "eligible to receive that same subsidy."

V. INDONESIA'S CLAIMS REGARDING THREAT ARE WITHOUT MERIT

A. The Commission's Analysis was Fully Consistent with AD Agreement Article 3.7 and SCM Agreement Article 15.7

80. The Commission's analysis was based on facts and clearly foreseen and imminent changes in circumstances. This is true both with respect to the likely impact of subject imports on domestic industry sales volume and the likely price effects of subject imports. Indonesia's argument that the Commission provided no reasoned and adequate explanation for its finding that the likely significant increase in subject import volume would come partly at the domestic industry's expense is belied by the Commission's determination. Similarly, Indonesia's claim that the Commission

failed to provide a reasoned and adequate explanation for its analysis of the likely price effects of subject imports on the domestic industry is disproven by its determination, which was based on and articulated the relevant facts and clearly foreseen and imminent changes in circumstances. The Commission found it likely that significant subject import underselling would continue in the imminent future, as a means of capturing market share, and Indonesia does not contest this finding. The Commission also highlighted two changes in circumstances that would clarify the role of subject imports as a key driver of prices in the U.S. market in the imminent future: the expiration of the black liquor tax credit in 2009, and the projected moderation in the rate of the decline in CCP demand.

B. The Commission's Analysis was Fully Consistent with AD Agreement Article 3.5 and SCM Agreement Article 15.5

81. The Commission examined other known factors in a manner fully consistent with WTO obligations. An investigating authority's finding that an industry is vulnerable to material injury would reduce the magnitude of the change in circumstances necessary to cause the industry to experience material injury in the imminent future. For this reason, the Commission considered the domestic industry's vulnerability as part of its threat analysis. While recognizing that declining demand and expiration of the black liquor tax credit contributed to the domestic industry's vulnerability, the Commission in no way attributed the effects of these factors to subject imports or mentioned subject imports in its discussion of vulnerability. Acceptance of Indonesia's argument would create a Catch-22: factors other than subject imports that leave a domestic industry vulnerable would preclude attribution of any subsequent injury sustained by the industry to subject imports, but where the industry was not shown to be vulnerable, Indonesia would presumably take the position that subject imports could not threaten the industry.

82. The Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports. The Commission demonstrated that subject imports would have adverse effects on the domestic industry independent of the moderate decline in demand that was projected, relying partly on the analysis contained in previous sections of the determination. The Commission also demonstrated that subject imports had injurious effects on the domestic industry independent of nonsubject imports, which had no injurious effects on the industry during the POI, and were generally priced higher than subject imports. There is no merit to Indonesia's criticisms of the Commission's non-attribution analysis.

VI. THE TIE VOTE PROVISION IS FULLY CONSISTENT WITH AD AGREEMENT ARTICLE 3.8 AND SCM AGREEMENT ARTICLE 15.8

83. The tie vote provision is consistent with ADA Article 3.8 and SCMA Article 15.8. Neither contains text relating to a Member's internal decision-making structure or processes. The Appellate Body made clear that the internal decision making process of a Member is entirely within the discretion of that Member. Rather, panels are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in dispute settlement. Consistently with *US – Line Pipe*, the panel's analysis in *Softwood Lumber VI* shows that "special care" is about the substantive analysis used to make an affirmative threat determination. The tie vote provision concerns the internal decision-making process of the United States. When the provision applies, nothing under it would prevent the Commissioners voting in the affirmative from demonstrating in their written determination that they exercised special care in reaching an affirmative threat determination.

84. Canada, a third party, takes the position that the provision breaches the "objective examination" requirement of ADA Article 3.1 and SCMA Article 15.1. But Indonesia's panel request asserts no claims under ADA Article 3.1 and SCMA Article 15.1. Those provisions are thus outside the Panel's terms of reference, and Indonesia's First Written Submission made no argument concerning the "objective examination" provisions. The Panel may not accept Canada's invitation to opine on claims outside its terms of reference or to find a consequential breach of the "special care" provisions on the basis of such non-claims.

EXECUTIVE SUMMARY OF U.S. CLOSING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

85. The standard of review for the panel has been articulated as not a *de novo* review, as the Panel is not the initial trier of fact. The Panel's task is not a mechanical search for magic words. Rather, the Panel should look at the determinations as a whole, in the context of the entire record, as the Panel evaluates whether the conclusions reached were reasoned and adequate.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF INDONESIA

I. INTRODUCTION

1. Indonesia has challenged findings made by two separate U.S. agencies, USDOC's subsidy determination and the USITC's threat of injury determination. In addition, Indonesia has challenged on an as such basis the provision of US law that requires a tie vote to be treated as an affirmative threat of injury determination.

2. With respect to USDOC's subsidy determination, Indonesia challenges USDOC's finding that the GOI provides standing timber for less than adequate remuneration and that the GOI log export ban confers a benefit. USDOC's benefit finding for both programs was based on a *per* se determination of price distortion based solely on the percentage of standing timber that is harvested from public forests in Indonesia. This is inconsistent with Article 14(d) of the SCM Agreement. In addition, the benchmark USDOC used was not for a similar good which is inconsistent with Article 14(d) of the SCM Agreement.

3. Indonesia also challenges USDOC's finding that the GOI knowingly allowed an affiliate of a debtor to buy back its own debt in violation of Indonesian law. USDOC relied on an adverse inference but only by ignoring the information Indonesia provided and creating a moving target through a series of additional burdensome and irrelevant requests. This was inconsistent with Article 12.7 of the SCM Agreement. The facts USDOC used to replace the missing information were not reasonable replacements because they were based on speculation which is inconsistent with Article 12.7 of the SCM Agreement.

4. USDOC's findings are also inconsistent with Article 2.1(c) of the SCM Agreement because USDOC did not determine that the collection of stumpage fees, the log export ban, or the alleged forgiveness of debt were part of a "plan or scheme" that confers a benefit.

5. Finally, USDOC's findings concerning the alleged debt forgiveness are inconsistent with Article 2.1 of the SCM Agreement because USDOC did not identify the jurisdiction allegedly providing a benefit, thereby calling into question the specificity analysis.

6. The USITC's threat of injury determination is inconsistent with US WTO obligations in several respects.

7. First, the USITC attributed adverse effects to the subject imports that were caused by other factors which is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. In its present injury analysis, the USITC found a number of factors explained the domestic industry's performance during the period of investigation. But in its threat of injury analysis the USITC attributed the effects of those other factors to subject imports.

8. Second, the USITC based its threat findings on conjecture and remote possibility which is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. The USITC made two findings that were based on conjecture, that subject imports would have adverse effects on US prices and would gain market share at the expense of the US industry.

9. Third, the USITC failed to exercise special care in making a threat of injury determination which is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement. The Commission reversed itself on every key finding it made in its present injury analysis which led to a no injury finding and then found against respondents to support a threat of injury determination. As Brazil aptly notes, "the assumptions considered by the USITC in order to reach a positive conclusion in the threat of injury determination seem to deviate from the direction pointed by the facts already evaluated previously during the material injury analysis."[1]

[1] See Brazil Response to First Panel Questions, para. 7.

10. US law contains a provision that mandates a tie vote be treated as an affirmative finding of threat of injury. This is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because it precludes the exercise of special care. A law that openly and consistently disadvantages respondents is biased on its face and violates the obligation to exercise special care in reaching an affirmative threat of injury determination.

II. THE PANEL SHOULD REJECT THE UNITED STATES' REQUEST FOR A PRELIMINARY RULING

11. The United States claims "Indonesia appears to be concerned about the particular words USDOC used in its explanations and the amount of space taken up by them."[2] According to the United States, this means Indonesia should have brought certain claims under Article 22 of the SCM Agreement.[3] The United States misunderstands the nature of Indonesia's claims.

12. The claims in paragraphs 33, 34, 41, and 42 of Indonesia's First Written Submission all relate to whether USDOC improperly based its finding of price distortion based on the GOI's purported dominance in the market. Indonesia's challenge has nothing to do with the words USDOC used. The claims in paragraphs 74, 78-79, and 81 of Indonesia's First Written Submission concern USDOC's failure to find a systematic series of actions to confer a benefit. Finally, the claim in paragraph 95 of Indonesia's First Written Submission relates to USDOC's finding that the GOI conferred a benefit based on the allegation of a knowing violation of Indonesian law.

III. THE UNITED STATES' DEFENSE OF ITS FLAWED SUBSIDY DETERMINATION

A. USDOC's Improper *Per Se* Determination of Price Distortion Based on Government Ownership Renders USDOC's Findings with Respect to the Provision of Standing Timber and Log Export Ban Inconsistent with Article 14(d) of the SCM Agreement

13. The Appellate Body has said that the question of price distortion must be based on an evidentiary finding and not a *per se* determination based on a government's predominance in the market.[4] While this governing principle should not be in serious dispute, the United States would have this Panel reach a finding that there are certain instances where a government's involvement in the market is so dominant that price distortion is inevitable.[5] In other words, the United States is asking the Panel to permit *per se* findings of price distortion in direct contravention of the Appellate Body's holding in *US – Countervailing Measures (China)*.[6] The Panel should reject this invitation, especially in light of USDOC's complete failure to acknowledge that 93 percent of the countervailed timber was planted, grown, and harvested from a plantation and was grown and harvested by the license holder.[7]

14. Indeed, the United States continues to demonstrate and convey an inaccurate depiction of the GOI's role.[8] For example, the United States claims that the facts of this dispute are more like those in *US-Softwood Lumber IV* "in terms of the government's role as a direct supplier of the input . . . ."[9] But the GOI does not sell standing timber.[10] Rather, the GOI grants concessions to companies to use the land that is the subject of the concession.[11] Moreover, the GOI only grants concessions on land that is heavily degraded, a fact USDOC has been aware of since its 2006/2007 investigation.[12]

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[2] See US Response to First Panel Questions, para. 28.
[3] See US Response to First Panel Questions, para. 29.
[4] See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.15.
[5] See Response by the Government of the Republic of Indonesia to the Questions from the Panel Following the First Meeting with the Parties, para. 8 (Indonesia's Response to First Panel Questions).
[6] See Appellate Body Report, *United States – Countervailing Duty Measures (China)*, para. 4.15.
[7] See Indonesia's Response to First Panel Questions, para. 8.
[8] See US Response to First Panel Questions, para. 31.
[9] See US Response to First Panel Questions, para. 31.
[10] See Opening Statement by the Government of the Republic of Indonesia at the First Meeting of the Panel (Indonesia Opening Statement), paras. 19-23.
[11] See Indonesia Opening Statement, para. 21.
[12] See Memorandum to David M. Spooner, Assistant Secretary for Import Administration from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration: Issues and Decision Memorandum for

15. In its Second Written Submission the United States claimed, for the first time, that "[t]he GOI retains title to the standing timber cultivated by private companies until the applicable stumpage fees are paid."[13] The United States' has no support for that conclusion in the record. As Indonesia has argued, the GOI was not providing standing timber. If the government does not own the good there cannot be a provision of goods pursuant to Article 14(d) of the SCM Agreement.

16. The United States has disavowed itself of USDOC's clear statement that the GOI's predominant role was the reason for resorting to a second tier benchmark[14] and defends the determination as based on more than just a *per se* finding of price distortion. The United States claims USDOC evaluated other features of the market that rendered the market distorted and that Indonesia did not identify other factors USDOC should have examined.[15] The other factors USDOC cites are merely variations of the same theme of the GOI's allegedly dominant market share.

17. Notably, the first factor the United States cites − the GOI's ownership of virtually all harvestable forest land − is not another factor at all.[16] With respect to in-country pricing information, the United States does not dispute that information was on the record showing the price per ton of acacia harvested from private land.[17] The United States repeatedly, and without justification, faults Indonesia for not providing information on in-country pricing data.[18] But why would Indonesia have prices from private transactions? Nor did USDOC attempt to gather information from companies APP identified as log suppliers. As Canada and China note in their respective responses to the Panel's questions, the investigating authority has an obligation to obtain evidence about in-country prices.[19]

18. The second "other" factor the United States cites − the existence of the log export ban − also ultimately comes back to the finding about the GOI's allegedly predominant role in the market.[20] But USDOC altogether failed to acknowledge that wood chips and pulp − the direct inputs in paper making − were not subject to the export ban during the POI.[21] The third "other" factor the United States cites − the negligible level of log imports − again relies on the finding about the GOI's ownership of harvestable land.[22] The fourth and final "other" factor the United States cites − alleged aberrationally low prices for logs in Indonesia relative to the surrounding region − does not show price distortion because USDOC was not even looking at the prices of comparable products.[23]

19. USDOC's analysis of log prices in Malaysia is fatally flawed because USDOC was unwilling to give fair consideration to any other evidence given its (mistaken) view of the GOI's market share. As the United States explains in its First Written Submission, USDOC determined that by removing exports from Sabah, Malaysia to Indonesia from the Malaysian export data, the Malaysian export data supported USDOC's determination that prices in Indonesia were distorted.[24] But USDOC had no reason to remove the export data from Sabah unless it was trying to prove what it had already concluded based on the GOI's ownership of harvestable forests. The price data from Sabah came from two sources: 1) actual transaction data for numerous sales of identical merchandise in 2008 and 2) export statistics reported by the Malaysian province of Sabah.[25] In rejecting this data, USDOC stated merely that shipments to Indonesia were not a suitable benchmark.[26] In other words, the GOI's share of harvestable forests served as the sole basis for USDOC's: 1) rejection of price data for actual transactions of identical merchandise and 2) conclusion that prices in

the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (Oct. 17, 2007), Exhibit IDN-26, p. 60.

[13] See United States Second Written Submission (US SWS), para. 25.

[14] See Final CVD Decision Memorandum, Exhibit IDN-10, p. 8.

[15] See US FWS, para. 43.

[16] See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

[17] See US SWS, para. 30.

[18] See US Response to First Panel Questions, paras. 35 & 39.

[19] See Canada Response to First Panel Questions, para. 5; China Response to First Panel Questions, para. 3.

[20] See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

[21] See Indonesia's Response to First Panel Questions, paras. 24-29.

[22] See US FWS, para. 61; see also US Response to First Panel Questions, para. 50.

[23] See US FWS, para. 67; see also US Response to First Panel Questions, para. 50.

[24] See US FWS, para. 62.

[25] See US FWS, Exhibit US-44, p. 12.

[26] See Final CVD Decision Memorandum, Exhibit IDN-10, p. 34.

Indonesia were distorted. As Brazil has noted, an investigating authority must be cautious about disregarding information provided by an interested party.[27]

B. USDOC's Improper Application of Adverse Facts Available Is Inconsistent with Article 12.7 of the SCM Agreement

20. USDOC found that a long defunct agency of the Government of Indonesia knowingly permitted an alleged affiliate of the APP/SMG group called Orleans to buy back the APP/SMG debt. The sole support for USDOC's finding of affiliation between Orleans and APP/SMG are two sentences from a newspaper article.[28]

21. The United States attempts to rely on an alleged unnamed expert but that expert's credentials were not even available to USDOC during the investigation because they had been redacted from the report and USDOC only had the redacted version. Even so, the supposed expert opinion is just as speculative as the newspaper article cited above because the expert had no direct knowledge and based his belief on rumours.

22. USDOC had all of the transaction documents from the APP/SMG sale, USDOC had IBRA's regulations and internal procedures, and it had Indonesia's verified statements in the questionnaire response that Indonesian laws and IBRA's regulations had been satisfied. USDOC even had its own expert's confirmation that this would have been all IBRA required.[29] This should have been the end of USDOC's inquiry. The United States had no reasonable basis to ask for more unless one accepts the proposition that an investigating authority has the unfettered ability to keep asking for information even after the question at issue has been definitively answered.[30] Indonesia respectfully submits that Article 12.7 speaks to this issue and says an investigating authority does not have such unfettered authority. Indeed, giving an investigating authority the ability to keep asking for more and more information would create a dangerous precedent whereby an investigating authority could force a party into an adverse facts available situation by virtue of increasingly burdensome requests.

23. One can even imagine that had Indonesia provided the documents USDOC requested concerning other transactions, USDOC would have said they were not sufficient. In fact, it does not require imagination at all. That is exactly what USDOC did after Indonesia provided all of the information USDOC requested about the APP/SMG sale. Indonesia respectfully submits that USDOC's resort to adverse facts available was unjustified based on the factual record as fully set forth in our First Written Submission and, thus, inconsistent with the United States' obligations under Article 12.7 of the SCM Agreement. In refusing to accept Indonesia's representations about the difficulties it had and was continuing to have in accessing information about a defunct agency, the United States' showed an utter lack of regard to Article 27 of the SCM Agreement.

24. USDOC's decision to cancel verification is evidence of the degree to which USDOC had already decided the affiliation question against Indonesia and demonstrates USDOC's commitment to making that decision stick. The United States claims it gave Indonesia ample time to respond.[31] On the question of the fairness of the timing, Indonesia asks the Panel to recall that USDOC requested information about other debt sales nearly 6 months after the original questionnaire. Indonesia also asks the Panel to recall that Indonesia was not able to locate complete information on the APP/SMG sale in the 2006/2007 investigation and it took Indonesia a considerable amount of time to locate complete information on the APP/SMG sale in the CCP investigation.

25. What the United States has not answered is why, despite the fact that USDOC was sending a team to verify the remainder of the GOI's questionnaire responses, USDOC would cancel just a portion of the verification. In fact, USDOC possessed all of the transaction documents from the APP/SMG sale, had all of the Indonesian laws and regulations, and was going to be able to talk directly to former IBRA officials. Had USDOC not already decided the issue of affiliation against Indonesia, verification would have been the perfect opportunity for USDOC to evaluate the

[27] See Brazil Response to First Panel Questions, para. 3.
[28] See US FWS, Exhibit US-40 (internal exhibit no. 33, p.2).
[29] See Exhibit US-81, p. 3.
[30] The United States appears to argue for such unfettered discretion. See US Response to First Panel Questions, para. 86.
[31] See US Response to First Panel Questions, paras. 95-113.

substantial information on the record and discuss it with former IBRA officials. Finally, it is important to recall that the basis for what amounted to a witch hunt by USDOC consisted of two sentences in a newspaper article and a so-called "expert's" speculation whose credentials were not part of the record in the CCP investigation and which the United States has refused to provide to the Panel.

26. The United States identifies two supposed "holes" in the record that needed to be filled. The first is the alleged lack of ownership information concerning Orleans.[32] As described above, Orlean's ownership information was not "missing" it simply was not part of the documentation IBRA required. As discussed above, the relevant question was whether Orleans was affiliated with APP/SMG and the transaction documents IBRA required showed it was not. The second alleged hole the United States identifies was the GOI's claim that IBRA accepted affirmations from the bidders that they were not affiliated with the debtor companies.[33] As discussed above, IBRA's regulations specified what documents were required and USDOC possessed those regulations and those documents from the APP/SMG sale. In addition, USDOC's purported expert explained that IBRA did not undertake extensive investigation on this. Further, the World Bank report which *preceded* the sale of the APP/SMG debt spoke of other affiliated debt buy backs suggesting IBRA did not inquire further.[34] Finally, had USDOC proceeded with verification, USDOC would have had the opportunity to ask former IBRA officials about the procedures that were followed on the subject of affiliation. In short, to the extent there was a hole in the record it was of USDOC's own making by cancelling verification.

27. The United States overstates the significance of differences between the PPAS and PPAS 2 terms of reference.[35] In fact, the differences highlight the limited relevance of the PPAS 2 transaction documents because they were part of a second round of bidding (known as PPAS 2) that occurred *after* PPAS (the original round of bidding in the APP/SMG debt sale occurred) – as USDOC was aware.[36] In the original round of bidding under PPAS, all bids except for the APP/SMG debt were below the floor price and no one placed a bid for the Texmaco Group's assets.[37] So while the PPAS 2 terms of reference may have been different from those of PPAS, the United States has not shown the PPAS terms of reference were different from one company to another.

28. Finally, the United States' argument that the SCM Agreement does not require verification is largely semantic. USDOC conducted an on-site verification of the GOI. By cancelling the debt buy back portion of the verification, USDOC merely refused to verify anything having to do with debt buy-back, even information that undeniably was on the record long before USDOC requested all of the PPAS 2 documents. The United States faults Indonesia for not providing the PPAS 2 document *after* USDOC cancelled verification on the debt buy back issue.[38] But this reading of the agreement would produce unreasonable and absurd results. According to the United States, a member would have to insist on providing every piece of rejected information or lose the right to a WTO challenge.

29. The third parties are largely in agreement with Indonesia. Brazil indicates that new information should be accepted at verification and that before cancelling verification, the investigating authority should consider whether verification could be used to obtain additional and more detailed information.[39] Canada agrees that nothing prohibits an investigating authority from accepting new information during the on-site verification.[40] Finally, the EU explained that it routinely accepts new information at verification and whether it will rely on it depends on the circumstances.[41]

[32] See US Response to First Panel Questions, para. 114.
[33] See US Response to First Panel Questions, para. 115.
[34] See para. 51 below.
[35] See US SWS, paras. 62-66.
[36] See Exhibit IDN-15, p. 5.
[37] See Exhibit IDN-15, p. 5.
[38] See US SWS, para. 78.
[39] See Brazil Response to First Panel Questions, para. 5.
[40] See Canada Response to First Panel Questions, paras. 7-11.
[41] See EU Response to First Panel Questions, para. 19.

C. USDOC's Failure to Make Specificity Findings in Accordance with Article 2.1 of the SCM Agreement

1. Article 2.1(c)'s Subsidy Program Requirement

30. The United States defends USDOC's finding of a "subsidy program" largely by focusing on the question of whether "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises" must be found in every instance.[42] Indonesia is not suggesting that an investigating authority must, in every instance, find evidence of both a plan and a systematic series of actions. But as the Appellate Body has recognized, it is not sufficient just to find that a financial contribution has been given to an entity.[43] Indonesia is arguing that because none of the programs in question confer a benefit, USDOC had to rely on more than just a finding of a mere alleged financial contribution.

31. As Indonesia noted in its First Written submission, the so-called provision of standing timber benefits the GOI because the GOI receives revenues from the use of the land.[44] Notably, because GOI is not providing timber, it is not reasonable to characterize the fees as payments for timber. In addition, the GOI receives services from the entities who hold licenses.[45] Because there is no written plan that confers a benefit, USDOC needed to look at whether a systematic series of actions conferred a benefit.

32. The log export ban, similarly, does not confer a benefit. Indonesia enacted the log export ban in 2001 to protect against deforestation.[46] The export ban never applied to pulp or wood chips. The United States continues to misapprehend the record on this point. As the United States acknowledges, the ban never applied to pulp.[47] The United States is mistaken when it states that the ban applied to wood chips.[48] As Indonesia has explained, the log export ban never applied to wood chips, which fall under HS 4401.[49] The United States agrees that wood chips fall under HS 4401 but claims they also fall under HS 4404.[50] As Indonesia has explained, chipwood − not wood chips − falls under HS 4404 and the ban was amended in 2003 to allow the export of chipwood.[51] USDOC appears to have mistaken the fact that the 2008 Decree No. 20/M-DAG/Per/5/2008 reflected the fact that products falling under HS 4401 and HS 4404 *already* were excluded from the ban as discussed above. The further steps the United States discusses about legalizing the export of forest products relate to the complete repeal of the ban,[52] which did not occur. Under those circumstances, where the law does not confer a benefit, USDOC needs to find a systematic series of actions that confer a benefit.

33. The alleged debt buy back is perhaps the most extraordinary finding by USDOC of the existence of a subsidy program. All of the written materials suggested no benefit was conferred. In fact, Indonesian law made it illegal for an affiliate to purchase its own debt.[53] USDOC found the existence of a subsidy program based on a violation of the law. Put differently, the Indonesian law, itself, was not the subsidy program. Instead, it was the violation of the law that USDOC found was a subsidy program. But in the absence of a written law, USDOC needed to find a systematic series of actions that conferred a benefit which it did not do. Rather, USDOC found a single illegal act (based on newspaper speculation) made it specific.

2. The Chapeau of Article 2.1's Requirement to Identify the Jurisdiction

34. USDOC's specificity finding for the alleged debt forgiveness rested on speculation from a newspaper article. But other newspaper articles suggested debt was sold to affiliates a number of times. At bottom, USDOC specificity finding rests on a conclusion, albeit unsupported, that

[42] See US FWS, paras. 174 (standing timber), 183 (log export ban), and 193 (debt forgiveness).
[43] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.143.
[44] See Indonesia FWS, para. 77.
[45] See Indonesia FWS, paras. 76-77.
[46] See Indonesia FWS, para. 13.
[47] See US Response to First Panel Questions, para. 67.
[48] See US Response to First Panel Questions, para. 65.
[49] See Indonesia Response to First Panel Questions, para. 25.
[50] See US Response to First Panel Questions, para. 69.
[51] See Indonesia Response to First Panel Questions FSM, para. 26.
[52] See US Response to First Panel Questions, paras. 70-71.
[53] See Indonesia FWS, para. 83.

Indonesia knowingly and deliberately violated Indonesian law. The United States argues that the jurisdiction was discernible from the determination.[54] But that misses the point. On the one hand, USDOC claims the debtor is affiliated with the purchaser based on two sentences in a single newspaper report. On the other hand, USDOC finds that the law was broken only with respect to the APP/SMG debt, despite other newspaper articles (and a World Bank report that preceded the APP/SMG sale),[55] related to other sales, implying that IBRA sales more generally (without any mention of APP whatsoever) may have allowed affiliates to buyback debt, indicating there was more than one instance of an affiliate of debtor buying back debt. USDOC cannot have it both ways. If newspaper reports are sufficiently credible to find a government violated its own law – Indonesia disagrees that they are – then newspaper reports are also sufficient to refute USDOC's specificity finding that the APP/SMG debt was the only instance where an affiliate bought back its own debt. In these circumstances, USDOC must identify exactly what individual or individuals acted on behalf of the GOI to violate Indonesian law.

35. Citing to a World Bank report, the United States argues debt buy-backs under the PPAS would have been specific even if other debtors bought back debt from affiliates.[56] But the provision of the World Bank report the United States relies on *was not discussing sales under the PPAS*, it was discussing sales of *small loans* of which there were some 300,000 NPLs.[57] Finally, it is worth noting that the World Bank report is dated November 4, 2003,[58] more than a month before the December 8, 2003 announcement of the sale of the APP Group assets.[59] Obviously the speculation in the World Bank report about affiliates repurchasing debt does not relate to APP.

IV. THE UNITED STATES' DEFENSE OF ITS FLAWED THREAT OF INJURY DETERMINATION

36. The following key are points before the Panel with respect to the USITC's threat of injury determination: 1) whether the USITC established a causal connection between the subject imports and the threat of injury to the domestic industry as required by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement; 2) whether the USITC based its findings on conjecture and speculation in contravention of Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement; 3) whether the cumulative effect of the individual flaws in the USITC's determination render it inconsistent with Article 3.8 of the Anti-dumping Agreement and Article 15.8 of the SCM Agreement.

A. The USITC's Failure to Establish a Causal Connection Is Inconsistent with Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement

37. As Indonesia set forth in its First Written Submission, Articles 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement contain three principles which the USITC's determination violates: 1) non-attribution, 2) concrete examination of other factors, and 3) isolation of factors other than subject imports that caused or threaten injury.[60]

38. With respect to non-attribution, the United States acknowledges that the vulnerability finding weighed heavily in the USITC's "consideration of the impact of subject imports on the domestic industry in the imminent future."[61] Indonesia submits this demonstrates violation of the non-attribution principle because subject imports were not what caused the domestic industry to be vulnerable. The USITC found that the domestic industry was vulnerable because all of its performance indicators exhibited a downward trend during the period of investigation.[62] Importantly, subject imports were not the cause of the downward trend, otherwise the USITC would have found present injury rather than a threat. Two factors, unrelated to subject imports, were the sole underpinnings of the USITC's vulnerability finding: declining demand and expiration of the black liquor tax credit. In the paragraph of its determination in which it analyses vulnerability the USITC expressly identifies declining demand as the cause of the domestic

[54] See US FWS, para. 221.
[55] See para. 51 below.
[56] See US Response to First Panel Questions, para. 83.
[57] See Indonesia Response to First Panel Questions, para. 49.
[58] See Exhibit US-40, p. 38 of pdf.
[59] See Exhibit US-33, p. 110 of pdf; see also US Response to First Panel Questions, n. 109.
[60] See Indonesia FWS, para. 99.
[61] See US FWS, para. 246.
[62] See USITC Opinion, Exhibit IDN-18, p. 38.

industry's declining performance.[63] The USITC then discusses the black liquor tax credit noting it had propped up the domestic industry during the period of investigation but, because of its expiration, would no longer help the domestic industry which was another factor making the domestic industry vulnerable.[64] There may be investigations where a vulnerability analysis suggests subject imports caused the domestic industry to be vulnerable − but this was not one of them. By heavily weighing the threat posed by subject imports in the context of a domestic industry which was vulnerable because of declining demand and an expiring tax credit, the USITC violated Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

39. The United States claims that the USITC never found the black liquor subsidy yielded a net benefit.[65] Whether the subsidy was included in operating income or had a one-time financial benefit misses the point. The subsidy affected normal market conditions, including pricing and costs and production-related activities.[66] The USITC failed to give any consideration or devote any of its threat analysis to the fact that subject imports likely would respond differently in a market without the subsidy. The USITC exacerbated its error by finding "*it likely that subject imports would be priced aggressively so as to regain market share lost in interim 2010 due to the pendency of the investigations*."[67] In other words, the USITC credited the lifting of the preliminary measures as a threat factor.

40. The USITC also claims that expiration of the subsidy was not a known other factor causing injury.[68] But the USITC found that the expiration of the subsidy meant "any benefit that the domestic industry received from it in 2009 will not continue into the imminent future."[69] The subsidy's expiration, along with declining demand, made the domestic industry vulnerable to injury.[70] In other words, the expiration of the subsidy was a known other factor that made the domestic industry worse off than when the subsidy was in place. Consequently, the United States' claim that the subsidy's expiration was not a known other factor causing injury is a distinction without a difference.

41. With respect to conducting a concrete analysis of factors other than subject imports, the United States argues that no specific methodology is required and that injury caused by other factors need not be quantified.[71] Indonesia is not suggesting that the United States must use a particular economic model or must quantify the effects of the black liquor tax credit's expiration, or of non-subject import and subject import market share swaps, or of declining consumption. But where an investigating authority's present injury analysis is more concrete and rigorous than its threat analysis, there is a clear inconsistency with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement and disregard for the special care requirement when making a threat of injury determination.

42. For example, the USITC's present injury findings contain a volume analysis consisting of precise measurements of the volume of subject imports, non-subject imports, domestic industry shipments, and market share.[72] The USITC's present injury findings contain a pricing analysis based on four pricing products.[73] Finally, the USITC's present injury findings contain an impact analysis that is based on several trade and financial performance indicators.[74] Yet the USITC concluded that none of the precise measures was sufficient to demonstrate a causal link between subject imports and injury to the domestic industry.[75] But by applying less precise, amorphous standards phrased in general terms like "increasing volumes of low-priced imports,"[76]"will take sales from current suppliers such as the domestic industry,"[77] and "will gain additional U.S. market

[63] See USITC Opinion, Exhibit IDN-18, p. 38.
[64] See USITC Opinion, Exhibit IDN-18, p. 38.
[65] See US Response to First Panel Questions, para. 129.
[66] See USITC Opinion, Exhibit IDN-18, p. 33.
[67] See US FWS, para. 244. (Emphasis added)
[68] See US Response to First Panel Questions, para. 134.
[69] See USITC Opinion, Exhibit IDN-18, p. 38.
[70] See USITC Opinion, Exhibit IDN-18, p. 38.
[71] See US FWS, para. 304.
[72] See USITC Opinion, Exhibit IDN-18, pp. 26-27.
[73] See USITC Opinion, Exhibit IDN-18, pp. 31-33.
[74] See USITC Opinion, Exhibit IDN-18, pp. 35-38.
[75] See USITC Opinion, Exhibit IDN-18, p. 38.
[76] See USITC Opinion, Exhibit IDN-18, pp. 38.
[77] See USITC Opinion, Exhibit IDN-18, pp. 38.

share in the imminent future,"[78] the USITC concluded subject imports would be a cause of injury in the future.

43. With respect to the need to isolate injurious effects, the United States responds that the USITC was merely repeating the domestic law standard when the agency stated that it did not need to isolate injury caused by other factors and that the USITC, in fact, performed a non-attribution analysis.[79] Indonesia does not doubt that the USITC was restating the domestic law standard and that is why it is troubling. Irrespective of whether the USITC examined other factors, the key question is with what degree of rigor did the USITC do so, especially in the context of a threat analysis? Indonesia respectfully submits that the analysis was without sufficient rigor.

44. For purposes of its present injury analysis, the USITC isolated factors other than subject imports, including the economic downturn and declining demand.[80] As a consequence, the USITC concluded there was not a "sufficient causal nexus necessary to make a determination that subject imports are currently having a significant adverse impact on the domestic industry."[81]

45. In its threat analysis the USITC, collapsed, rather than isolated factors other than subject imports with the likely effects of subject imports. The way the USITC did this was through its vulnerability finding. The USITC begins its vulnerability analysis by noting the downwards trends in virtually all of the domestic industry's performance indicators "weigh heavily in our consideration of the impact of subject imports in the imminent future."[82] But in its present injury analysis, the USITC had just stated found subject imports were not the cause of those downwards performance trends, rather it was the economic downturn and declining demand. The USITC also found that the expiration of the black liquor tax credit, another factor unrelated to subject imports, made the domestic industry vulnerable.[83]

46. To comply with the isolation component of the non-attribution requirement, the USITC needed to do the opposite of what it did. Rather than finding the domestic industry's vulnerability made it more likely that subject imports threatened injury, the USITC should have analyzed the impact of just the subject imports on the domestic industry during the period of investigation, after isolating out the other factors and, based on that analysis, determined whether a threat of injury was likely.

47. In short, the USITC found a threat of injury not based on subject imports but because of the expiration of a tax credit, a decline in consumption, and an increase in imports that had declined because of the investigation. In reaching an affirmative threat of injury determination, the USITC attributed those effects to subject imports and violated US obligations under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

B. The USITC Relied on Conjecture and Speculation in Contravention of Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement

48. Indonesia has challenged the USITC's threat determination as inconsistent with Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement because it is based on conjecture or speculation regarding events which were not clearly foreseen and imminent. The specific findings at issue are that subject imports would have adverse effects on US prices and would gain market share at the expense of the domestic industry.[84] The defences the United States offers are without merit. First, the United States claims that the USITC did not find the increase in subject import volume was innocuous for the domestic industry pointing to the finding that import volumes were significant and domestic shipments declined.[85] Yet the USITC concluded, in spite of those two facts, that there was no causal connection between subject imports and the domestic industry's condition − even when subject imports were at their peak

[78] See USITC Opinion, Exhibit IDN-18, pp. 38.
[79] See US FWS, n. 630.
[80] See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470-471 and 731-TA-1169-1170 (Final), Pub. 4192 (Nov. 2010) (USITC Opinion), Exhibit IDN-18, p. 37.
[81] See USITC Opinion, Exhibit IDN-18, p. 38.
[82] See USITC Opinion, Exhibit IDN-18, p. 38.
[83] See USITC Opinion, Exhibit IDN-18, p. 38.
[84] See Indonesia FWS, para. 124.
[85] See US FWS, para. 263; US Response to First Panel Questions, para. 137.

market share.[86] In addition, a decline in shipments (as opposed to market share) could be caused by declining demand. Indeed, domestic shipments declined less than demand.[87]

49. Second, the United States makes much about the existence of a new distributor called Eagle Ridge, even claiming that it was established to double exports to the United States.[88] In reality, Eagle Ridge was established in response to APP's loss of business with Unisource.[89] Unisource was a major paper distributor.[90] APP had hoped to expand its business with Unisource but lost the account instead.[91] If anything, Eagle Ridge is evidence of an attempt to recoup lost sales, not evidence of a major, planned expansion of sales.

50. The underlying support is a single declaration that is questionable in a number of respects. One, the declaration is evidence that lower prices do not automatically mean exporters will gain market share. Indeed, Unisource dropped APP as a supplier.[92] This contradicts the USITC's conclusion about the likelihood of lower priced subject imports gaining market share.[93] Two, the declaration states that the conversations about doubling imports occurred in 2008. Even if the declarant was truthfully and accurately relaying his conversations, the USITC's record showed that from 2008 to 2009 imports from China increased by seven percent and imports from Indonesia increased by fifteen percent – hardly doubling.[94] Recall, too, that the USITC found that the increase in subject imports from 2008 to 2009 did not materially injure the domestic industry. Three, the declaration is from a company official who is a competitor of APP and had a deep interest in seeing orders imposed.

51. Third, the United States refers to the domestic industry's market share gain of 6.8 percentage points from subject imports.[95] But that was not a market share gain in the traditional sense of competing for customers. Rather, subject imports abruptly left the market which the USITC attributed to the pendency of the investigation.[96] Under those circumstances, a void simply needed to be filled and it says nothing about whether subject imports would compete with the domestic industry for market share if orders were not imposed.

52. Fourth, the United States refers to new capacity coming online in China as evidence of imminent increases in the volume of subject imports.[97] This was speculative and not imminent. The USITC found that after accounting for the additional capacity and projected Chinese consumption growth, there would be 900,000 metric tons of excess capacity from 2009-2011.[98] The USITC also found that consumption in the rest of Asia was likely to exceed capacity growth by 160,000 tons from 2009-2011.[99] In other words, there would only be 740,000 metric tons available for export to the rest of the world. But the USITC did not undertake any further analysis on other markets, excluding the United States, to which the Chinese industry might export. The USITC appears to assume, without support or explanation, that the Chinese industry will export all of its excess capacity to the United States in an ambiguous 2009-2011 timeframe which also calls into question the imminence of the alleged increase.

53. Contrary to the United States' suggestion, Indonesia does not concede that the Chinese producers possessed 740,000 metric tons of capacity.[100] Indonesia was merely citing to the figures on which the USITC relied. Table VII-2 of the USITC's report, on which the United States also relies for projections,[101] shows that the Chinese industry projected very little excess capacity in

[86] See USITC Opinion, Exhibit IDN-18, pp. 37-38.
[87] See US Response to First Panel Questions, para. 137 (noting domestic shipments declined by 10.4 percent at the same time apparent U.S. consumption "plummeted" by 14.7 percent).
[88] See US FWS, para. 282.
[89] See USITC Opinion, Exhibit IDN-18, p. 24.
[90] See USITC Opinion, Exhibit IDN-18, p. 29.
[91] See US FWS, n. 612.
[92] See USITC Opinion, Exhibit IDN-18, p. 29.
[93] See USITC Opinion, Exhibit IDN-18, p. 35.
[94] See USITC Opinion, Exhibit IDN-18, Table C-1.
[95] See US FWS, para. 301.
[96] See USITC Opinion, Exhibit IDN-18, p. 27.
[97] See US FWS, para. 282.
[98] See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.
[99] See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.
[100] See US Response to First Panel Questions, para. 154.
[101] See US Response to First Panel Questions, para. 154.

2011.[102] The point Indonesia was making is that the USITC undertook no analysis of other markets to which the Chinese industry might export. Further, the Chinese industry had excess capacity during the POI.[103] If the USITC's theory were correct, i.e., that the Chinese industry would get rid of excess capacity by exporting to the United States, then the Chinese industry would not have had excess capacity in any year of the POI.

54. Indonesia has demonstrated the inconsistency between the USITC's present injury finding that subject imports had not had adverse price effects despite underselling and the threat finding that subject imports likely would have adverse price effects.[104] At the heart of the United States' defence is the argument that the expiration of the black liquor tax credit and a more moderate decline in consumption would no longer obscure the adverse effects subject imports were having on domestic prices.[105] But this is pure speculation. To the extent that the black liquor tax credit and declining consumption were affecting pricing behaviour throughout the period of investigation, as the USITC finds they were, the USITC lacks any basis to make a projection about how subject imports would perform in a market where those factors were not operating to lower prices. In other words, those same factors that the USITC found were driving down the domestic industry's prices may be, indeed, likely were, responsible for driving down subject import prices. In short, the USITC's conclusion about a threat of injury based on price depression is based on speculation and, thus, inconsistent with Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement.

55. Indonesia has argued that the USITC did not point to facts that were going to change in the imminent future such that subject imports would take significant share from the domestic industry. As a factual matter, there was no correlation between subject import volumes and the decline in the domestic industry's shipments. The volume of the domestic industry's shipments declined in each year of the period of investigation, including from 2007 to 2008, when the volume of subject imports also declined.[106] Indeed, the USITC found declining consumption and the economic downturn were responsible for the decline in the domestic industry's shipments.[107]

56. The United States also relies on the increase in production capacity in China,[108] which as addressed above the USITC improperly concluded would all be used to export to the United States during the 2009-2011 timeframe. In addition, the United States relies on the establishment of Eagle Ridge as evidence of likely increases in subject import volumes.[109] But as addressed above, Eagle Ridge was established because APP lost a major customer. This was a negative development. While the United States points to the fact that subject import volumes increased even after APP lost the account,[110] there is no evidence on the USITC's record to support that conclusion. The United States cites to page 26 of the USITC's report which reports that the volume of subject imports increased from 2008 to 2009.[111] But Eagle Ridge was not even started to be established until the second half of 2009.[112] The only way to see the impact of APP's loss of Unisource on subject import volumes would be to examine monthly imports before and after. Data for whole year 2009 could mask a large volume of imports before the business was lost and a decline thereafter. Indeed, the USITC even noted that import volumes were particularly high in January 2009.[113] The USITC even appears to have had the data to perform this analysis but, for whatever reason, chose not to do so.[114]

57. The United States argues that the USITC "*found it likely that subject imports would be priced aggressively so as to regain market share lost in interim 2010 due to the pendency of the*

[102] See USITC Opinion, Exhibit US-1, Table VII-2.
[103] See USITC Opinion, Exhibit US-1, Table VII-2.
[104] Indonesia FWS, paras. 125-126.
[105] See US FWS, para. 279.
[106] See USITC Opinion, Exhibit IDN-18, Table C-3.
[107] See USITC Opinion, Exhibit IDN-18, p. 37 ("The deterioration in almost all of the domestic industry's performance indicators between 2007 and 2009 coincided with the economic downturn and a sharp decline in demand for CCP.").
[108] See US FWS, para. 264.
[109] See US FWS, para. 265.
[110] See US FWS, para. 265.
[111] See USITC Opinion, Exhibit IDN-18, p. 26.
[112] See USITC Opinion, Exhibit IDN-18, p. 24.
[113] See USITC Opinion, Exhibit IDN-18, p. 30, n. 193.
[114] See USITC Opinion, Exhibit IDN-18, p. 30, n. 193 (referencing a document containing monthly import statistics for the period of investigation).

investigations."[115] If this reasoning is sufficient, a threat finding will be compelled in nearly every case because the investigating authority can start an investigation, observe a decline in subject imports once preliminary measures are imposed, and then infer subject imports will increase significantly to regain lost market share. Under that simplistic analysis, why should exporters even bother to defend themselves? As the EU stated, "[i]t would . . . mean that it would be within the control of the authority whether a change of circumstances would occur (by imposing preliminary duties) or not (by not imposing preliminary duties). This cannot be correct."[116]

58. The United States also relies on the increase in production capacity in China and the establishment of Eagle Ridge.[117] As discussed above, neither point supports a finding of an imminent likely increase in the volume of subject imports. Finally, the United States claims the USITC did not have to "pinpoint the precise volume of sales that subject producers were likely to capture from non-subject imports instead of the domestic industry."[118] But if the USITC did not attempt such an analysis, as the United States concedes it did not, Indonesia respectfully submits that the USITC's conclusion is, by definition, nothing more than conjecture, which is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

C. The USITC Did Not Exercise Special Care in its Threat of Injury Determination

59. The United States relies solely on the panel's statement in *US – Softwood Lumber VI* to defend the inconsistencies Indonesia identified in the USITC's threat determination as also being inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[119] The reasoning, in turn, on which the United States hangs its defence consists of the following: "[W]e believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations."[120] This Panel should reach a different result and one that is grounded on something more concrete than a mere "belief." Indeed, the panel did not cite any authority to support its view. Further, the panel's view would mean that a single action or finding could not violate more than one WTO obligation which is not the case. For these reasons, this Panel should find that the specific violations Indonesia has identified also violate Articles 3.8 Anti-Dumping Agreement and 15.8 of the SCM Agreement.

60. Indonesia also has argued the USITC violated the special care requirement by resolving all key issues against respondents. The United States attempts to dismiss this argument by relying on its defences to the specific violations Indonesia identified.[121] The same panel in *Softwood Lumber VI* on which the United States relies also stated that "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury."[122]

61. Indonesia has argued that the each individual deficiency constitutes a violation of the duty to exercise special care pursuant to Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[123] Indonesia has argued that the cumulative effect of the deficiencies also amount to violations.[124] The United States argues that the claims must go beyond those made under other provisions of the Anti-Dumping and SCM Agreement.[125] In Indonesia's view, there is no textual evidence that arguments made under other Articles cannot also constitute a violation of Articles 3.8 and 15.8. Indeed, neither the panel in *US Softwood Lumber VI* nor the United States offer such evidence.

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[115] See US FWS, para. 244. (Emphasis added).
[116] See European Union's Responses to the Questions from the Panel to the Third Parties following the Third-Party Session, para. 36; see also Responses of Brazil to the Panel's Questions to the Third Parties, para. 10.
[117] See US FWS, para. 271.
[118] See US FWS, para. 272.
[119] See US SWS, para. 147.
[120] See Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004 ("*US-Softwood Lumber VI*"), para. 7.34.
[121] See US SWS, para. 148.
[122] See *US – Softwood Lumber VI*, para. 7.33.
[123] See Indonesia FWS, para. 131.
[124] See Indonesia FWS, para. 132.
[125] See US Response to First Panel Questions, para. 157.

V. THE TIE VOTE PROVISION OF UNITED STATES' LAW IS INCONSISTENT WITH THE DUTY TO EXERCISE SPECIAL CARE

62. Indonesia has challenged, on as such basis, *Section 771 of the Tariff Act of 1930* as contravening basic fairness principles and the special care provisions of Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[126] The effect of the law, which the United States does not dispute, means foreign exporters always need four votes to win a threat of injury determination while domestic petitioners only ever need three. The United States responds that the tie vote provision is strictly a matter of internal decision-making that does not interfere with individual commissioners' exercise of special care.

63. The United States response boils down to one point: that Articles 3.8 and 15.8 only address "substantive obligations" that, in this case, individual USITC Commissioners must abide by when conducting the threat of injury analysis; in the US view, the Anti-Dumping and SCM Agreements provide complete discretion as to the "internal-decision making procedure" of how the USITC adds up individual votes and comes to a final decision.

64. Nowhere does the text of Articles 3.8 and 15.8 draw a line between substantive and procedural conduct. On the contrary, these provisions explicitly refer to both the "consideration" of threat of injury measures and the "decision" itself related thereto. Hence, meaning must be given to this, pursuant to the principle of effective treaty interpretation (*effet utile*) and Article 31.1 of the VCLT. The Panel cannot read either "considered" or "decided" out of the WTO agreements, nor can it equate "considered" with "decided" on the assumption that they mean the same thing.

65. "Consider" is defined as "*To view or contemplate attentively, to survey, examine, inspect, scrutinize*".[127] "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".[128] Hence, even if "considered" may refer to (or even be limited to) the ITC's substantive consideration of the requirements under the SCM Agreement, the term "decided" unequivocally includes the way the ITC as a body brings the question of applying or not applying countervailing measures in threat of injury situations "to a resolution or conclusion", that is, including the way the ITC resolves a tie vote in those situations. By limiting Articles 3.8 and 15.8 to "substantive analysis"[129] the United States reads the word "decided" out of the Anti-Dumping and the SCM agreements.

66. WTO members must exercise "special care" not only in their substantive analysis or consideration, but also in how the final determination is "decided". Indonesia does not contest, in this dispute, that the individual USITC members may have cast their individual vote after considering the matter "with special care". That is not the issue in dispute. Indonesia claims that the way US law tallies these individual votes to come to a final "decision" in the event of a 3 to 3 vote is contrary to the "special care" obligation. As Canada points out in its third party submission[130], this "special care" obligation in Articles 3.8 and 15.8 must be interpreted in the light of the "objective examination" requirement in Articles 3.1 and 15.1 which, according to the Appellate Body, mandates an "examination *process*" that "must conform to the dictates of the basic principles of good faith and fundamental fairness" and precludes investigating authorities from conducting their investigation "in such a way that it becomes more likely that, as a result of the … evaluation *process*, they will determine that the domestic industry is injured".[131] As Canada puts it, the "structural bias" of the US tie vote rule "blatantly favours petitioners and prejudices respondents", "cannot be consistent with the obligation to conduct an 'objective examination'" and

[126] See Indonesia FWS, paras. 133-165. The relevant provision of United States law has been codified at *19 U.S.C. § 1677(11)(B)*.

[127] Oxford English Dictionary, online at http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid.

[128] Oxford English Dictionary, online at http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid.

[129] US FWS, para. 313.

[130] Canada, Third Party Submission, paras. 39-44.

[131] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, paras. 193 and 196 (emphasis added).

is also "manifestly inconsistent with the obligation to exercise 'special care' in the context of threat of injury determinations".[132]

67. The US relies on the Appellate Body report in *US – Line Pipe*. But that decision reversed a panel finding that the ITC should have issued discrete safeguard determinations on either serious injury or threat of serious injury. It is in that context that the Appellate Body finding that the Agreement on Safeguards "does not prescribe the internal decision-making process" for safeguard determinations must be read. Moreover, Indonesia is not arguing that the Anti-Dumping or SCM agreement mandate a specific "internal decision-making process", be it a unitary decision by a single entity or individual, or a decision by a multi-member body. WTO members are, indeed, free to pick either option. What Indonesia claims, however, is that once a WTO member has decided to make determinations by a multi-member body (as the US did), and decides to put 6 members on that body, to then mandate an affirmative finding of threat of injury even if the votes are tied 3 to 3, is *not* a determination "decided with special care".

68. To accept the US artificial bifurcation between "substance" and "procedure" would imply that WTO members can set up a multi-member body to make threat of injury determinations and then decide that all determinations by that body will be presumed affirmative as soon as one individual on, for example, a 15 member body decides in favour of petitioners. It is hard to see how such determinations would be "decided with special care". If a WTO member decides, like the US did, to give decision-making power to a body composed of 6 individuals, acting in a commission, it cannot then mandate an affirmative determination by that body as soon as one of these 6 individuals considers there is a threat of injury, even if that one individual is contradicted by the other 5. Yet, that is exactly what the US argument in this dispute would allow for.

69. "Special care" in threat of injury cases implies both an absolute standard and a relative one as compared to present injury determinations. In absolute terms, and irrespective of what happens in present injury cases, threat decisions must be made not using standard due diligence and attention, but additional, extra care or protection. Stating that one side (petitioners) only need three votes to win, the other side (exporters) need four, simply does not meet this heightened standard. The obligation of "special care" implies also extra carefulness as compared to present injury cases. This extra or special care can be expressed in many ways, both substantive and procedural. It does obviously not mandate (as the EU third party submission seems to imply) that for threat cases respondents must win with fewer votes than what they normally need in present injury cases. Indonesia is not claiming here that USITC voting rules in threat cases must be skewed in favour of respondents or be more favourable to respondents than in present injury cases. The only claim Indonesia is making in this dispute is that mandating an affirmative threat of injury determination where USITC votes are tied 3 to 3 is systematically discriminating petitioners and anything but a decision taken "with special care". For the US to state, at para. 349 of its FWS, that "there is nothing partial … about the manner in which the Commission resolves tie vote situations" is simply not credible.

VI. CONCLUSION

70. Indonesia brought this case not only to redress several U.S. violations of its WTO obligations but because Indonesia believed it had been treated unfairly. In the USDOC proceedings, USDOC inaccurately portrayed Indonesia as providing standing timber to paper manufacturers at distorted prices. As Indonesia has demonstrated, nothing could be further from reality.

71. USDOC found Indonesia's log export ban was designed to promote downstream industries in spite of the clearly expressed purpose of the law to prevent illegal logging. The fact that the law may not have been 100 percent successful is not evidence of a hidden intent but, rather, the pervasive nature of the problem the law is trying to solve.

72. Perhaps the most remarkable and most disturbing USDOC finding concerns the express claim by USDOC that the Government of Indonesia broke its own law by allowing an affiliate to buy back debt. As Indonesia has demonstrated, USDOC cites no actual evidence this occurred, just two speculative sentences from a single newspaper article.

[132] Canada, Third Party Submission, paras. 44 and 47.

73. In the USITC proceedings, one of the unfavorable factual findings the Indonesian exporters faced was not because of a subsidy that Indonesia bestowed on them, but because of a subsidy the United States government was taking away from its domestic industry.

74. Finally, Indonesia challenges a provision of U.S. law that always operates in favor of the U.S. domestic industry and against exporters/respondents. The law, not the Commissioners, determines a threat of injury exists.

75. Indonesia submits that as much as this case is about violations of U.S. WTO obligations, it is also about basic questions of fairness.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. INDONESIA'S ARGUMENTS CHALLENGING USDOC'S FINDINGS THAT THE PROVISION OF STANDING TIMBER AND THE LOG EXPORT BAN PROVIDED INPUTS AT LESS THAN ADEQUATE REMUNERATION ARE BASELESS AND SHOULD BE REJECTED

A. Indonesia's Factual Arguments with Respect to the Operation of the Standing Timber Program and Log Export Ban Are Not Supported by the Evidence That Was Before USDOC in the Underlying Investigation

1. ***Indonesia's arguments about stumpage licensing and royalties relate to financial contribution, not LTAR, and are not supported by record evidence.*** For the first time at the panel's December 6, 2016 meeting, Indonesia asserts that it provided only land access, and not standing timber, to the extent that logging companies cultivated timber under government concessions rather than clearing pre-existing timber. This argument is not germane to issues of adequacy of remuneration, but instead Indonesia essentially argues that USDOC analyzed the wrong financial contribution. As the United States has explained, however, Indonesia has not presented a claim under Article 1.1(a) and accordingly Indonesia has no basis for asking the Panel to examine issues related to financial contribution. Second, Indonesia points to no record evidence in the Coated Paper investigation that supported this assertion. For example, Indonesia did not raise USDOC's supposed "fundamental misconception of the nature of the alleged subsidy program" during the entirety of the underlying investigation. The Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as reviewer of agency action" and not as "initial trier of fact."

2. Indonesia's new argument is contradicted both by record evidence and prior representations by Indonesia. USDOC learned in the underlying investigation that logging companies can obtain timber from GOI land in three ways: harvesting pre-existing timber from the natural forest, clear-cutting pre-existing timber to establish an area as a future plantation, or harvesting cultivated timber on a plantation. Whether timber is pre-existing or cultivated, the harvesting company must pay species-specific "PSDH" cash stumpage fees as a royalty for harvesting the timber. It is this stumpage rate that USDOC was examining for consistency with market principles. The GOI regulated timber plantations in a manner consistent with providing standing timber. To obtain an "HTI license" to operate a timber plantation on GOI land, a logging company must meet a number of regulatory requirements and pay a concession fee. Rather than payment of a lease based on a given acreage, the concessionaire pays stumpage fees on the volume of wood harvested from the land. GOI officials accompany logging company officials into the fields at the time of the harvest to check the accuracy of the company's volume reporting. The GOI retains title to the standing timber cultivated by private companies until the applicable stumpage fees are paid. Only then are the logs officially the property of the logging company and permitted to exit the collecting area. The royalties are tied to stumpage, not land use. GOI "provided" standing timber even where it was grown by the concessionaire. USDOC understood the nature of the GOI's financial contribution, and characterized it in a manner consistent with the fact that the GOI provided both cultivated and pre-existing timber. For instance, USDOC stated that the GOI "allowed timber to be harvested from government-owned land," and noted the percentage of the harvest during the period of investigation attributable to or accounted for by government land. These conclusions were clearly articulated in the determination. To determine whether standing timber provided a benefit, USDOC properly assessed whether the GOI's stumpage fees were set in accordance with market principles. The factors identified by USDOC in its analysis of distortion of the market for standing timber apply equally to both pre-existing and cultivated timber. The GOI administratively set the applicable PSDH fee, which applied equally to pre-existing and cultivated timber, without regard for market principles. Therefore, USDOC analyzed the correct measure and the relevant factors in its assessment of whether the market is distorted so that recourse to an out-of-country benchmark was necessary.

3. ***Contrary to Indonesia's assertions, USDOC considered all relevant pricing information***. The Appellate Body has explained that the investigating authority's analysis of whether in-country prices provide a proper benchmark "will vary depending upon the circumstances of the case … including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record." Pursuant to Article 12.1 of the SCM Agreement, investigating authorities may require "Interested Members and all Interested Parties" to supply evidence, and must ensure that such parties have notice and "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." The SCM Agreement does not obligate investigating authorities to collect data from non-interested parties, who in any event lack the incentive to respond.

4. USDOC asked both the GOI and APP/SMG to report stumpage fees paid for timber on private land. Neither responded to these questions with information on such fees. The GOI stated that it did not collect price information on timber harvested from private land. APP/SMG reported payments to the GOI of PSDH, DR, and PSDA fees, and none to private owners. APP/SMG provided a partial response to a separate USDOC question regarding whether APP/SMG had an arrangement to harvest private timber, and to indicate whether the arrangement was with an unaffiliated party, and if so, to provide a copy of the relevant contracts and other documents. APP/SMG responded that its cross-owned company Wirakarya Sakti, PT (WKS) "purchased a small quantity of logs from private individuals in villages from the Jambi region, who individually grow trees on their private land" around the perimeter of WKS' plantations. APP/SMG did not identify whether these individuals were affiliated with it, and did not provide any documentation regarding the arrangement. Neither did APP/SMG report any actual payments to such private individuals. APP/SMG responded to the initial questionnaire's remaining questions that applied both to arrangements for timber harvested from public and private land as if the private arrangement did not exist.

5. In the first supplemental questionnaire, USDOC asked whether APP/SMG's initial questionnaire response had included "the total fees paid or total fees accrued for all timber harvested by APP/SMG cross-owned companies in the POI." In response, APP/SMG provided "detailed payment data for the timber harvested during annual 2008," which again did not reflect any payments to private individuals by WKS. Accordingly, the purported price of 20,000 IDR per ton of acacia to private individuals was 1) based on "a small quantity"; 2) was not reflected in the stumpage payment records APP/SMG provided to USDOC; 3) was not substantiated by any contract or other documentation; 4) was not confirmed to be arms-length; and 5) was based on an atypical type of commercial activity – i.e., was arranged merely because the private individual's land abutted the cross-owned company's plantation. In addition, APP/SMG did not characterize the payment as a stumpage fee, instead stating that it was a "pure rental payment," while providing conflicting information regarding whether it was the private individuals or WKS that grew the timber. The information had limited probative value and was of questionable reliability. Neither APP/SMG nor the GOI argued that the information should be considered with respect to evaluating the viability of using an in-country price as a benchmark.

6. The Issues and Decision Memorandum summarized the key issues and evidence among a record spanning thousands of pages, and did not purport to discuss each and every bit of information on the record, especially information of little probative value, and for which no argumentation was submitted. Consequently, there is no basis for Indonesia's statement that USDOC "had information on in-country prices but chose not to examine it."

7. The other purported evidence of in-country prices that Indonesia says USDOC failed to consider was not on the record of the underlying countervailing duty investigation. Rather, Indonesia has submitted to the Panel documents pertaining to APP/SMG affiliates' sales and purchases of logs, which was presented in the *antidumping* duty investigation of coated paper from Indonesia *but not in the CVD investigation.* Indonesia has no legal basis for arguing that USDOC somehow failed to comply with the SCM Agreement by not considering a document never filed in the CVD proceeding.

8. USDOC did not, as Indonesia argues, "refuse to consider evidence relating to factors other than government market share." Indonesia fails to identify a factor or facet of the domestic market that USDOC refused to consider. The mere existence of a private price does not establish that such a price is market-determined or otherwise suitable as a benchmark, particularly where the record has been analyzed and found to be replete with evidence of market distortion and the

government's role is "so predominant that price distortion is likely and other evidence carries only limited weight."

9. ***Indonesia's explanation for its claim that wood chips were not within the scope of the log export ban is inconsistent with its statements to USDOC and is of no relevance.*** As Indonesia concedes, its case brief and questionnaire response incorrectly identified wood chips as being excluded from the ban under a 2007 regulation, i.e., Government Regulation No. 6 of 2007. Because Indonesia had also stated, and USDOC had verified, that the 2007 regulation had not been implemented, USDOC reasonably determined that that wood chips remained subject to the log export ban. Indonesia never informed USDOC of its view, shared for the first time in the response to the Panel's questions that wood chips did not fall within the scope of the 2001 decree reinstating the prohibition on log exports. Similarly, it did not offer the explanation of Indonesia's HS codes that it has provided the Panel. USDOC was informed that the 2008 decree providing for the export of timber chips and the underlying 2007 regulation, were not yet in effect at its on-site verification, it had no basis to conclude that the GOI permitted export of "timber chips." Additionally, whether wood chips were covered by the ban during the period of investigation has little relevance. USDOC did not countervail APP/SMG's purchases of wood chips, or any other downstream product. Those products are distinct with distinct market considerations.

B. Indonesia's Economic Theories About Whether Its Provision of Standing Timber and Log Export Ban Suppressed Log Prices and Distorted the Market Are Not Supported by Qualitative or Quantitative Analysis

10. Indonesia's arguments lack any analysis or facts – empirical or otherwise – to support them. Without proof and analysis, this exercise is hypothetical and academic. The issue here is not whether new economic theories can be developed and elaborated during a WTO proceeding, but a question of whether USDOC's determination was based on record evidence and adequately explained. And here, the record evidence speaks for itself. USDOC examined log prices, which refute Indonesia's theories because they show that Indonesian log prices remained well below prevailing regional prices. USDOC also noted that the volume of log imports into Indonesia was negligible. In examining the export ban specifically, USDOC further found that had the ban not been in place, domestic log customers would have had to compete with foreign buyers.

C. Indonesia Has No Basis for Claiming That USDOC Ignored Evidence or Did Not Act in Good Faith

11. USDOC issued unabridged questionnaires (and multiple supplemental questionnaires), conducted verification, and addressed the respondents' comments in detail. Indonesia fails to identify what additional process it should have received from USDOC. It is entitled to disagree with USDOC, but that USDOC found the GOI's ownership of virtually all forest land significant on its merits does not indicate that USDOC was "blinded" to other evidence. Similarly, it is entitled to disagree with USDOC's conclusions considering the viability of using log import prices to Indonesia as a benchmark, but that does not indicate that USDOC gave the proffered evidence "no weight." Indonesia's own data provided empirical support for the benchmark that USDOC employed to evaluate adequacy of remuneration. Indonesia was required to provide complete, accurate responses to USDOC's questions, and accordingly, its excuse that it did not correct USDOC's supposed misconception of the financial contribution element of the provision of standing timber program because the *CFS* decision indicated that "USDOC was not interested" rings hollow. Indonesia's argument that USDOC did not address private, domestic prices for standing timber is foreclosed by its failure to build a record that would support its claims. In the context of a case in which APP/SMG expended significant effort to develop evidence concerning import prices to Indonesia and argue for their applicability, it strains credulity for Indonesia to argue that reliable domestic private prices were available, but it did not attempt to provide them because of a formality like some perceived instruction from USDOC.

II. INDONESIA'S ACCOUNT OF USDOCS ACTIONS IN APPLYING FACTS AVAILABLE IS NOT LEGALLY OR FACTUALLY SOUND

A. Indonesia's Description of the Factual and Procedural Circumstances Surrounding USDOC's Actions is Erroneous

12. Contrary to Indonesia's assertions, during the CCP investigation, Indonesia did not cooperate to the fullest, and did not provide complete and timely information. Further USDOC did not change course midstream to inquire into areas unrelated to the investigation and into which Indonesia could not possibly have been expected to look. These matters are made clear by the timeline of events the United States presented during the first Panel meeting.

13. In addition, as Indonesia itself acknowledges, USDOC inquired about only four debt sales out of thousands of transactions the IBRA conducted or oversaw. Indonesia's complaint that the supplemental questionnaire contained multipart questions and required translation of documents provided is not convincing. To the contrary, these are standard elements of any questionnaire in a trade remedies investigation. Furthermore, the records should have been timely found − especially given that although IBRA had dissolved, Indonesian law required recordkeeping for a period of years that extended further back than the IBRA's dissolution.

14. Moreover, the limited information on the additional terms of reference and bid protocol that Indonesia provided to USDOC in response to the supplemental questionnaire actually appears to undercut Indonesia's assertions. The document revealed that the "PPAS 2" terms of reference were different than those which governed the APP/SMG sale. This is shown by a comparison between the "PPAS 2" terms of reference submitted in response to the supplemental questionnaire and the APP/SMG terms of reference and accompanying bid protocol. The United States also notes that document containing the "PPAS 2" terms of reference represented only one document from one of four other PPAS transactions. Other necessary information remained missing, namely, the actual bidding documents. The identities of the bidders in the other PPAS sales revealed nothing about how the IBRA approached possible affiliation in those other transactions. The bidding documents themselves were needed to understand whether the IBRA approached possible affiliation any differently in the APP/SMG debt sale compared to other sales under the PPAS.

B. Indonesia Urges the Panel to Adopt Legal Standards That Have No Textual Basis.

15. Article 15 of the AD Agreement is plainly irrelevant. The measure at issue here is USDOC's countervailing duty determination, and Indonesia's claims are under the CVD Agreement.

16. Indonesia has no basis for asserting that Article 27 modifies Article 12.7 in the event the subsidizing Member is a developing country. Interpretation of treaty provisions begins with the ordinary meaning of the terms themselves. Nothing in Article 27 states that Article 12.7 is somehow modified. Likewise, nothing in Article 12.7 of the SCM Agreement incorporates or cross references the obligations of Article 27 of the SCM Agreement. Indonesia's proposed interpretation is also unsupported by relevant context. To the contrary, the relevant context further supports that Article 27 does not modify Article 12.7. In particular, the relevant context here is the detailed nature of the obligations set out in Article 27. That is, the drafters of Article 27 were explicit and precise in stating which provisions in the SCM Agreement would be affected by the developing country status of a subsidizing Member. Article 27 contains technical modifications and qualifications to other provisions of the SCM Agreement for developing country Members' subsidies subject to certain disciplines under the Agreement, including some pertaining to the conduct of countervailing duty proceedings. It contains certain express carve-outs and qualifications to application of other articles of the SCM Agreement to developing country Members, but contains no limitation or prohibition to an investigating authority having resort to Article 12.7. Had the SCM Agreement drafters wished to include a qualification to Article 12.7 for developing country Members in Article 27, they could have done so. The fact that Article 27 is narrowly tailored with regard to "[s]pecial and [d]ifferential [t]reatment" for developing country Members, reflects the drafters' intention that "special regard" be given to developing country Members under certain, but not all, provisions of the SCM Agreement. Any "special regard" to be given to developing country Members under the SCM Agreement is contained in Article 27's specific rules. This conclusion

comports with the interpretive principle that "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."

17. The United States also disagrees that "Article 15 of the Anti-Dumping Agreement applies *mutatis mutandis* to the application of CVD measures under the SCM Agreement, including Article 12.7 thereof." There is nothing in Article 12.7 that references or incorporates any aspect of AD Agreement Article 15; there is therefore no legal basis to − as Indonesia argues − apply Article 15 of the AD Agreement to one or more provisions of the SCM Agreement. Even were Indonesia's argument to be construed as asserting that Article 15 is context for Article 12.7, the argument fails. Both agreements have "special and differential treatment" provisions. In this circumstance, it would be inappropriate to augment the rules in one agreement by using the "context" of another set of rules in another agreement to add substantive rights or obligations to the first agreement. Second, a circumstance in which the AD Agreement has provided relevant context for the SCM Agreement is one in which both agreements have provisions on use of facts available. The AD Agreement, of course, has a separate annex on facts available, which is absent in the SCM Agreement. In those circumstances, the Appellate Body has looked to Annex II of the AD Agreement for "additional context" in interpreting the facts available provisions of the SCM Agreement. Thus, the situations of use of facts available and special and differential treatment are different. Where both agreements have explicit text of their own governing a specific matter, Indonesia has provided no basis for reading into the SCM Agreement an obligation that may exist in the AD Agreement. Even with respect to Annex II of the AD Agreement, the Appellate Body has explained that it is not incorporated into the SCM Agreement. We also agree with the European Union that "Indonesia has [not] specifically explained or demonstrated how its status as a developing country Member would be of relevance in the context of this particular dispute under Article 12.7" of the SCM Agreement.

18. ***Indonesia is incorrect in arguing that USDOC's decision to allegedly refuse to accept certain documents on the affiliation issue at verification was inconsistent with obligations under the SCM Agreement.*** In any event, Indonesia never attempted to submit these documents at the verification, or afterwards. Additionally, Indonesia's argument is undercut by the fact that Article 12.6 supports USDOC's decision to cancel verification regarding the debt buy-back, and, by implication, USDOC's choice not to solicit the missing information at verification. Article 12.6 of the SCM Agreement is prefaced by the word "may." In the context of analyzing the similarly-worded Article 6.7 of the AD Agreement, panels have found that this term is precatory; it "makes clear that on-the-spot verifications in the territory of other Members are permitted, but not required." Based on the presence of "may" in Article 12.6, USDOC was not required to perform an on-the-spot verification of Indonesia under the SCM Agreement. The United States agrees with certain third parties' statements that an investigating authority has the discretion to accept new or clarifying information at verification, but this is not required in every instance.

19. The Appellate Body explained in *China − HP-SSST (Japan)* that "[c]ircumstances will vary, and investigating authorities have some degree of latitude in deciding whether to accept and use information submitted by interested parties during on-the-spot investigations and thereafter." USDOC appropriately exercised its discretion in deciding to cancel verification pertaining to the debt buy-back. When Indonesia failed for the second time to provide the bidding documents for the other PPAS sales, there remained only a few days prior to the outset of verification. The United States explained why it was important to have these documents prior to verification. Furthermore, only a few months remained at that point to complete the investigation. During that time, USDOC had to conduct verification of Indonesia and of APP/SMG, prepare and issue verification reports for both respondents, solicit and accept case and rebuttal briefs from interested parties, analyze all arguments raised in those briefs, and prepare the final determination and respond to all arguments raised by interested parties in their briefs.

20. An investigating authority may satisfy itself as to the accuracy of submitted information "by conducting on the spot investigations . . . '[i]n order to verify information or to obtain further details.'" This obligation does not extend to "circumstances provided for in paragraph 7." The Appellate Body has explained that "it would not be possible for investigating authorities to 'satisfy themselves as to the accuracy of the information' in circumstances where interested parties refuse access to, or otherwise do not provide, such information." The Panel should not interpret an investigating authority's obligations to include seeking "further details" regarding information necessary to its determination, where the party in possession of that information previously failed to provide it within a reasonable time. If this were required, then an authority would need to

satisfy itself as to the accuracy of *information that was never provided*, and this would nullify the qualifying language in Article 12.5 of the SCM Agreement.

III. INDONESIA'S ARGUMENTS IN SUPPORT OF ITS SPECIFICITY CLAIMS CONTINUE TO LACK MERIT

A. Indonesia's Article 2.1(c) Claims Conflate the Separate Prongs of a Subsidy Analysis

21. ***The requirements of Article 2.1(c) are not superfluous.*** Indonesia charges that none of the subsidy measures at issue meet the requirements of de facto specificity because they do not confer a benefit. Whether a benefit has been conferred is a separate legal element from specificity. Indonesia simply ignores that USDOC examined the issue of benefit at length in its determinations, in USDOC's benefit analysis, not in its specificity analysis. Also, Indonesia's argument appears to be premised on the contention that for a subsidy program to exist, the subsidizing Member must have adopted a specific written plan. This premise is incorrect. Nothing in the SCM Agreement states or even implies that a subsidy program must be embodied in a written plan.

22. ***Indonesia Misconstrues the Appellate Body's Specificity Findings in* US – Countervailing Duties (China)**. The Appellate Body was looking at unwritten measures in *US – Countervailing Measures (China)*. The situation here is fundamentally different. The subsidies here are evidenced by specific documents laying out a "plan or scheme." When that is the case, there is no additional need to look for additional evidence of a program in the form of a "systematic series of actions." The United States also notes that even in the absence of written evidence, it is an overstatement to conclude that an investigating authority must in every case find a "systematic series of actions" to support its definition of a subsidy program. This reads too much into the Appellate Body's finding in that case.

23. The provision of standing timber for less than adequate remuneration, the log export ban, and the debt buyback, all constituted written plans or schemes. There was no need for USDOC to additionally consider whether each subsidy constituted a "systematic series of actions" under Article 2.1(c). With respect to the provision of standing timber for less than adequate remuneration and the log export ban, both programs were reduced to writing.

24. With respect to the debt buy-back, the subsidy itself − the financial contribution and benefit − stems from the forgiveness of debt, regardless of whether it violated Indonesian law. Both the existence of the regulation and its violation informed the "subsidy programme" analysis. Other relevant documents also described the program. The IBRA issued "terms of reference" in "early December 2003," which "sets out the process for bidder registration, due diligence, and submission of bids." The IBRA also developed "a specific set of bid protocols for the bidding," which "described in some additional details the specific procedures that would be followed for the auctioning of the APP/SMG debt." Those protocols also prohibited debt purchases from affiliated companies. Thus, collectively, these documents constituted a written plan or scheme.

25. Because affiliate Orleans purchased affiliate APP/SMG's debt, only the specific company debtor is "eligible to receive that same subsidy." If an unaffiliated company had purchased APP/SMG's debt, there would be no financial contribution or benefit because there would be no debt forgiven. The debt buy-back's structure demonstrates that, as a matter of fact, it was de facto company-specific. A subsidy that is limited to one enterprise is clearly one that is provided to "a limited number of certain enterprises" as defined in Article 2.1(c). Indeed, USDOC explained that "[a] benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it." Indonesia's contention that the buyback was not company-specific because it consisted of "multiple companies" misses the point. The terms of reference list the debt of "the APP Group," "which comprises" five companies and their subsidiaries. All of these companies form the "APP Group" (or APP/SMG) and the debt for sale was aggregated. For purposes of Article 2.1(c), APP/SMG constituted a "single company" whose debt was for sale.

26. ***Indonesia's suggestion that a written plan or scheme must evince an intent to confer a benefit is incorrect***. The Appellate Body has acknowledged that "overarching purpose" is a factor to consider in determining whether a measure is part of a subsidy scheme, but it does not follow that a subsidy cannot be de facto specific under Article 2.1(c) unless the intent of the

measure is clear in the plan or scheme. Contrary to Indonesia's argument, the SCM Agreement does not require that a finding of specificity is contingent upon intent. Even where the written instruments do not on their face evince the exporting Member's explicit intention to grant a subsidy, those documents can still evince a written plan or scheme if those instruments actually convey financial contributions that confer benefits upon certain enterprises or industries. That is the case here. As discussed above, the licensing regime pertaining to the provision of standing timber for less than adequate remuneration is set forth in writing through regulations and other government documents that make it possible for certain enterprises to acquire standing timber. The log export ban compelling logging entities to sell domestically is set forth in law. The PPAS bid package that enables buyers to bid on the debt and the regulation and terms of reference that prohibit an affiliated sale all are reduced to writing.

B. USDOC Identified the Relevant Jurisdiction of the Granting Authority for the Debt Buyback Pursuant to the Chapeau of Article 2.1

27. Indonesia's remaining arguments are unpersuasive. The jurisdiction of the granting authority was "'discernible from the determination.'" Indonesia does not dispute that USDOC identified the particular agency within Indonesia that provided the financial contribution, the IBRA, which Indonesia reported "was responsible for administering the program," and which "the GOI created." These findings are all that is relevant.

28. Prior to its opening statement at the first Panel meeting, Indonesia never pointed to the newspaper article as supporting its specificity arguments in any way. In any event, the points Indonesia cites are not mutually exclusive. USDOC determined that certain information on the record of this investigation, including newspaper articles and a World Bank report, could be relied on as available facts under Article 12.7.

IV. USITC'S THREAT DETERMINATION IS CONSISTENT WITH ARTICLE 3 OF THE AD AGREEMENT AND ARTICLE 15 OF THE SCM AGREEMENT

A. The Commission's Vulnerability Analysis Was Consistent With Article 3 of the AD Agreement and Article 15 of the SCM Agreement

29. The Commission's analysis of the domestic industry's vulnerability to material injury in the imminent future was fully consistent with the non-attribution requirement under ADA Article 3.5 and SCMA Article 15.5. In *Egypt – Rebar*, the panel recognized that "[s]olely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset."

30. The Commission thus logically prefaced its threat analysis with a consideration of the condition of the domestic industry at the end of the period of investigation, which was necessarily the point of departure for its consideration of the likely impact of subject imports on the industry in the imminent future. The conclusion that the domestic industry was vulnerable was based on industry's condition at the end of the period of investigation. In its material injury analysis, moreover, the Commission expressly found that subject imports contributed to the domestic industry's declining performance during the period of investigation. The Commission noted that the domestic industry's financial indicators in 2009 may have been even worse but for the temporary existence of black liquor tax credit payments in that year. The Commission considered the black liquor tax credit (BLTC) as a one-time event that might have obscured the full extent of the domestic industry's vulnerability in 2009. The Commission found that non-renewal of the credit eliminated a factor that had contributed to lower domestic like product prices in 2009, thereby obscuring the contribution of subject imports to price depression in that year. Given this, and the moderation of declining demand, the Commission found that subject imports would be a key driver of domestic prices in the imminent future.

31. After it found the domestic industry vulnerable, the Commission then assessed whether the domestic industry was threatened with material injury by reason of subject imports, and in doing so considered other known causal factors and ensured that any threat from such factors was not attributed to subject imports. Indonesia's argument appears to constitute nothing more than opposition to consideration of the vulnerability of a domestic industry in connection with threat

analysis. Indonesia's logic, moreover, seems to suggest that a finding of threat cannot be made absent a finding of present injury – if vulnerability could be found only based on injury from subject imports, present injury caused by subject imports would be a pre-requisite.

B. The Commission's Non-Attribution Analysis is Consistent With Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement

32. The Commission separated and distinguished the effects of other known factors that were at the same time threatening the domestic industry, consistent with the non-attribution requirement of ADA Article 3.5 and SCMA Article 15.5. At the outset, the ITC established a causal link between subject imports and the threat of material injury. The Commission then explained that subject imports threatened injury independent of other known causal factors. While recognizing that the moderate decline in demand projected for 2011 and 2012 would limit the domestic industry's sales opportunities and restrain price increases to some extent, the Commission reasoned that the decline would not discourage subject imports from significantly increasing their penetration of the U.S. market, given their aggressive pursuit of market share during the period of investigation despite declining demand, substantial new capacity to produce increased subject imports, and the attractiveness of the U.S. market. The Commission also explained that the projected moderation of declining demand in 2011, coupled with the non-renewal of the black liquor tax credit – which depressed prices in 2009 – would likely make the significant increase in aggressively-priced subject imports a key driver of domestic like product prices in the imminent future, likely depressing them to a significant degree.

33. The Commission explained that the likely effects of nonsubject imports on the domestic industry were not of a magnitude that would render insignificant the likely effects of subject imports, based on the declining market share of nonsubject imports during the period of investigation and their higher prices relative to subject imports. Indeed, the Commission identified no injurious effects caused by nonsubject imports during the period of investigation, and respondents did not argue that nonsubject imports posed any threat of material injury.

34. Indonesia concedes that respondents did not argue before the Commission that expiration of the BLTC would injure the domestic industry in the future. Rather, before the Commission, respondents asserted that the BLTC's existence depressed prices, and the Commission found that the credit's existence depressed prices in 2009. The Commission also noted that the credit would no longer do so for subsequent years as it was not renewed. The Commission also noted that the domestic industry's financial indicators in 2009 may have been even worse than they were but for the temporary existence of BLTC payments in that year – a one-time factor that would not repeat. To the extent that the tax credits yielded any benefit to the industry, the Commission considered the BLTC as a one-time event that might have obscured the full extent of the domestic industry's vulnerability in 2009.

C. The Commission's Threat Analysis Was Based on Facts and Changes in Circumstances

35. Indonesia's criticisms of the Commission's findings are based on a misreading of the Commission's determinations, and do not withstand scrutiny. The Commission thoroughly explained how APP's establishment of Eagle Ridge supported its finding that subject import volume was likely to increase significantly in the imminent future. The Commission noted that in November 2008, APP indicated to Unisource, a major purchaser, that it intended to double its exports of CCP to the United States from 30,000 short tons a month to 60,000 short tons per month, and was willing to reduce its already low prices to do so. After Unisource declined APP's offer and dropped APP as a supplier in 2009, APP invested in the establishment of Eagle Ridge as a means of retaining and growing its U.S. market presence.

36. The Commission supported with facts its conclusion that subject producers had both the ability, through excess capacity, and the incentive to increase significantly their exports to the United States. Relying on authoritative RISI data, the Commission found that Chinese producers would likely possess 740,000 metric tons of excess capacity in 2011, equivalent to 815,709 short tons, even after satisfying all projected consumption growth in China and Asia. Given this massive level of excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009, Chinese producers could have significantly increased their exports to the United States from 2009 levels

using a fraction of their excess capacity. Chinese producers themselves projected that exports to third country markets would increase by only 43,578 short tons, or 7.5 percent, between 2009 and 2011.

37. The record facts also supported the Commission's conclusion that subject producers had the incentive to use their excess capacity to increase significantly their exports to the United States. In particular, the Commission found that APP, the leading exporter of CCP from China and Indonesia, was even in 2008 determined to double its exports to the United States from 2008 levels by reducing its already low prices, and established its own distribution network, Eagle Ridge, to retain and increase its market presence. The Commission also found that the United States represented a highly attractive market to subject producers because prices in the United States were higher than in China or other Asian markets, the U.S. market was large and well understood by subject producers, and the prevalence of spot sales and private label products would facilitate their increased shipments to the U.S. market.

38. The Commission's finding that subject imports were likely to depress domestic like product prices to a significant degree was also supported by facts in the record. The Commission found that significant subject import underselling was likely to continue in the imminent future, thereby increasing demand for subject imports, because subject imports pervasively undersold the domestic like product throughout the period of investigation. In considering the likelihood of price depression, the Commission first noted that domestic like product prices were flat in interim 2010, and that the moderate decline in demand projected over the next two years meant that increased subject import volume could not be absorbed by additional demand. The Commission then explained that the reduced influence of factors other than subject imports on domestic prices, meant that subject imports would become a key driver of U.S. market prices in the imminent future, noting that subject imports led domestic prices downward between 2008 and 2009. The Commission further found that subject producers were likely to use aggressive prices to increase their exports to the United States significantly and recoup market share lost in interim 2010 based on their substantial excess capacity, the attractiveness of the U.S. market to subject producers, APP's stated intention to double its exports to the U.S. market from 2008 levels using low prices, and establishment of Eagle Ridge. As a consequence, the Commission concluded that subject imports would likely pressure domestic producers to lower their own prices to compete for sales and defend their market share, particularly given the prevalence of spot sales and the propensity of purchasers to quickly switch suppliers.

39. Nor was there any inconsistency between the Commission being unable to find significant adverse price effects in the present injury context and the Commission's price effects findings in its affirmative threat determinations. The Commission found that the moderation in declining demand and expiration of the black liquor tax credit would leave the likely significant increase in subject import volume as a key factor influencing market prices going forward. Coupled with the likely intensification of subject import competition, these developments left the Commission's well able to find that subject imports were likely to depress domestic prices to a significant degree in the imminent future.

40. The Commission cited two changes in circumstances that made it likely that subject import competition would intensify in the imminent future. First, the Commission found that the massive excess capacity that Chinese producers were likely to possess in 2011, equivalent to 815,709 short tons or 36.3 percent of apparent U.S. capacity in 2009, would give them the ability and the incentive to increase their exports to the United States significantly. Second, the Commission found that towards the end of the period of investigation, APP expressed its determination to double exports to the United States over 2008 levels by reducing its already low prices, and established Eagle Ridge to retain and expand its sales in the U.S. market.

41. Facts also supported the Commission's finding that the likely significant increase in subject import volume would come partly at the domestic industry's expense. The Commission found that the significant increase in subject import volume during the period of investigation coincided with a decline in the domestic industry's U.S shipments. The Commission found that subject producers were likely to use aggressive pricing in order to fill their massive excess capacity and recoup the market share lost during the interim period due to the pendency of the investigations, including 6.8 percentage points of market share lost to domestic producers. The Commission explained, moreover, that subject producers were likely to do so, given, among other things, their massive excess capacity, the attractiveness of the U.S. market, the establishment of Eagle Ridge, and

APP's determination even in 2008, before the massive increase in Chinese producers' capacity, to use lower prices to double exports from 2008 levels (this doubling in and of itself would result in an increase in APP shipments equivalent to over 109 percent of the volume of non-subject import shipments in 2009). The ITC concluded that, in a market with slightly *declining* demand, the likely significant increase in subject import volume, driven by significant subject import underselling, would likely force domestic producers to either lower their prices or relinquish market share to subject imports. The Commission had ample reason for concluding that the likely significant increase in subject import volumes above the levels occurring during the period of investigation was likely to cause material injury.

D. The Commission Complied With the Special Care Requirement of Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement

42. For the same reasons that Indonesia fails to establish a *prima facie* case that the Commission violated ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7, Indonesia fails to make a *prima facie* case that the Commission breached the special care requirement.

V. THE TIE VOTE PROVISION OF THE U.S. STATUTE IS NOT INCONSISTENT WITH ARTICLE 3.8 OF THE ADA AND ARTICLE 15.8 OF THE SCM AGREEMENT

43. In *U.S. – Line Pipe*, the Appellate Body made clear that the internal decision making process of a Member is within the discretion of that Member, and hence not subject to dispute settlement. As the Appellate Body explained in *Thailand – H Beams*, "the focus of Article 3 [of the ADA] is thus on *substantive* obligations that a Member must fulfil in making an injury determination." Not only do the ADA and SCMA not "mandate a specific 'internal decision-making process,'" they do not limit Members' discretion in establishing decision-making processes at all. As the Appellate Body explained, it is "the determination itself" that matters, and it "is of no matter … whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member."

44. The tie vote rule is not like a substantive test that automatically excludes all low priced sales. The tie vote rule operates—if at all—only *after* the substantive analysis and reasoning has occurred. Nor is there any relevance to the fact that the tie vote rule determines the outcome in the infrequent circumstances where it applies. Countless aspects of an authority's structure and decision-making procedure can occasionally affect the outcome of an investigation. But they do not change the fact that the determination's substance is the analysis in the determination itself.

45. The Vienna Convention on the Law of Treaties (VCLT) is clear that the terms of an agreement must be read "in their context" and not in isolation. Viewed in context, the meaning is clear. Special care in "consider[ing] and decid[ing]" the application of measures in cases involving threat of injury requires firm analytical grounding of both an investigating authority's consideration of whether a domestic industry is threatened with material injury and of the authority's ultimate decision on whether such a threat exists. In other words, the investigative and analytical steps that result in a measure must reflect special care both in "consider[ing]" often complex factual records, as well in decid[ing] the ultimate issue of whether material injury is in fact threatened. Special care in both "considering" and "deciding" can thus be reflected in the substantive analysis of the determination. The term "decided" in no way suggests that the reach of the provision extends beyond substantive analysis.

46. When the context of the provision is considered, it is clear that the provision requires special care in the substance of the decision, and that Articles 3.8/15.8 are not addressed to the procedure used for ascertaining the final result of a vote. The "special care" provisions of each agreement are parts of SCMA Article 15 and ADA Article 3. The drafting history confirms the reading that is apparent from an understanding of the words in context and in light of the structure of the agreement: that the special care provisions concern the substantive analysis underlying a threat determination and not an investigating authority's decision-making procedure.

47. The absurd results that would follow from Indonesia's position further confirm that special care does not apply to voting procedure. A reading of the special care provision suggesting coverage of vote tabulation would necessarily imply structural requirements for any investigating authority assigned to assess the existence of threat. It would, for instance, call into question the

WTO-consistency of any authority in which a higher level official has the authority to override a negative recommendation on threat from one or more lower level officials. A view of "special care" as implicating decision-making procedure could not logically be limited to the context of multi-Member authorities, and thus would instead necessarily cover the process used by a single-decision maker to gather and accept or reject the views of staff. Indonesia's understanding of how special care is reflected would also require intrusive examination of the decision-making process of individual decision-makers. If Articles 3.8 and 15.8 discipline the manner in which the ultimate decision-making act is undertaken, determinations of threat of material injury could be subject to challenge in WTO dispute settlement on grounds such as that the decision-maker was not fully engaged in consideration of the matters at issue. Such an absurd and intrusive result clearly could not have been what the drafters intended. Indonesia's proposed understanding of Articles 3.8 and 15.8 also implies that a threat of injury determination requires a higher voting majority than an injury determination.

48. The vote aggregation practices of four other Members cited by Indonesia are irrelevant. Indonesia's attempt to defend the point's legal relevance is unavailing, and reflects misunderstanding of the VCLT and the Appellate Body's understanding of the import of post-agreement developments. Further, the variety of approaches to resolving or avoiding tie votes taken by different Members simply serves to underscore that the internal decision-making process is not prescribed by the ADA or SCMA. Equally meritless is Indonesia's defense of its invocation of developing country status.

49. Nothing about the tie vote provision precludes the application of special care in any proceeding involving threat of material injury. In the event that the Commission makes an affirmative threat determination, regardless of the vote tally, those Commissioners voting in the affirmative will draft a written determination explaining their reasons, which may then be reviewed by a WTO panel for consistency with the ADA and SCMA. Accordingly, even in the event of a tie vote, nothing in the tie vote provision would prevent the Commission from issuing an explanation for its affirmative threat determination that is fully consistent with the ADA and the SCMA, including the special care requirement. For Indonesia's as-such claim against the tie vote provision to succeed, Indonesia would have to establish that the tie vote provision compels the Commission to violate the special care provision. Yet the Commission retains the discretion under the tie vote provision to issue affirmative threat determinations that comply fully with the special care provision, even in the event of a tie vote. Looking to the substantive analysis ensures that trade remedies have an appropriate substantive underpinning, regardless of the number of members of a multi-member investigating authority that endorsed the determination.

50. A requirement to use "special care," even if included in some hypothetical treaty provision explicitly addressed to the process of administrative decision making, would not rule out a procedure in which a tie vote resulted in a certain outcome. Under the ordinary meaning of "special care," there would be no basis to conclude that a tie-breaking rule somehow means that a State had provided some sort of reduced level of care in its administrative process. An administrative decision does not reflect any less care just because it results from a tie-breaking procedure. A tie vote rule is simply a means of anticipating and resolving in a uniform manner a possible situation (that is, a tie vote) that could occur when a decision is taken by an even number of people.

51. Indonesia's panel request asserts no claims under AD Agreement Article 3.1 or SCM Agreement Article 15.1. The claim that Canada seeks to have the panel resolve is thus fundamentally different from the one raised by Indonesia, and outside the panel's terms of reference. In any event, there is nothing about the tie vote provision that is inconsistent with the "objective examination" requirement in Articles 3.1 and 15.1. Like the remainder of Articles 3 and 15, this requirement does not serve as a discipline on decision-making procedure. Moreover, the tie vote rule certainly causes no "disregard[]" for any vote when applied in the threat context. The rule is simply a means of anticipating and resolving in a uniform manner a possible, albeit not common, situation that could occur when a decision is taken by an even number of people.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INDONESIA'S CLAIMS REGARDING THE COUNTERVAILING DUTY DETERMINATION ARE WITHOUT MERIT

52. Whatever name Indonesia wishes to use for its stumpage program, USDOC's well-reasoned determination properly found that this program confers a subsidy. This stumpage program is very similar to the description of how Canadian provinces administered their stumpage programs in *US − Softwood Lumber IV*. The panel and Appellate Body in that case found that Canada's stumpage regime constituted a subsidy. The fact that Indonesia now relies upon − namely, that plantation owners may undertake tasks associated with growing and harvesting cultivated timber (versus "pre-standing" timber) − changes nothing. Moreover, it is irrelevant whether the land for which concessions were granted is degraded. Rather, the salient point is that without the government's provision of timber for less than adequate remuneration, the logging companies would have had to procure it at market price. This conclusion was drawn from the record evidence and was reasoned and adequate.

53. USDOC, in accordance with Article 12.1 of the SCM Agreement, asked the interested parties to provide evidence of private sales that could be used to establish in-country benchmarks. Indonesia responded that it did not collect or maintain information that could be used for that purpose − i.e., the only data available was aggregate data, not species-specific data. APP/SMG provided partial information about a single, private arrangement, but its payment records do not support the existence of this arrangement. Furthermore, APP/SMG never provided any underlying documentation that USDOC requested or argued that this arrangement was relevant to USDOC's benchmark analysis. Clearly, Indonesia and APP/SMG are the parties in the best position to provide data that pertains to activity in their jurisdiction and sourced from primary sources in the Indonesian language. The GOI and APP also had direct access to other parties with whom they have commercial relationships or ties; and in APP/SMG's case, its own company records. Indonesia has not explained why USDOC is likely to succeed where the interested parties failed through requests for information from non-interested parties who have no obligation or incentive to cooperate. By analogy, the Appellate Body's finding in *US − Wheat Gluten* is that investigating authorities do not have "an open-ended and unlimited duty to investigate all available facts that might possibly be relevant." The question is not whether Indonesia might have conducted the investigation differently, or weighed the facts differently, but whether the USDOC provided a reasoned and adequate explanation for its determinations.

54. With regard to Indonesia's Article 12.7 claim, it must be recalled that the bidding documents pertaining to the other PPAS sales were necessary for USDOC to have a baseline for understanding whether the IBRA's due diligence procedures − of which there were no formal written procedures − were applied more deferentially for the APP/SMG debt sale than other sales. USDOC was only requesting those documents because Orleans' ownership information was already missing from the record. Thus, USDOC relied on the news articles, report, and expert summary evidence in finding the companies affiliated. They must be viewed collectively and not piecemeal for what they represent. Read together, this evidence suggests that the IBRA was allegedly allowing debtors to buy back their debt through third parties, and with specific regard to the Orleans transaction, that there were "long-running creditor suspicions that APP/SMG has been surreptitiously been buying back its debt." Indonesia also claims that the independent expert summary is, on its face, speculative. Indonesia bases this claim on the diction in the report that the expert "believed the speculation" that affiliated parties are buying back debt. The word "speculation" in this excerpt refers to others' opinions, which was one element of the evidence examined by the expert. Nothing in the report, which examined diverse sources of information, supports the view that the expert's own opinion was speculation.

55. Indonesia has not challenged the evidence upon which USDOC relied in finding the debt buyback de facto company-specific. Indonesia's Article 2.1(c) challenge in this dispute is whether a subsidy program exists as a precursor to USDOC's de facto specificity analysis. With regard to the issue Indonesia has challenged here, the subsidy program's existence in the form of a plan or scheme is comprised of the terms of reference, the bid protocol, and other documents stipulating the conditions of sale.

II. SYSTEMIC CONCERNS WITH INDONESIA'S ARGUMENTS

56. First, Indonesia raises arguments that are tantamount to requests for a *de novo* review of the factual record. Second, Indonesia relies on supposed legal principles that are not applicable to the facts in this dispute, and/or that lack any basis in the covered agreements. Third, Indonesia's arguments and theories have continued to change during the course of these Panel proceedings and are untimely.

III. INDONESIA'S CLAIMS REGARDING THREAT OF MATERIAL INJURY ARE WITHOUT MERIT

57. Indonesia's second written submission reinforced that Indonesia's claims concerning the threat determination rest on misreading of the ITC's well-reasoned determination and on misunderstanding of the WTO disciplines concerning threat. The ITC based its finding that the industry was vulnerable on the industry's weak condition at the end of the period of investigation, according to most measures of industry performance. Having established the baseline condition of the industry, the Commission proceeded to consider the questions of threat and non-attribution. It is obvious that the impact of subject imports going forward will depend on the baseline condition of the domestic industry. Indeed, it is unclear as a matter of logic how one could construct a hypothetical, imaginary domestic industry where the only factor bearing on its performance was subject imports. Indonesia's alternative approach is also inconsistent with the requirement that investigating authorities address threat in the context of the economic factors set out in ADA Article 3.4 and SCMA Article 15.4 "to establish a background against which to evaluate the effects of future dumped and subsidized imports." Acceptance of Indonesia's position would as a practical matter eliminate the possibility that an investigating authority could ever find threat of material injury.

58. Indonesia's second written submission contains numerous mischaracterizations of what the Commission actually found. These mischaracterizations form the foundation for Indonesia's claims that the Commission's analysis was flawed, or failed to account for relevant factors. As explicitly set forth in the determination, the Commission based its vulnerability finding on the domestic industry's declining performance during the POI, and not on declining demand or expiration of the BLTC. The Commission, moreover, noted connections between subject imports and the domestic industry's declining shipments and prices. It is simply not the case that BLTC was an aspect of "normal market conditions." To the contrary, the credit paid benefits in only one year, 2009, and the Commission properly took that into account. During the investigation, Indonesian respondents themselves argued that the credit harmed the domestic industry in 2009 by reducing prices, and the Commission agreed.

59. The Commission considered the totality of the evidence and issued a well-reasoned determination. APP itself stated − before losing the Unisource account − that its goal was to double shipments to the United States by reducing its already low prices. APP lost Unisource as a distributor after Unisource refused to assist, and Eagle Ridge provided a vehicle to accomplish APP's stated goal notwithstanding the loss of Unisource. That APP did not immediately realize its goal of doubling shipments in no way detracts from the Unisource affidavit. Likewise, that the domestic industry's market share gain in 2010 resulted from preliminary duties in no way undermines its significance, nor was that gain remotely the only basis for the Commission's view that subject import volumes would increase significantly in the absence of orders.

60. Facts supported the Commission's conclusion that subject imports were likely to increase significantly in the imminent future, in significant part at the expense of domestic producers. The Commission found that subject imports adversely affected the domestic industry during the period of investigation. The Commission explained that subject producers would be in a better position to take sales from domestic producers in the imminent future than they were during the 2007-2009 period due to clearly foreseen and imminent changes in circumstances; namely, the excess capacity that Chinese producers were likely to possess in 2011, and APP's establishment of Eagle Ridge. The Commission found it likely that subject producers would use their massive excess capacity to increase exports to the United States significantly based on their familiarity with the large U.S. market; the higher prices available there, relative to China and other markets in Asia; the prevalence of spot sales and private label products in the U.S. market, which would enable subject producers to quickly gain market share; and crucially, APP's stated intent to double its exports to the U.S. market by reducing its already low prices. Because demand was projected to

decline, the significant increase in subject import volume that was likely would necessarily take sales from existing suppliers, including the domestic industry.

IV. THE ITC'S TIE VOTE PROVISION IS FULLY CONSISTENT WITH AD AGREEMENT ARTICLE 3.8 AND SCM AGREEMENT ARTICLE 15.8

61. The special care obligation applies to the substantive requirements for a determination of threat; it does not relate to an investigating authority's decision-making procedure. The specific placement of the special care provisions within the AD and SCM Agreements, as well as the text of other portions of those agreements, make this clear. Nothing in the text of the ADA or SCMA requires investigating authorities to make affirmative threat determinations by majority vote, or to treat tie votes in any particular way. This is confirmed by the fact that, where the AD and SCM Agreements do discuss procedural matters − in connection with things other than decision-making − they are explicit. It is further confirmed by the drafting history. The process of determining the outcome where members of a multi-member body disagree is, as the Appellate Body explained in *US − Line Pipe,* "entirely up to WTO Members in the exercise of their sovereignty."

62. "View[ing]," "contemplat[ing] attentively," "survey[ing]," "examin[ing]," "inspect[ing]," and "scrutinize[ing]," all involve non-decisional consideration and analysis. This understanding of consideration is confirmed by the language of Articles 3.7/15.7, which notes factors which must be "consider[ed]." By contrast, "deciding" − "bring[ing] to a resolution or conclusion" − involves assessment of the ultimate question. In other words, the special care requirement speaks to both the substantive analysis of the ultimate question and the way that underlying or intermediate issues were viewed, contemplated, or scrutinized. Understanding that the requirement is about substantive analysis is fully consistent with the wording of Articles 3.8/15.8 even when it is taken in isolation.

63. The logic of Indonesia's arguments would not permit a unitary decision-maker to determine threat. A single, politically motivated individual's vote would result in a threat determination in that context − even if countless professional staff serving under the political decision maker concluded that threat had not been established. However, the number of decision makers at an investigating authority or the means of resolving disagreements among them are not addressed by the AD Agreement or SCM Agreement. Those agreements have detailed provisions on the substance of determinations to ensure that they are adequately grounded.

EXECUTIVE SUMMARY OF SELECTED RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING

I. "AS APPLIED" CLAIMS WITH RESPECT TO THE USITC'S THREAT OF INJURY DETERMINATION

64. This proceeding is a review of whether the ITC based its threat determination on positive evidence on the administrative agency record, and whether ITC presented a reasoned and adequate explanation for its determination. This proceeding is not a *de novo* review, where disputing parties are entitled to present oral testimony on what may or may not have occurred with respect to the market. The Commission's threat analysis was supported by facts and clearly foreseen and imminent changes in circumstances.

65. Indonesia's claim that the Commission breached the special care requirement is derivative of its claims of "specific violations" under ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7. Having failed to establish a *prima facie* case that the Commission committed any of the specific violations alleged under ADA Article 3.5 and 3.7 or SCMA Article 15.5 and 15.7, Indonesia has also failed to establish a *prima facie* case that the Commission breached the special care requirement. There is no basis for suggesting that Articles 3.8 or 15.8 require an investigating authority to resolve some percentage of issues − or "key" issues − in an AD or CVD investigation in favor of respondents instead of resolving each based on analysis of the facts and application of the applicable legal standards. To the extent that Indonesia is attempting at this point to assert any independent argument with respect to the Commission's analysis of any subject, the moment for doing so has long passed. But in any event, the Commission cited ample factual support for its analysis.

II. "AS SUCH" CLAIMS UNDER ARTICLES 3.8 OF THE ANTI-DUMPING AGREEMENT AND 15.8 OF THE SCM AGREEMENT CONCERNING SECTION 771 OF THE TARIFF ACT OF 1930

66. With respect to ADA Article 3.8 and SCMA Article 15.8, the obligation is not that the investigating authority must reach a negative determination in the presence of finely balanced facts, but rather that the investigating authority is to consider and decide the application of duties in threat cases with special care. Deciding with special care in the context of finely balanced facts does not imply reaching a negative determination. Rather, one decides with special care by thinking carefully about the decision − evaluating relevant considerations thoroughly to reach a well-reasoned conclusion. So long as an investigating authority's decision reflects this kind of reasoning, there is no reason that "special care" would require one outcome or another in a situation presenting finely balanced facts.

67. To prevail on an as-such claim, the complaining Member has the burden of establishing that the statute mandates a WTO-inconsistent result, and that absolutely no discretion is providing to administering authorities to take decisions that comply with WTO rules. The text of the agreement requires consideration and decision with special care; what it does not require is that special care be reflected in each step of the decisionmaking process. So long as the obligation to apply special care at some point in the decisionmaking process is not *precluded* by the statutory provision at issue, then there is no legal basis for finding that the statutory provision requires a breach of the obligation stated in Articles 3.8/15.8. The U.S. statute at issue does not forbid the Commissioners from exercising special care in their threat determinations. Accordingly, and leaving aside that a tie breaking rule does not involve "special care" or "regular care", the U.S. statute cannot be in breach of Articles 3.8/15.8, because the statute fully allows the decisionmakers to apply "special care" in every other aspect of the process. Any finding that Articles 3.8/15.8 applied to *each step* in the decisionmaking process, and that a tie vote rule was somehow inconsistent with "special care," would amount to substantial over-reach by the WTO dispute settlement system. It would not be credible for the DSB to find that ADA Article 3.8 and SCMA Article 15.8 could be expanded from beyond their plain text to support a determination that the United States' choice to apply special care at the stage of Commissioners' decisionmaking was somehow inconsistent with the ADA and SCMA.

68. The "special care" provisions of the ADA and SCMA do not discipline decision-making procedure. However, even if ADA Article 3.8 and SCMA Article 15.8 were deemed to set out a requirement that could be satisfied by means of a particular decision-making rule, the tie vote provision would still be fully consistent with the discipline, as there would be no need for any particular decision-making rule − and certainly no need for any particular rule concerning the handling of tie vote situations − to satisfy the requirement. The rule would be satisfied in any particular case provided that the requisite analytical rigor had been applied.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF BRAZIL

INTRODUCTION

1. In Brazil's oral statement and answers to the Panel's questions, the following aspects were highlighted:

i) Whether export restrictions can be considered to accord a financial contribution in the sense of Article 1.1(a) of the SCM Agreement

2. In Brazil's view WTO law does not authorize equating the economic effects of export restrictions applied to inputs with the granting of a subsidy to the upstream market. While it is likely that export restraints will result in increased supply of the restrained good, this is not sufficient, in and of itself, to establish government entrustment or direction.

3. Brazil does dispute that that export restraints can be associated with a subsidy. Whether there is entrustment or direction in the provision of goods subject to export restraints needs to be assessed on a case-by-case basis and cannot be inferred from a mere reference to the declared policy objective of the export restriction of adding value to a Member's exports.

ii) To which extent the predominant presence of the Government in the market would authorize the rejection of in-country prices as benchmark under Article 14(d) of the SCM Agreement

4. Price distortion is a determinant factor to allow the departure of an in-country benchmark, as recorded by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. However, a mere finding of the government's substantial presence in a given market is not a definitive feature to allow for the use of an out-of-country benchmark.

5. In cases where the government has a predominant presence in the market as a provider of goods, it is likely that private suppliers would align their prices with those of the government in order to maintain their market share. However, the distortion analysis that the investigating authority has to make should be performed on a case-by-case basis. Other evidence could be analysed when market conditions, including quality, availability, marketability, transportation and other conditions of purchase or sale, as described in Article 14(d) of the SCM Agreement, would allow a private supplier to deviate from the government given price and still maintain its market share.

6. Where the dominant presence of the government occurs in the initial stages of the chain of production, investigating authority should demonstrate the passing through effect in order to disregard domestic prices of the input. It is necessary to assess whether the price paid by the downstream producer for the input was effectively lower than it would have been in the absence of the government's dominant presence in the initial stages of the production chain. In some circumstances, the subsidy to the upstream producer may not result in lower prices charged to the downstream producer. Therefore, as per Article 14(d) of the SCM Agreement, there would not be a provision of goods for less than adequate remuneration, and thus no benefit would be conferred to the downstream producers.

iii) The standard under Article 12.7 of the SCM Agreement with regard to the use of "facts available"

7. Brazil considers that the "adverse facts available" methodology recurrently employed by the United States is based on a biased interpretation of Article 12.7 of the SCM Agreement. Article 12.7 does not grant investigating authorities a blanket authorization to "select" facts available to worsen the situation of the respondents. Although it indeed was conceived to "ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation"[1], as the United States recalled, it does not permit departing from the facts available to arrive at biased conclusions, in disfavour of the investigated party. The objective and

[1] US FWS p. 102.

rationale of Article 12.7 is to allow for the replacement of the missing necessary information with a view to arriving at an accurate determination[2].

8. It follows that the correct legal standard of this provision requires, first and foremost, a comparative evaluation of all available evidence with a view to selecting the best information that "reasonably replaces the information that an interested party failed to provide"[3]. The proper application of Article 12.7 also requires a connection between what is required from the investigated party and what is necessary to carry out an investigation. Although the investigating authority enjoys some level of discretion in conducting an investigation, it is not allowed to submit questions that are irrelevant or extraneous to the matter at hand, that are "not necessary", and then, when informed about such irrelevance or impertinence, simply reaches the conclusion that an interested party was non-responsive or that there was no cooperation, thus triggering the use of adverse facts available. The conditions under Article 12.7 to rely on "facts available" are limited and must be interpreted accordingly. As the Appellate Body had clarified "Article 12.7 is not direct at mitigating the absence of 'any' or unnecessary" information but rather is concerned which overcoming the absence of information required to complete a determination".[4] The information required in this sense must be reasonable and in line with the necessity of the investigation, otherwise the burden to the investigated country is heavier than it should be.

9. Moreover, in what concerns the submission of new evidence at verification, Brazil considers that additional clarifications may be submitted at the beginning of the on-the-spot verification and may be taken into account whenever it can be verifiable without excessive difficulties. Additionally, investigating authorities are required to consider new evidence presented at verification whenever this evidence represents the "best information available". As the Appellate Body has explained in para 4.419 of *US – Carbon Steel (India),*

> "It would frustrate the function of Article 12.7, namely, to "replac[e] information that may be missing, in order to arrive at an accurate subsidization or injury determination", if certain substantiated facts were arbitrarily excluded from consideration. In addition, we note that the participants agree that Article 12.7 should not be used to punish non-cooperating parties by choosing adverse facts for that purpose. Rather, the participants agreed at the oral hearing that the function of Article 12.7 is to replace the missing "necessary information" with a view to arriving at an accurate determination."

10. In Brazil's view, investigating authorities would not be justified in refusing to accept a piece of evidence at verification because it was arguably not provided in a timely fashion, and, at the same time, relying on evidence that do not "reasonably replace the information that an interested party failed to provide".[5] Therefore, the need to rely on the "best information available" when making a determination serves as relevant context for the interpretation of the obligations of investigating authorities regarding whether to allow new evidence during verification.

11. Furthermore, the failure to provide information must be assessed in light of the amount and the specificity of information required by investigating authorities. In other words, the investigating authority should evaluate the amount of information required, the efforts applied by the interested party in gathering this information and what was in fact presented. The investigating authority must take into account that companies and Members may face some difficulties, such as complex organizational structure or legal constraints that may hinder the timely provision of the information requested.

12. In situations such as these, and considering the extent of the information requested, the assessment of compliance with Article 12.7 should take into consideration the effort applied by the interested party to provide the information. When investigating authorities require a large amount of information, an equivalent large amount of effort will be required from a given country or company to provide such information. Thus, even though the information supplied may not be ideal in all aspects, this should not justify its disregarding - even less so resorting to facts that have no connection with the investigation - provided that the interested party has acted to the best of its ability.

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[2] AB Report. *United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.419.

[3] US FWS p. 109.

[4] AB Report US – *United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.416.

[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice* (DS 295), para. 294.

iv) The analysis of causation and change of circumstances in the threat of injury determination

13. On the matter of causation, Brazil finds that considering the lifting of preliminary duties among the factors that account for a change in circumstances is difficult to reconcile with a strict analysis of causation. For one thing, whenever preliminary duties are lifted, an increase of imports into the domestic market is likely to happen. It is only natural that market will progressively return to the situation before the imposition of the duties. In this situation, one cannot properly speak of a change in circumstances.

14. In addition, Brazil considers important that the Panel assess whether differences between the market situation and the behaviour of subject imports during the period of investigation, on the one hand, and the situation predicted to take place in the future, on the other hand, would amount to a change in circumstances. As Brazil sees it, the data on the record[6] show that the market situation and the behaviour of subject imports were not expected to experience significant change. One could notice that a similar situation to the one foreseen for the future periods has already happened during the period of investigation. In said period, none of the effects relied on by the Commission for the positive determination of threat of injury, price suppression and gain of market share for the subject imports, occurred.

v) The obligation to consider and decide with special care in Article 3.8 of the ADA and 15.8 of the SCM

15. Brazil is of the opinion that voting procedures are an internal matter left to the discretion of each WTO Member, and, as a rule, are not directly addressed by the ADA and SCM Agreements. This understanding was corroborated by the Appellate Body in *US – Line Pipe*. However, Brazil considers that what is at stake in this dispute are not voting procedures *per se*, but rather the determination of the step in the US process of analysis in which the application of anti-dumping measures should be considered and decided with special care.

16. In Brazil's view, the ADA distinguishes the moment of fulfilment of substantive requirements and the moment of the application of anti-dumping measures. The text of the ADA substantiates this understanding. First, the negotiators of the ADA chose to treat these two topics into two separate articles: article 5, Initiation and Subsequent Investigation; and article 9, Imposition and Collection of Anti-Dumping Duties. As Article 9.1 specifies, once the requirements for the imposition of duties are fulfilled, there are still two separate decisions to be made: whether or not to impose an anti-dumping duty and the amount of the anti-dumping duty to be imposed (full margin or lesser duty).

17. For reference, in the Brazilian trade remedies system, this separation can be clearly observed, since there are two different institutions responsible for the anti-dumping, subsidies and safeguard investigations and for the decision about the application of the measures.

18. Brazil acknowledges the legislation of some Members, such as the US, may not distinguish between the moment of the fulfilment of the substantive requirements and that of the application of the measure. However, this does not exempt those Members from the obligation of considering and deciding the application of anti-dumping duties with special care, even if it happens in the same moment as the fulfilment of the substantive requirements.

19. What is before the Panel is whether the Commission is voting on the application of anti-dumping measures or on the fulfilment of substantive requirements. The former would entail the duty to exercise special care. As the Appellate Body has found "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury"[7]. Independently of when those two determinations happen (in the same moment in time or not), the duty to exercise special care still exists.

20. Based on this understanding, Brazil finds that a rule providing that a tie vote shall always result in the application of anti-dumping duties seems not to be in line with the obligation to exercise special care under Article 3.8 of the ADA.

[6] U.S. FWS, Exhibit US-1, table C-3.
[7] *US – Softwood Lumber VI (Panel)*, para. 7.33.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF CANADA

I. INTRODUCTION

1. Canada intervenes in these proceedings because of its systemic interest in the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) that are raised in this dispute. Canada's submissions address the following issues: the rejection of in-country prices as benchmarks under Article 14(d) of the SCM Agreement, the treatment of export restraints as a subsidy, the use of facts available under Article 12.7 of the SCM Agreement, and the inconsistency of the United States International Trade Commission (USITC) tie vote rule with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

II. THE UNITED STATES DEPARTMENT OF COMMERCE ACTED INCONSISTENTLY WITH ARTICLE 14(D) OF THE SCM AGREEMENT IN RESORTING TO AN OUT-OF-COUNTRY BENCHMARK

2. With respect to the appropriate benchmark, in the Coated Paper investigation the U.S. Department of Commerce (USDOC) rejected in-country standing timber prices and instead resorted to Malaysian pulp log export prices. It justified its decision summarily in the following two sentences: "the [Government of Indonesia] clearly plays a predominant role in the market for standing timber. As such, we determine that there are no market-determined stumpage fees in Indonesia".

3. This justification is insufficient to warrant resort to an out-of-country benchmark under Article 14(d) of the SCM Agreement.

4. The Appellate Body has indicated that an investigating authority must establish price distortion in a market based on the particular facts underlying each countervailing duty investigation before rejecting in-country prices on that basis. Even where evidence indicates that the government is a predominant supplier of goods, evidence other than government market share must be considered and analyzed before an investigating authority can conclude that there has been market distortion. This may include evidence regarding the structure of the relevant market, the type of entities operating in that market and their respective market share, any entry barriers, and the behavior of the entities operating in that market.[1]

5. The Appellate Body has therefore cautioned against equating government predominance with price distortion. Yet, this is precisely what the USDOC did in the Coated Paper investigation.

III. EXPORT RESTRAINTS DO NOT CONSTITUTE A SUBSIDY

6. Regarding export restraints, Canada notes that Indonesia's panel request does not contain a claim that the USDOC improperly found that Indonesia's log export ban constitutes a financial contribution. Accordingly, Canada requests that the Panel make no findings with respect to whether Indonesia's log export ban constitutes a financial contribution.

7. That said, Canada disagrees with the U.S. position that export restraints can constitute financial contributions.

8. Previous panels have considered different forms of export restraints. None has found them to constitute financial contributions. Moreover, the panel in *US – Countervailing Measures (China)*

[1] Depending on the factual circumstances of a given case, different types of evidence may establish that the remaining portion of the market is not influenced by the predominant presence of the government as a supplier. For example, evidence regarding the manner in which the government sets prices for the goods it supplies may indicate that the market is not influenced by its predominant presence. In particular, a government that sets prices in a market-determined manner, such as through an auction mechanism, would not, despite its predominant presence in the market, distort private prices in that market.

indicated that allegations predicated solely on the existence of the export restrictions and their suppressing effect on prices were an insufficient basis on which to even initiate a countervailing duty investigation.

IV. THE USE OF FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT IS SUBJECT TO RIGOROUS CONDITIONS

9. In terms of the use of facts available in the Coated Paper investigation, Canada notes that the USDOC applied adverse facts available to conclude that Asia Pulp and Paper/Sinar Mas Group (APP/SMG) and Orleans were affiliated companies, which would mean that APP/SMG was effectively allowed to repurchase its own debt at a discounted rate.

10. When deciding whether the USDOC's use of facts available is consistent with Article 12.7 of the SCM Agreement, the Panel should pay particular attention to four elements of the applicable legal framework.

11. First, Article 12.7 limits the use of facts available to replace necessary information that is missing from the record of the investigation. In this case, the Panel must determine whether detailed information pertaining to unrelated Government of Indonesia debt sales was necessary for ruling on the affiliation between APP/SMG and Orleans.

12. Second, Article 12.7 requires that, before being entitled to apply facts available, an investigating authority afford a reasonable period of time for an interested party to respond to a request for information. The Panel must therefore determine whether the USDOC gave enough time to the Government of Indonesia to respond to the requests for information at issue.

13. Third, in applying Article 12.7 to the facts of this case, the Panel should also take into account the fact that Article 12.7 is informed by the due process rights set out under Article 12 of the SCM Agreement, and the detailed guidance on the application of facts available set out under Annex II of the Anti-Dumping Agreement. In accordance with these protections, an investigating authority must take due account of the difficulties experienced by interested parties in supplying information requested. An investigating authority must also refrain from rejecting information on the basis that it is not ideal in all respects, if an interested party acted to the best of its ability.

14. Fourth, whether an investigating authority is affirmatively required to accept information provided at on-site verification will ultimately depend on the factual circumstances of a given case. The Appellate Body in C*hina – HP-SSST (Japan) / China – HP-SSST (EU)* indicated that an investigating authority's latitude to reject information provided at on-site verification or thereafter is constrained by the obligation to ensure that the information relied upon is accurate and by the legitimate due process interests of the parties to an investigation.

V. THE TIE VOTE PROVISION OF THE U.S. STATUTE IS INCONSISTENT WITH ARTICLE 3.8 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.8 OF THE SCM AGREEMENT

15. With respect to Indonesia's "as such" claim, Canada recalls that U.S. law mandates that all tie votes among the six USITC Commissioners are resolved in favour of an affirmative finding of injury. This rule is inconsistent with key provisions of the Anti-Dumping and SCM Agreements concerning injury investigations.

16. Article 17.6 of the Anti-Dumping Agreement mandates that investigating authorities conduct an "unbiased and objective" evaluation of facts on the record. With respect to injury determinations, Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement also require that investigating authorities base their findings on positive evidence and conduct "an objective examination" of the relevant evidence concerning dumping or subsidization.[2]

[2] The "objective examination" obligation in Articles 3.1 and 15.1 is contextually relevant to the special care requirement in Articles 3.8 and 15.8 because it informs the operation of all of the substantive rules governing injury determinations in Articles 3 and 15. In other words, the obligation to conduct an objective examination must be read into all of the rules governing injury determinations. This was confirmed by the Appellate Body in *Thailand – H-Beams* and by the panel in *US – Softwood Lumber VI*.

17. The Appellate Body has repeatedly indicated that conducting an "objective examination" entails evaluating facts in an "even-handed" manner without prejudging the outcome of an investigation. It is settled law that an investigating authority must not favour the interests of any interested party, or group of interested parties, when making injury determinations.

18. The tie vote rule cannot be reconciled with the "objective examination" requirement. It effectively creates two different standards for petitioners and respondents that appear before the USITC: affirmative injury determinations only require the support of three USITC Commissioners while negative injury determinations require the support of four. In the event of a tie, the vote of one of the Commissioners in favour of a negative injury determination is effectively disregarded. In Canada's view, this structural bias, which blatantly favours petitioners and prejudices respondents, is clearly inconsistent with the requirement to conduct an "objective examination".

19. With respect to Indonesia's claim under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, Canada submits that a legal rule that precludes an "objective examination" is also manifestly inconsistent with the obligation to exercise "special care" in the context of threat of injury determinations. Indeed, given that the exercise of "special care" presupposes that an investigating authority has already exercised the level of care required when making all determinations of injury, a failure to conduct an "objective examination" in a threat of injury determination also necessarily entails a failure to exercise "special care".

20. Canada recognizes that voting procedures for injury determinations are internal matters left to the discretion of each WTO Member, as neither the Anti-Dumping Agreement nor the SCM Agreement contains specific rules with respect to the organizational structure of investigating authorities. This general principle is consistent with the Appellate Body's decision in *US – Line Pipe*. Yet, in that case, the Appellate Body recognized that while a WTO Member has considerable discretion with respect to the internal organization of its investigating authority, it still must structure its authority and establish its decision-making rules in a manner that results in WTO-compliant determinations. In other words, matters of internal procedure are disciplined to the extent they impact the substance of an investigating authority's final decision.

21. Indeed, accepting the U.S. position that the decision-making procedure at the USITC is immune from the application of the Anti-Dumping and the SCM Agreements would lead to the unreasonable conclusion that it would be permissible for the United States to mandate an affirmative injury determination if only one of the six USITC Commissioners voted for such a determination.

22. This cannot be the case. The obligations pertaining to injury determinations are borne by the investigation authority as a whole. When making a determination, an investigating authority must respect all of the obligations in Articles 3 and 15. Accordingly, if a voting procedure, or any other internal arrangement, prevents the investigating authority from conducting an objective examination and, consequently, from exercising special care, its threat of material injury determination cannot be consistent with the Anti-Dumping and SCM Agreements.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

I. CONCERNING THE ALLEGATION OF USDOC'S FLAWED SUBSIDY DETERMINATION

A. Concerning the alleged inconsistency with Article 14(d) SCM due to USDOC's improper per se determination of price distortion

1. Under Article 14(d) SCM the primary benchmark for the determination of benefit is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions. However, prior Appellate Body Reports have accepted that the market of the subsidizing Member may be so distorted by the government's predominant role in it, that no market conditions in the country of provision exist as the government effectively determines the price at which private suppliers sell the same or similar goods.

2. The EU considers that the extent to which an investigating authority needs to carry out an analysis of the market structure depends on the particular market characteristics. An in-depth market analysis of the market structure is not required in each and every case. The higher the market share of the government the more likely it becomes that the government is predominant and that prices in the subsidizing Member's market are distorted. While an investigating authority must also consider evidence relating to factors other than government market share, such other evidence will carry only limited weight in case of very high government market shares.

3. The EU considers that the Appellate Body's statements in *US – Anti-Dumping and Countervailing Duties (China)* provide for the possibility that an investigating authority may - exclusively based on a government's predominant role - find price distortion, depending on the circumstances of the particular case. This may be the case, for example, where no other evidence is available or where the government is the sole supplier of the good in question or effectively controls private prices, in which case there is no private price available.

4. Market share is a key factor to demonstrate a government's predominance, although not necessarily the only factor. The higher the market share of a government (possibly in combination with other factors), the more likely predominance becomes and the less weight other evidence carries. In situations in which a government has a 100% market share it is predominant and there is also price distortion as there are no private prices. It follows that no price distortion analysis on the basis of in-country data collected by the authority is required.

5. In situations in which a government holds less than 100% but very high market shares (e.g., 90-95%) and is found to be predominant (on the basis of market shares, possibly in combination with other evidence on record), this may also in itself be sufficient to find price distortion in case no other relevant evidence is on record. If other evidence is on record, it must be considered by the authority. No price-distortion analysis on the basis of in-country data collected by the authority is required by the authority to reject in-country prices if predominance can be established.

6. In view of these considerations, the EU takes the position that the Panel may take into account (i) how predominant the Indonesian government's role was, (ii) whether other evidence was available to the USDOC, (iii) how relevant (strong) such other evidence was and (iv) whether the USDOC considered such other evidence. The EU notes that in view of the factual circumstances (notably high market shares) it does not consider that the USDOC was under an obligation to ask for pricing data of private suppliers and government prices in order to carry out a price distortion analysis.

B. Concerning the alleged inconsistency with Article 12.7 SCM due to USDOC's improper application of an adverse inference to find the Indonesian government knowingly sold debt to an affiliate of the debtor in contravention of Indonesian law

7. ***Status as developing country.*** The EU does not consider that Indonesia has specifically explained or demonstrated how its status as a developing country Member would be of relevance in the context of this particular dispute under Article 12.7 SCM. It should not be presumed that the preparation of responses to questionnaires will always be influenced by the development status of a Member. Indonesia did not allege any concrete difficulties arising from its invoked status as a developing Member that would have hindered it from providing the requested information.

8. ***Good faith arguments.*** The EU takes the position that the use of facts available under Article 12.7 is not excluded or restricted in case an interested party is able to provide a good faith explanation (reason) for not being able to provide certain documents (e.g. destruction by fire). Otherwise the purpose of Article 12.7 SCM - to "overcome a lack of information" and to enable investigating authorities to continue with the investigation and make determinations - could be easily nullified through "good faith" arguments e.g. of lost or destroyed documents that will be difficult for investigating authorities to verify and rebut. However, when assessing evidence and when using facts available (including the drawing of adverse inferences), the investigating authority may in its overall analysis take into account the underlying reasons for the non-provision of relevant information.

9. Similar considerations apply in case of "difficulties" encountered by the company in providing information. It is correct that Article 12.11 ADA – which informs Article 12.7 SCM - requires an investigating authority to take "due account of any difficulties experienced by interested parties". There is no guidance in the case law on how such difficulties should be taken into account in practice. The EU considers that practical difficulties could be solved e.g. by providing an extension of the deadline to reply or by limiting the request to information that is strictly necessary, where appropriate. Furthermore, the fact that a party made good faith efforts to provide the information can be taken into account, as explained above, in the overall assessment of the available evidence. However, irrespective of the nature and extent of the difficulties, Article 12.7 remains applicable.

C. Concerning the alleged inconsistency with Article 2.1(c) SCM due to USDOC's failure to demonstrate the existence of a subsidy program

10. The EU notes that the case law cited by Indonesia, according to which an investigating authority must demonstrate the existence of a "plan or scheme" and "systematic series of actions" for a *de facto* subsidy refers to a case in which no "written instrument" existed at all regarding the subsidy. In such situations, the need may indeed arise to prove the existence of a subsidy programme through other means than through direct documentary evidence. However, in situations in which the subsidy programme is manifested in writing, e.g. through laws, decrees or other written documents (here e.g. for the log export ban and the provision of standing timber), there is no need to systematically require, in addition, a plan or systematic actions. The plan and the systematic actions may in such situations be expressed in the documents themselves.

11. The EU would disagree with a proposition that where only one company is eligible to receive the subsidy, there is no need to otherwise base a finding of specificity on the factors listed under Article 2.1(c). The EU sees no basis for such an interpretation in the wording of Article 2.1(c) which makes no distinction between a subsidy granted to one company versus a subsidy granted to more than one company. The phrase "limited number of certain enterprises" also covers the situation of the smallest number, i.e. one.

D. Concerning the alleged inconsistency with Article 2.1 SCM due to USDOC's alleged failure to identify the relevant jurisdiction

12. The EU considers that Indonesia's claim is based on an erroneous reading of the case law. An investigating authority must not in each and every case precisely determine the government entity that administers the subsidy nor, if a central government is administering the subsidy, must it assess the implementation of the subsidy at regional or local level. It suffices if the investigating authority makes an adequate finding whether the jurisdiction covers the entire territory of the Member or is limited to a designated geographical region and this will normally also identify the granting authority. The jurisdiction of the granting authority must be "discernible from the determination". The EU considers that it was clear from USDOC's determination that "GOI" referred to the Government of Indonesia and hence to the national (or central) government as opposed to any local or regional government. The jurisdiction of the granting authority therefore was the entire territory of Indonesia. The EU does not consider that Indonesia's claim under Article 2.1 SCM has legal merit.

II. CONCERNING USITC'S ALLEGED FLAWED THREAT OF INJURY DETERMINATION

A. Concerning USITC's alleged failure to establish causation between the subject imports and the threat of injury under Articles 3.5 ADA / 15.5 SCM

13. The EU considers that the two factors that broke the causal link for present injury are either not present (i.e. the Black Liquor Tax which expired in 2009) or are not present to the same degree (i.e.

the decline in demand which was forecast to be less pronounced for 2010-2012 than for 2007-2009) as regards threat of injury. Hence it could be argued that there was a change in circumstances as required under Article 15.7. However, the EU points out that there is a certain contradiction between the USITC's finding that in 2007-2009 subject imports took away market share from non-subject imports and that in 2010-2012 subject imports will take away market share (also) from domestic producers.

14. The EU considers that the removal of the US Black Liquor Tax − as tax credit temporarily counter-acting the effects of the subsidy − could not be qualified as the genuine and substantial cause of the injury as claimed by Indonesia. At the same time, the lifting of preliminary duties, without more, cannot be considered a change of circumstances within the meaning of Article 15.7 SCM.

15. ***Alleged failure to carry out a "concrete" analysis.*** The EU recalls that under the case law there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidised and non-subject imports respectively. The EU agrees. It does not consider that a "concrete" (i.e. quantitative) analysis was required by USITC.

16. ***Alleged failure to isolate injurious effects.*** The EU recalls that no particular method or approach is prescribed under the case law for the isolation of injurious effects. The EU considers, on the basis of the available information, that USITC's analysis would *prima facie* appear to conform to the requirements of Article 15.5 SCM. The non-attribution factors at issue − notably the predicted modest consumption levels and the non-subject imports - were recognised as possibly causing threat of injury to domestic producers. Their effects were separated and distinguished by USITC from the effects of the subject imports. Ultimately, they were not considered to be so significant as to break the causal link, i.e. detract from the hypothesis that the subsidised imports are causing threat of injury. A qualitative explanation was provided for that conclusion.

B. Concerning the claim under Articles 3.7 ADA and 15.7 SCM that USITC's findings were improperly based on conjecture and remote possibility

17. The EU considers that Articles 3.7 ADA / 15.7 SCM necessarily presuppose a certain degree of speculation regarding a finding of threat of injury as the future, even the imminent future, can never be predicted with absolute certainty. This interpretation is also supported by the texts of Articles 3.7 ADA / 15.7 SCM which state that threat of injury shall not *merely* be based on allegation, conjecture or remote possibility. Whether a finding of threat of injury is "sufficiently" based on facts on record and adequately explained is a question that will have to be determined on a case-by-case basis.

18. As a general matter, the EU considers that, under normal circumstances and absent significant market developments, solid evidence of pricing behaviour in the past may serve as a reasonable indicator of future pricing behaviour as was done by USITC. However, the EU also points out that the USITC's finding that subject imports would gain market share from domestic producers seems to be little supported by the facts as set out in the determinations since USITC found that the subject imports' (and domestic producers') increase of market share in 2007-2009 "came at the expense of non-subject imports".

C. Concerning the claim under Articles 3.8 ADA / 15.8 SCM that USITC did not exercise "special care" in its threat of injury determination

19. The EU recalls that a previous panel stated that an inconsistency under the special care provision of Articles 3.8 ADA / 15.7 SCM could only be invoked as a separate violation under particular circumstances, namely when specific additional or independent arguments would be brought compared to arguments made under the specific ADA / SCM provisions. The EU agrees with this position and does not consider that Indonesia's arguments are sufficiently "independent".

III. CONCERNING THE ALLEGED AS SUCH CLAIM UNDER ARTICLES 3.8 ADA / 15.8 SCM

20. The EU considers that the special care provisions of Articles 3.8/15.8 do not refer to procedural aspects such as voting requirements. Notably, Articles 3.8/15.8 refer to the "consideration" of the − substantive - conditions for threat of injury under Articles 3.7/15.7 and to the − also substantive − discretionary "decision" by an authority whether to impose a measure or not under Articles 9.1/19.2. The texts of Articles 3.8/15.8 do not make reference to any procedural provisions such as Article 6 ADA or Article 12 SCM. Nor can the term "decision" in Articles 3.8/15.8 be interpreted to include procedural decision-making aspects since the term "decision" in Articles 3.8/15.8 and Articles 9.1

ADA/19.2 SCM does not refer to procedural but only to substantive aspects, namely the discretionary power of authorities to abstain from imposing measures (e.g. in view of public interest considerations).

21. Voting procedures are an internal matter that is left to the discretion of each WTO Member. The EU finds implicit support for its position in the fact that even though the SCM and ADA Agreements do provide for certain procedural rules (e.g. Articles 6 ADA and 12 SCM) they do not contain rules as to how authorities must organise their decision/making process. This interpretation is also supported by the Appellate Body in *US – Line Pipe*.

22. By basing its claim on the special care provisions, Indonesia is essentially arguing that in case of injury threat determinations a different (higher) standard must apply for voting requirements than for "normal" injury determinations (e.g. if a 4-3 majority is required for present injury, a 5-2 majority would be needed for threat of injury). Such a position would likely affect the voting systems of almost any Member and cannot be correct.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes the opportunity to present its views as a third party in this case. Turkey is participating in this case because of its systemic interest in correct and consistent interpretation and implementation of the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as "SCM Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining its interest, Turkey will share its views on issues addressed by the United States of America (hereinafter referred to as US) and the Republic of Indonesia (hereinafter referred to as Indonesia) in their first written submissions pertaining to Article 14 (d) of the SCM Agreement.

II. LEGAL INTERPRETATION OF ARTICLE 14(D) OF THE SCM AGREEMENT

3. In its first written submission Indonesia claims that the US Department of Commerce (hereinafter referred to as USDOC) improperly concluded per se that the predominant market share of standing timber from public forests caused a price distortion and failed to determine the adequacy of remuneration based on prevailing market conditions in Indonesia. Thus, according to Indonesia, the use of out-of-country benchmarks, which is the benchmark value for Malaysian exports of acacia pulpwood and mixed tropical hardwood, breached Article 14(d) of the SCM Agreement.[1] Indonesia, specifically underlines that this per se determination tainted the conclusion of the USDOC since it is not legally permissible to reach, without further inquiries, an outcome that the market of the investigated good is distorted for the sole reason that the government acts as the predominant provider.[2]

4. The US, replies in its first written submission that even though there is no threshold to determine whether the market power of the government amounts to a per se price distortion, it is reasonable to conclude that the more predominant a government's role is in the market, the more it is possible to observe distorted prices.[3] Nevertheless, an investigating authority must consider the particular facts of the investigation and analyze factors other than the impact of government market share to determine whether the price distortion is caused by the influence of the government.[4] The US stresses that in-country prices for the good in question is a starting point for the investigating authority and that the authority is not bound to use these prices if they are not determined by market forces due to government intervention. According to the US, the government intervention can be at such a level that it may distort in-country private prices by artificially lowering the prices which the private-providers are compelled to follow.[5]

5. Article 14 (d) provides as follows:

> "The provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

6. Turkey understands that the government may act as a purchaser or provider of goods or services as long as this transaction is not made less (or more in the event of purchase) than the adequate remuneration. Despite this provision, the government has still discretion to sell the

[1] Indonesia's First Written Submission, para. 29.
[2] Ibid, para. 33.
[3] United States' First Written Submission, para. 50.
[4] Ibid, para.51.
[5] US First Written Submission, para. 49.

good/services in question less than the adequate remuneration by taking into consideration that such an option will lead to a "benefit" within the legal framework of the SCM Agreement. Since a separate analysis of benefit and remuneration are not required under Article 14(d), "benefit" will become evident at the point that the investigating authority determines that the provision is made less (or more) than the adequate remuneration.[6]

7. Turkey opines that assessing the influence of the government in the market under investigation is the first step to determine whether the in-country prices are useable to make an "adequate remuneration" analysis. Turkey shares the view that neither the SCM Agreement nor the case law provides a numerical value to be used to judge whether the economic weight of the government providers is at such a level that the prices charged by the government drives the prices of even private-providers out of ambit of unconstrained forces of supply and demand. The case law directs that, in the context of the Article 14 (d), a market need not to be "pure" or "absent of any government intervention".[7] Thus, in a marketplace where government itself is a market actor, the evaluation on whether the influence of the government enables it to set, directly or indirectly, all prices of the relevant good in the market should be made on a case-by-case basis considering, *inter alia*, the peculiarities of the market.[8] As a final point, Turkey understands that the burden to explain adequately how the government's substantial involvement eventually leads to the significant distortion of the market is cardinal to ensure due process requirements.

8. Even though Turkey underscores that the circumstances considered in the investigation is central to the assessment on the economic weight of the government provider and its ability to influence the price level of the good in questions in the market; Turkey equally considers that the "likelihood" of the government provider to set prices, which all market actors will be compelled to follow, may increment proportionally with its market power.[9] The question whether these prices lead to distortion in market, however, shall be the subject of a separate analysis.

9. Turkey observes that there is a chain of same-toned Appellate Body decisions concerning the legal margin of using in-country-benchmarks to determine whether the provision is less than adequate remuneration. The case law indicates that, prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision is the "primary benchmark" and a "starting point" [10] to be considered. As matter of interpretation, it is possible to use "secondary benchmarks" if it is established that the "primary benchmark" is not serving the legal objectives of Article 14(d) of the SCM Agreement provided that the investigating authority abides by the guidelines in this Article and the methodology selected in line with the chapeau of Article 14 relates or refers to or is connected with the prevailing conditions in the country of provision or purchase[11]. Moreover, Turkey once again would like to emphasize that necessity for using the secondary benchmarks needs to be established on a case-by-case basis according to the facts underlying each CVD investigation.

III. CONCLUSION

10. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

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[6] *US – Carbon Steel (India)*.4.125-4.126.
[7] *US – Softwood Lumber IV*, para. 87; *Canada – Renewable Energy/Feed In Tariffs*, para. 7.274.
[8] *US – Softwood Lumber IV*, para. 102.
[9] *US – Carbon Steel (India)*, paras. 4.152-4.158.
[10] Ibid, paras. 4.152-4.158.
[11] *US – Softwood Lumber IV*, para. 96; *US – Carbon Steel (India)*, paras. 4.197-4.199.

ANNEX D

PRELIMINARY RULINGS OF THE PANEL

ANNEX D-1

DECISION OF THE PANEL CONCERNING CANADA'S REQUEST FOR ENHANCED THIRD-PARTY RIGHTS

3 November 2016

The Panel refers to Canada's communication of 8 July 2016, in which Canada requests that the Panel grant it certain additional "passive" third-party rights in these proceedings, namely: (i) the right to receive an electronic copy of all submissions and statements of the parties, including responses to Panel questions, up to the issuance of the interim report; and (ii) the right to be present for the entirety of all meetings of the Panel with the parties.[1]

In its request, Canada submits that, in addition to having a legal and systemic interest in these proceedings, it has significant economic interests in the present dispute. Canada submits, in particular, that: (i) the forest products industry is of great importance to Canada's economy and the United States is the most important market for its exports of forest products; (ii) Canada maintains measures similar to those at issue in this dispute because, like in Indonesia, a significant portion of Canada's forests are publicly-owned and managed; Canadian provincial and territorial governments maintain regimes to regulate the harvest of standing timber and to set the price of stumpage and other fees; and Canada controls the export of logs through export permitting processes; and (iii) Canada's stumpage and other forest management measures have been the subject of several trade remedy actions by the United States in the past and could be the subject of further investigations in the near future in light of the expiry of the standstill period under the Canada – United States Softwood Lumber Agreement of 2006.

For the foregoing reasons, Canada submits, its legal rights and economic interests are very much at issue in this dispute. Canada adds that, to ensure that its interests are fully taken into account, it needs to be aware of the arguments and evidence presented in the later stages of these proceedings so that it can be fully informed of the arguments and issues that are before the Panel, that will be relied on by the Panel to reach its conclusions, and that may be subject to appeal. According to Canada, the nature of the additional rights it seeks would not prejudice either of the parties or impose an undue burden on them, the Secretariat or the Panel as its request concerns only "passive" additional third-party rights. Nor would granting its request raise confidentiality concerns or result in delays. Finally, Canada submits that a panel has discretion to grant enhanced third-party rights even in the absence of consent from the parties.[2]

At the organizational meeting, the Panel invited the parties to comment on Canada's request. Indonesia indicated that it supports Canada's request[3] whereas the United States opposes it.[4]

The Panel has carefully considered the reasons advanced by Canada to support its request, in light of the provisions of the DSU and relevant prior panel and Appellate Body decisions. In this respect, the Panel notes that Articles 10.2 and 10.3, and paragraph 6 of Appendix 3, of the DSU specify the rights of third parties: to receive the parties' submissions up to the first meeting of the panel, to make submissions to the panel, to present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session. However, it is well established that panels have discretion to depart from these standard rights and grant so-called "enhanced" third-party rights, subject to the requirements of due process and the need to guard against an inappropriate blurring of the distinction drawn in the DSU between the rights of parties and those of third parties.[5] Prior panels have granted requests

[1] Canada's request for enhanced third-party rights, p. 1.
[2] Canada's request for enhanced third-party rights, p. 3 (referring to Panel Report, *EC – Tariff Preferences*, p. A-2).
[3] Indonesia's statement at the organizational meeting.
[4] United States' statement at the organizational meeting, and written comments of 20 July 2016.
[5] Appellate Body Reports, *EC – Hormones*, para. 154; and *US – 1916 Act*, para. 150; Panel Reports, *China – Rare Earths*, para. 7.7; *EC and certain member States – Large Civil Aircraft*, paras. 7.166-7.167; *US – Large*

for enhanced third-party rights in situations in which third parties demonstrated an interest in the dispute going beyond the "substantial interest" that all third parties may be presumed to have in the matter before a panel.[6] Specifically, prior panels have granted enhanced third-party rights on the basis of one or several of the following factors: the significant economic effect of the measures at issue for certain third parties[7], the importance of trade in the product at issue to certain third parties[8], the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue[9], claims that the measures at issue derived from an international treaty to which certain third parties were parties[10], third parties having previously been granted enhanced rights in related panel proceedings[11], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[12]

In the majority of instances in which enhanced third-party rights were granted in past disputes, the panel based its decision on the fact that third parties' rights or interests would be directly affected by the outcome of dispute. The measures at issue in the present dispute are not Indonesia's forestry management programmes, but the anti-dumping and countervailing measures imposed by the United States on imports of coated paper from Indonesia. Thus, the rights and interests alleged by Canada do not directly relate to the matter at issue before the Panel or to the outcome of the present dispute.[13] Moreover, the Panel notes that Canada's alleged rights and interests in these proceedings depend on the occurrence of a number of events − that the US authorities will initiate countervailing duty investigations on Canadian forestry products, that those investigations will target programmes similar to Indonesian programmes that were the subject of the investigation underlying this dispute, and that the United States will apply measures on the basis of findings and interpretations regarding those programmes similar to the USDOC's findings and interpretations in the investigation underlying this dispute. Not only does this conditionality undermine the significance of Canada's alleged interests, the Panel is also of the view that, should these assumptions materialize, Canada will be able to defend its rights and interests by bringing its own dispute and pursuing its own claims, which would then be assessed on their own merits.[14]

The Panel also notes that the United States opposes Canada's request. In the absence of a demonstration of a specific interest in the dispute, the Panel does not consider that the consent of one of the parties to the dispute provides a sufficient basis for the granting of enhanced third-party rights.[15]

Finally, the Panel notes that Canada does not seek the right to be granted additional active participatory rights, but only seeks to be apprised of the arguments and evidence put forward by the parties over the entire course of the proceedings. Canada has not explained why or how granting the additional "passive" third-party rights it seeks would ensure that its interests are "fully taken into account" in a way that the third-party rights provided for in the DSU and the Panel's Working Procedures would not; at the end of the dispute, like all other third parties and WTO Members, Canada will be apprised of the relevant arguments and evidence relied on by the Panel in its Report and annexes attaching the executive summaries of the parties' arguments. Therefore, the Panel considers that its existing Working Procedures provide Canada and other third parties adequate opportunities to be made aware of the arguments and issues that will be addressed by the Panel.

Civil Aircraft (2nd complaint), paras. 7.16-7.17; *EC – Export Subsidies on Sugar*, para. 2.7; *EC – Tariff Preferences*, Annex A, para. 7; and *EC – Bananas III*, para. 7.9.

[6] See Article 10.2 of the DSU.

[7] Panel Reports, *EC – Bananas III*, para. 7.8; and *EC – Tariff Preferences*, Annex A, para. 7. See also Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.

[8] Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.

[9] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

[10] Panel Report, *EC – Bananas III*, para. 7.8.

[11] Panel Report, *EC – Bananas III*, para. 7.8.

[12] Panel Report, *EC – Hormones (Canada)*, para. 8.17.

[13] In addition, the Panel is not convinced that the fact that a third party maintains measures similar to the measures being challenged is, in itself, sufficient to justify the granting of enhanced rights to that third party. The panel in *EC – Tariff Preferences* invoked this as one of several reasons in its decision to grant enhanced third-party rights in that dispute. However, the principal reason for the panel's decision in that case appears to have been that some of the third parties were direct beneficiaries of the challenged programme.

[14] See Panel Report, *US – Washing Machines*, para. 1.12.

[15] The Panel is not aware of any prior panel having granted enhanced third-party rights solely on the basis that one, or even both, of the parties agreed to the request.

In sum, Canada has not demonstrated a specific interest in the dispute sufficient to justify granting that third party additional participatory rights beyond those provided to all third parties under the DSU and the Working Procedures adopted by the Panel. In light of the foregoing, the Panel denies Canada's request for enhanced third-party rights.

ANNEX D-2

DECISION OF THE PANEL CONCERNING THE EUROPEAN UNION'S REQUEST REGARDING BCI

4 November 2016

In its third-party submission, the European Union requested that third parties be given access to the exhibits containing BCI submitted by the parties, in addition to objecting to the fact that the Additional BCI Procedures adopted by the Panel do not provide for third party access to BCI submitted by the parties. The European Union argued, *inter alia*, that failure to provide such access to third parties is inconsistent with the DSU.[1]

The Panel consulted with the parties regarding the European Union's request. The parties provided written comments on 2 November 2016. Indonesia opposed the request, stating that, in its view, limiting access to BCI to the parties is not inconsistent with the DSU. The United States was also of the view that limiting access to BCI to the parties is not inconsistent with the DSU, but did not object to granting the third parties access to the BCI submitted by the parties in the present dispute.

The Panel adopted its Additional BCI Procedures after consulting with the parties, who jointly proposed that the Panel limit access to BCI to the parties. The Panel considers that its Additional BCI Procedures as adopted are not inconsistent with the DSU and that it is therefore not required to modify them. Particularly as one of the parties to the dispute opposes third party access to BCI, the Panel also considers it neither appropriate nor necessary to grant the European Union's request. In this context, the Panel notes that the parties submitted non-confidential versions of each exhibit containing BCI that they submitted to the Panel. Moreover, third parties were provided the same data concerning projections for US demand in 2010-2012 – the only instance of BCI allegedly not provided to the third parties that the European Union specifically identified[2] – as the Panel and the parties.[3] Finally, the Panel notes that, of the 18 exhibits to which the European Union specifically requested access, as subsequently clarified by the United States, 11 of those exhibits do not exist.[4]

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[1] European Union's third-party submission, para. 5. The European Union also took issue with the requirement in paragraph 2 of the Additional BCI Procedures that the party submitting BCI provide an authorizing letter from the entity that submitted that information to the investigating authority in the underlying investigation, but made no concrete request in this regard. (Ibid. para. 4)

[2] European Union's third-party submission, para. 65.

[3] The Panel and the other party received the same version of Exhibits IDN-18 and US-1 as the third parties. In addition, as indicated in footnote 491 of the United States' first written submission (corrected version), the US demand projections data, while redacted from Exhibit US-1 , p. II-12, was provided to the Panel, Indonesia and the third parties in Exhibit US-4 (pp. 1 and 21), and was discussed in paras. 229 and 243 of the United States' first written submission (corrected version).

[4] As indicated in the list of exhibits submitted by the United States, these were "intentionally omitted", i.e. there is no content associated with those exhibit numbers.

ANNEX E

INTERIM REVIEW

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the comments and arguments made at the interim review stage by the parties. As explained below, we have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate. In addition, we have made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the United States.

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. In the discussion below, we use the numbering in the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Paragraph 1.3

2.1. The United States suggests that the Panel modify its characterization of the panel request submitted by Indonesia on 20 August 2015 after the filing of a prior panel request on 9 July 2015. The United States submits that, because Indonesia's panel request procedurally, was made *ab initio*, the Panel should refer to it as a "new" panel request rather than as a "revised" panel request in the second sentence of paragraph 1.3. Indonesia does not comment on the United States' request.

2.2. We have modified paragraph 1.3 in accordance with the suggestion of the United States.

2.2 Footnote 51 to paragraph 7.18

2.3. The United States requests that the Panel make two changes to the first sentence of footnote 51 to paragraph 7.18. Specifically, the United States suggests clarifying that in its request for ruling described in the footnote, the United States asked the Panel to find that Indonesia's Article 14(d) and Article 2.1(c) claims with respect to the log export ban are in fact financial contribution claims "not before the Panel", and that the United States made this request in the alternative. Indonesia does not comment on this request.

2.4. To better reflect the ruling sought by the United States, we have amended the first sentence of footnote 51.

2.3 Paragraph 7.68

2.5. The United States suggests adding a new footnote at the end of paragraph 7.68 following the Panel's statement that the USDOC established that a benefit was conferred by comparing the price paid by APP/SMG to a benchmark price, citing page 13 of the USDOC Issues and Decision Memorandum. Indonesia does not comment on this request.

2.6. We have added the reference suggested by the United States, but to paragraph 7.66 rather than paragraph 7.68.

2.4 Paragraph 7.234

2.7. The United States requests that the Panel modify the second and third sentences of paragraph 7.234. In this respect, the United States submits that the USITC did not affirmatively find that subject imports caused no material injury during the POI but rather, the USITC "[did] not find a sufficient causal nexus necessary to make a determination that the subject imports [were]

having a significant adverse impact on the domestic industry".[1] Accordingly, the United States requests that the Panel amend the language of the second sentence of paragraph 7.234 to indicate that the USITC "declined to make a finding of present material injury". In the same vein, the United States requests that the Panel change the language of the third sentence of paragraph 7.234 to state that the USITC determined that the deterioration in the domestic industry's condition coincided with an economic downturn and a sharp decline in demand in the course of "determining not to find present material injury". Indonesia does not comment on the United States' request.

2.8. We have, in light of the United States' request, modified the second sentence of paragraph 7.234 to better reflect the USITC's conclusion concerning present material injury, albeit not in the specific terms requested by the United States.

2.5 Paragraph 7.286

2.9. The United States suggests adding a footnote at the end of the final sentence of paragraph 7.286, referring to page 38 of the USITC's final determination. Indonesia does not comment on this request.

2.10. We have added the reference suggested by the United States, as well as a cross-reference to a paragraph of the Report quoting the relevant language from the USITC's final determination.

2.6 Paragraph 7.299

2.11. The United States suggests that, to underscore the significance of APP's intentions, the Panel insert a footnote at the end of the second sentence of paragraph 7.299 to mention the USITC's finding, on page 24 of its final determination, that APP accounted for the large majority of subject merchandise produced and exported in 2009. Indonesia objects to the United States' request. In Indonesia's view, the United States is asking the Panel to make an additional finding of fact, not to correct a factual error. Indonesia submits that the United States' request is not appropriate at this phase of the proceeding.

2.12. We have, in light of the United States' suggestion, provided a more complete quotation of the USITC's final determination in paragraph 7.299. We also consider it appropriate to add a reference in the Report to the indication by the USITC that APP accounted for the large majority of the production and export of subject merchandise in 2009. As the USITC made this statement in describing the conditions of supply in the market for coated paper, we have added this reference to the footnote attached to paragraph 7.197, in the introduction to the claims pertaining to the USITC's final determination.

2.7 Footnote 555 to paragraph 7.310 and paragraph 7.314

2.13. The United States requests that the Panel correct certain errors in the description of the USITC's price trends analysis in footnote 555 to paragraph 7.310. Indonesia does not comment on this request.

2.14. In addition, the United States requests that the Panel include, in the same footnote and in the second sentence of paragraph 7.314, a discussion of other evidence that the USITC relied on in concluding that subject imports depressed domestic prices "at least to some extent" for part of the POI. Specifically, the United States suggests that the Panel add language to reflect the fact that, in its conclusion in this respect, the USITC also relied on "domestic producer testimony that domestic producers reduced prices to compete with subject imports during the POI, and on confirmation from numerous purchasers that domestic producers had lowered prices to meet subject import prices", and the corresponding reference to the USITC's final determination. Indonesia objects to this request. In Indonesia's view, the United States is asking the Panel to make an additional finding of fact, not to correct a factual error, and such a request is not appropriate at this phase of the proceeding.

[1] The United States refers to USITC Final Determination, (Exhibit US-1), p. 38.

2.15. We have, in light of the United States' request, modified the description of the USITC's price trends analysis in footnote 555, including a more complete description of the USITC's findings regarding price depression and the evidence relied upon. In light of this change, we do not consider it necessary to amend paragraph 7.314 as suggested by the United States.

2.8 Paragraph 7.341

2.16. The United States suggests certain edits to the penultimate sentence of paragraph 7.341 to more accurately reflect the United States' argument concerning Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement. Indonesia does not comment on this request.

2.17. We have made the changes suggested by the United States.

2.9 Paragraph 7.344

2.18. The United States requests that the Panel clarify that the words "the two" in the penultimate sentence of paragraph 7.344 refer to ''subject imports and injury to the domestic industry'', to reflect that an investigating authority must consider whether subject imports cause or threaten injury to a domestic industry. Indonesia does not comment on this request.

2.19. We have amended paragraph 7.344 in light of the United States' request, albeit not in the specific terms requested by the United States.

WORLD TRADE ORGANIZATION

WT/DS491/R/Add.1

6 December 2017

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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS491/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 29 July 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

5. The Additional Working Procedures of the Panel Concerning Business Confidential Information shall, once adopted, be a part of these Working Procedures.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Indonesia requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Indonesia shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, including where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Indonesia or the United States could be numbered IDN-1 and US-1, IDN-2 and US-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5 and US-5, the first exhibit of the next submission thus would be numbered IDN-6 and US-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, as well as its closing statement if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Indonesia. If the United States chooses not to avail itself of that right, the

Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submission, first opening and closing oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions following the first substantive meeting. In addition, each party shall also submit a separate integrated executive summary of its written rebuttal, second opening and closing oral statements, which may include a summary of its responses to questions following the second substantive meeting and comments thereon. Each integrated executive summary shall be limited to no more than 20 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents (incl. submissions and exhibits) it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, in the form of an e-mail attachment or in the form of 5 CD-ROMs, 5 DVDs or 5 USB keys. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and xxxxx.xxxxx@wto.org. If a CD-ROM or a USB key is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 29 July 2016

1. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the U.S. Department of Commerce or the United States International Trade Commission as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned proceedings agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in any of the proceedings at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Indonesia and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of any of the proceedings. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party, or an outside advisor to a party for the purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceedings at issue in this dispute, or an officer or employee of an association of such enterprises.

4. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

5. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)).

6. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

7. In the case of an oral statement containing BCI, the party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure

that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 5.

8. Where a party submits a document containing BCI to the Panel, the other party, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 5.

9. If a party considers that information submitted by the other party should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel and the other party, together with the reasons for the objection. Similarly, if a party considers that the other party submitted information designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF INDONESIA

I. INTRODUCTION

1. The Government of the Republic of Indonesia (Indonesia or GOI) brought this dispute to challenge the United States' unjustified imposition of anti-dumping and countervailing duties on coated paper from Indonesia. The United States' actions are inconsistent with a number of obligations set out in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and GATT 1994.

2. In addition, the United States' disregard for its obligations is made more acute by its failure to accord any special regard pursuant to Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement towards Indonesia, a developing country Member.

II. UNITED STATES' REQUEST FOR A PRELIMINARY RULING

3. As part of its challenge to the United States' log export ban findings, Indonesia cited to the panel's decision in *US – Export Restraints*.[1] The United States asked the Panel to make a preliminary ruling that Indonesia was making a backdoor attempt to bring a claim under Article 1.1(a) of the SCM Agreement.[2] But as we informed the Panel, Indonesia may rely on any appropriate authority and that does not change the claims into something different.[3] Indonesia has not asked the Panel to make a finding under Article 1.1(a) of the SCM Agreement and for that reason, the United States' request should be rejected.

4. The United States has made a separate request for a preliminary ruling in relation to Indonesia's challenges to USDOC's findings as inconsistent with Articles 2.1, 2.1(c), and Article 14 of the SCM Agreement.[4] According to the United States, these claims should have been made under Article 22.3 of the SCM Agreement.[5] The Panel should reject this reasoning for three reasons. First, the fact that the US may also have violated Article 22.3 of the SCM Agreement does not mean it has not also violated Articles 2.1, 2.1(c), and Article 14 of the SCM Agreement. Second, the Appellate Body in *US – Countervailing Measures (China)* confirmed that Article 22.3 of the SCM Agreement does not have to be included for there to be violations of the nature Indonesia has asserted under Articles 2.1, 2.1(c), and Article 14. Third, Indonesia's claims were set forth clearly in the request for a panel which the Appellate Body has explained is sufficient.[6]

III. USDOC'S FLAWED SUBSIDY DETERMINATION

5. The GOI's challenge to the United States' subsidy determination concerns the following programs that USDOC found to be countervailable: 1) the alleged provision by the GOI of standing timber for less than adequate remuneration, 2) government prohibition of log exports and 3) debt forgiveness through alleged debtors' buyback of its own debt from the GOI at a discounted rate.

[1] See Indonesia' First Written Submission (Indonesia's FWS), pp. 11-12, 22-23 (citing Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767).

[2] See US FWS, p. 11.

[3] See Indonesia's Response to the US Request for a Preliminary Ruling, p. 1.

[4] See US FWS, pp. 11-12.

[5] See US FWS, p. 12.

[6] See Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 141.

A. USDOC's Finding of Lack of Adequate Remuneration Is Flawed Because USDOC Made an Improper *Per Se* Determination of Price Distortion Based Solely on the Predominant Market Share of Standing Timber from Public Forests

6. USDOC improperly made a *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests and failed to determine the adequacy of remuneration in relation to prevailing market conditions in Indonesia. Instead of using Indonesian prices for pulpwood, USDOC resorted to aberrationally high out-of-country benchmarks for Malaysian exports of acacia pulpwood and mixed tropical hardwood as reported in the World Trade Atlas.

7. Article 14(d) of the SCM Agreement states that a government provision of goods or services is considered to confer a benefit when it is made for less than adequate remuneration. The second sentence of Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question *in the country of provision or purchase*." (emphasis added)

8. In *US – Carbon Steel (India)*, the Appellate Body explained that the benchmark price would normally be found in the market for the good in question in the country of provision, and that these in-country prices could be from private or government-related entities.[7]

9. The Appellate Body further stated that the issue of "whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."[8]

10. The Appellate Body has made clear that just because the government may be the predominant supplier of a good, a *per se* rule of price distortion is impermissible. In *US – Countervailing Measures (China)*, the Appellate Body noted that, in previous cases, "the Appellate Body has cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one."[9]

1. USDOC's finding that the GOI provided standing timber for less than adequate remuneration relies on an improper *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests

11. The USDOC investigated whether the GOI provided standing timber to companies harvesting it such that a benefit was passed through to producers of coated paper who use the pulpwood as an input to making the paper. However, USDOC made it clear from the outset of the investigation that it was not interested in revisiting the benchmarks or calculation methodology it had used in the 2006/2007 investigation of coated paper from Indonesia. USDOC instructed the parties to provide new information only with respect to "changed circumstances in the GOI's *administration*" of the program. Given USDOC's clear instruction not to provide information on anything other than changes to the GOI's administration of the program, Indonesia and APP/SMG focused on USDOC's numerous other requests, including providing out-of-country benchmarks.

12. The GOI requires that any entity that wants to harvest wood forest products from the State Forest must obtain a license and pay fees for the forest products that are harvested. In addition to the fees a licensee must pay, the licensee must perform a number of services at its own expense, including: forest management planning, seed and seedling procurement and planting, maintenance, fire and forest protection, social and environmental obligations, and infrastructure development. In other words, the licensee pays for the use of public land, not the provision of standing timber.

13. Private forests also exist in Indonesia. In 2008, over 2 million cubic meters of logs were harvested from private forest land. The GOI does not control how private forest land is used and it

[7] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.515.
[8] Ibid., para. 4.154.
[9] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.51.

does not charge a fee for harvesting timber on such land. Consequently, the licensing system, fee payment, and forest management system described above only applies to entities who harvest from the State Forest. The only information the GOI maintains about private forest land is the volume of logs that are harvested.

14. USDOC's finding of price distortion rested entirely on the predominant market share of standing timber from public forests, which the USDOC (wrongly) equated with the fact that the GOI was the predominant supplier of standing timber. Almost all of the "standing timber" for which USDOC calculated a benefit was planted, grown, and harvested from a plantation and was not "pre-standing." In short, nearly all of the "standing timber" the USDOC countervailed was *not* provided by the GOI. Rather, it was planted, grown, and harvested by the plantation owners.

15. USDOC had data on in-country prices available but chose not to examine it. In addition, USDOC had information on timber purchase prices and sales prices. Finally, USDOC had the names and addresses of log suppliers in Indonesia. USDOC did not use any of this information to analyze price distortion or to seek to obtain additional information on that question.

16. Contrary to the clear line of Appellate Body decisions on the subject, USDOC made no evidentiary finding of price distortion, neither for standing timber from public forests, nor in the substantial private market that existed in Indonesia. Indonesia has demonstrated that none of the other factors USDOC allegedly relied on are persuasive. Hence, in resorting to an external benchmark, USDOC acted inconsistently with Article 14(d) of the SCM Agreement.

2. USDOC's finding that the GOI log export ban provides a benefit relies on an improper *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests

17. The USDOC investigated whether the GOI's log export ban provided a benefit. As part of its benefit analysis, USDOC relied on the same aberrational Malaysian export data rather than Indonesian prices.

18. As the GOI explained, to confront the growing problem of deforestation in Indonesia, the Minister of Forestry and the Minister of Industry and Trade issued a decree in 2001 to prohibit the export of logs and chipwood, but wood chips (that is, logs cut in smaller pieces, the way they are normally exported so as to facilitate transportation) have never been subject to the export ban. Nor was there ever a ban on the export of pulp. In other words, there was no ban on exports of the downstream products used to make paper. USDOC found, however, without support, that a purpose of the log export ban was to develop downstream industries. USDOC relied on its view of the purpose of the log export ban in deciding whether there was a benefit.

19. Even if the effect (but not the purpose) of the log export ban were an increased domestic supply of logs potentially benefitting downstream industries in Indonesia, the panel on *US – Export Restraints* found that export restraints including export bans do not constitute countervailable subsidies as defined in the SCM Agreement.[10] This finding was confirmed by the panel on *China – GOES*,[11] as well as the panel on *US – Countervailing Measures (China)*.[12]

20. In *US – Export Restraints*, Canada did not contest the fact that its export restraints reduced domestic input prices, thereby conferring a benefit to local producers. In the present case, the GOI disagrees with the very starting point that domestic input prices decreased because of an export ban limited to logs (and not preventing the export of wood chips and pulp, the products that matter). In addition, even if the Panel were to find reduced input prices (quod non), the alleged financial contribution in this case (i.e., the "provision of goods … by a government") cannot be "considered as conferring a benefit" as, following the finding in *US – Export Restraints* export restraints do not constitute a financial contribution. In other words, if the log export ban does not constitute a financial contribution neither can it bestow or "confer" a benefit under Article 14(d) of the SCM Agreement. The causal link required in Article 14(d) -- between the "provision of goods …

[10] *US – Export Restraints*, para. 8.75.
[11] *China – GOES*, para. 7.90.
[12] Panel Report, *US – Countervailing Measures (China)*, para. 7.401.

by a government" and any "benefit" -- is missing. As a result, any benefit that the Panel may find is not "conferred by" a financial contribution by the GOI.

21. After errantly determining the GOI law's purpose was to develop downstream industries, USDOC found the existence of a countervailable subsidy without any analysis of Indonesian prices. USDOC's calculation of the benefit, however, suffers from the same WTO inconsistency as the calculation of the benefit for stumpage. USDOC used the same second tier benchmark it had used for stumpage. Consequently, USDOC's benefit finding with respect to the log export ban is inconsistent with Article 14(d) of the SCM Agreement for the same reasons as the findings on standing timber discussed above.

B. USDOC Improperly Applied an Adverse Inference to Find the GOI Knowingly Sold Debt to an Affiliate of the Debtor in Contravention of Indonesian Law

22. USDOC investigated whether the GOI provided a benefit to Indonesian coated paper producers by permitting the sale of debt to an alleged affiliate of the debtor in contravention of Indonesian law. USDOC found a benefit had been conferred and supported its finding by taking an adverse inference based on the GOI's purported lack of cooperation.

23. In the aftermath of the Asian financial crisis, the GOI created the Indonesian Bank Restructuring Agency ("IBRA") in January 1998 whose purpose was to manage the financial restructuring of the Indonesian economy. In May 2003, the GOI established a special program operating within IBRA known as the Strategic Asset Sales Program (its Bahasa acronym is "PPAS") to sell the GOI-owned assets involving large amounts of debt. Because of its size, the debt of the Asia Pulp and Paper/Sinar Mas Group (APP/SMG) was designated to be sold as part of the PPAS.

24. The only reason USDOC found the existence of a benefit was based on an adverse inference of affiliation between Orleans (the company purchasing the debt) and APP/SMG. USDOC reasoned that this meant the GOI provided a benefit to APP/SMG by selling APP/SMG debt to an affiliate in contravention of Indonesian law. USDOC reasoned that this constituted debt forgiveness equal to the difference between the value of the outstanding debt and the amount the alleged affiliate paid for it. USDOC took an adverse inference because of Indonesia's purported lack of cooperation. In reality, what happened was that USDOC set a constantly moving target and then used it as a pretext for taking an adverse inference.

1. Indonesia acted to the best of its ability and provided "necessary" information within a "reasonable period"

25. Article 12.7 of the SCM Agreement states that where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period . . ., preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

26. Article 6.8 of the Anti-Dumping Agreement is identical to Article 12.7 of the SCM Agreement with the addition of a reference to Annex II of the Anti-Dumping Agreement. Annex II:5 to the Anti-Dumping Agreement provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." In *Mexico – Anti-dumping Measures on Rice*, the Appellate Body noted that the conditions in Annex II of the Anti-Dumping Agreement existed in the SCM Agreement[13] and that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations. . . ."[14] Hence, the conditions in Annex II apply in the context of USDOC's countervailing duty investigation.

27. USDOC issued the original CVD questionnaire to Indonesia on November 3, 2009. USDOC's original questionnaire included a single specific question on the purchase of debt by an alleged affiliate. The GOI initially responded that it did not have new information or evidence of changed

[13] Appellate Body Report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice, Complaint with Respect to Rice,* WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853, para. 291.

[14] Ibid., para. 295.

circumstances but that it was continuing to review archived documents and would provide any new information that it located.

28. USDOC issued a supplemental questionnaire to the GOI on January 29, 2010 asking for additional information. The GOI submitted all of the documents USDOC requested concerning Orleans, consisting of articles of association, certificate of incorporation, power of attorney, letter of compliance, and a statement letter. The GOI also submitted documentation on IBRA's internal procedures and a narrative explanation of the same. Finally, the GOI submitted addition information it located concerning the APP/SMG sale, including a letter notifying Orleans that it was the winning bidder, correspondence confirming Orleans' payment, an asset and sale purchase agreement, and an opinion letter from outside counsel that Orleans complied with the conditions necessary to purchase the debt.

29. USDOC issued a third supplemental questionnaire to the GOI on April 29, 2010. USDOC's third supplemental questionnaire contained twenty-nine questions, most of which had multiple subparts. USDOC asked about documentation the GOI had provided and about how IBRA satisfied itself that the bidders were not affiliated with the debtor. The GOI responded to that portion of USDOC's third supplemental questionnaire in full, providing both a narrative response and the requested additional documents.

30. But USDOC's third supplemental questionnaire contained a demand for documents designed to make it impossible for the GOI to respond. Prior to the request, the GOI had no reason to expect USDOC would need documents from other sales. With respect to this new demand for documents that USDOC knew about from the beginning of the investigation but waited to request nearly six months after issuing the original questionnaire, the GOI responded that the documents were not available but explained that they were standard forms and would be substantially identical to those documents used in the APP/SMG transaction. The GOI further explained that the articles of association would be unique but that all of the winning bidders were offshore companies.

31. Importantly, what was on the record were all of the records concerning Orleans' purchase of the APP/SMG debt that USDOC requested. None of those records suggested an affiliation between Orleans and APP/SMG. In essence, USDOC said those records were irrelevant to the question of whether the GOI acted to the best of its ability because the GOI could not provide documents on all of the other PPAS sales within the short period of time USDOC provided and then based the adverse inference on two sentences from a newspaper article stating APP/SMG may have purchased its own debt. Even the unnamed "expert" USDOC purportedly relied on stated he was merely speculating that APP/SMG purchased its own debt.

32. As the Appellate Body found in *US – Hot-Rolled Steel from Japan*, Annex II of the Anti-Dumping Agreement (which, as referred to earlier, applies also in the context of Article 12.7 of the SCM Agreement) is an expression of "the organic principle of good faith" which "restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable".[15] At no stage in the proceedings did the GOI "refuse access to" information it had in its possession, nor did it fail to "provide necessary information" (information relating to other PPAS debt sales was not "necessary" to assess the APP/SMG sale) or "significantly impede the investigation". Instead, throughout, the GOI acted "to the best of its ability", considering, in particular, that Indonesia is a developing country member of the WTO, the special interests of which Article 27 of the SCM Agreement and Article 15 of the Anti-Dumping Agreement recognize. For the USDOC, in these circumstances, to rely on "facts available" violates Article 12.7 of the SCM Agreement.

2. The facts available do not "reasonably replace" the missing information

33. USDOC's determination is also inconsistent with Article 12.7 of the SCM Agreement because the facts available on the record that USDOC resorted to do not "reasonably replace" the information that Indonesia allegedly failed to provide.

[15] *US – Hot-Rolled Steel from Japan*, para. 101 (referring specifically to paragraph 2 of the Annex II to the Anti-Dumping Agreement).

34. In *US – Countervailing Measures (China)*, the Appellate Body recalled its previous decisions in *Mexico – Anti-dumping Measures on Rice*[16] and *US – Carbon Steel (India)*[17] in stating that "an investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination."[18] The Appellate Body stated that, under the standard of review, the Panel was to examine whether USDOC's determination was "reasoned and adequate."[19] In *US – Carbon Steel (India)*, the Appellate Body stated that "where there are several 'facts available' from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison. . . ."[20]

35. The facts available that USDOC applied in this case did not "reasonably replace" the information that USDOC alleged the GOI failed to provide. The GOI provided all of the information that USDOC requested on the APP/SMG transaction. USDOC cannot deny that those documents do not show an affiliation. Likewise, the records USDOC sought for other debt sales would not have shed light on whether Orleans was an affiliate because those other transactions involved different companies. In other words, while records from the other transactions might have shown differences in how the sales were conducted, they would not have established the central fact of whether there was an affiliation between Orleans and APP/SMG. Indeed, the newspaper article and expert report USDOC were speculative and merely "suggested" an affiliation.

36. USDOC erred by giving more weight to speculative newspaper articles and rumor than the actual documents from the transaction leaving its determination inconsistent with Article 12.7 of the SCM Agreement.

C. USDOC Did Not Demonstrate the Existence of a Subsidy Program

37. The USDOC relied on *de facto* specificity as referred to in Article 2.1(c). "Article 2.1(c) identifies factors that investigating authorities and panels are to evaluate in assessing whether, despite not seemingly *de jure* specific, a subsidy may still be specific in fact."[21]

38. The second sentence of Article 2.1(c) provides a list of particular factors regarding the use of the subsidy.[22] In *US – Countervailing Measures (China)*, the Appellate Body determined that the mere fact that financial contributions have been provided to certain enterprises is not sufficient and rather the investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[23]

39. As the Appellate Body noted[24], Article 2.1(c) of the SCM Agreement requires that there be "a plan or scheme" and "systematic series of actions" that confer a benefit. USDOC did not cite to evidence that the GOI or any regional or local government entity had in place a plan, scheme, or *systematic* series of actions to confer a benefit. None of the programs in question confer a benefit. As Indonesia noted in its First Written submission, the so-called provision of standing timber benefits the GOI because the GOI receives revenues from the use of the land.[25] Notably, because GOI is not providing timber, it is not reasonable to characterize the fees as payments for timber. In addition, the GOI receives services from the entities who hold licenses.[26] Because there is no written plan that confers a benefit, USDOC needed to look at whether a systematic series of actions conferred a benefit.

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[16] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*.
[17] Appellate Body Report, *US – Carbon Steel (India)*.
[18] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 (footnotes omitted) (emphasis added).
[19] Ibid., para. 4.187.
[20] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[21] 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. 4.373.
[22] Ibid.
[23] Ibid., para. 4.143 (emphasis original).
[24] Ibid.
[25] See Indonesia FWS, para. 77.
[26] See Indonesia FWS, paras. 76-77.

40. The log export ban, similarly, does not confer a benefit. Indonesia enacted the log export ban in 2001 to protect against deforestation.[27] The export ban never applied to pulp or wood chips. Under those circumstances, where the law does not confer a benefit, USDOC needs to find a systematic series of actions that confer a benefit.

41. The alleged debt buy back is perhaps the most extraordinary finding by USDOC of the existence of a subsidy program. All of the written materials suggested no benefit was conferred. In fact, Indonesian law made it illegal for an affiliate to purchase its own debt.[28] USDOC found the existence of a subsidy program based on an alleged violation of the law. Put differently, the Indonesian law, itself, was not the subsidy program. Instead, it was the violation of the law that USDOC found was a subsidy program. But in the absence of a written law, USDOC needed to find a systematic series of actions that conferred a benefit which it did not do. Rather, USDOC found a single illegal act (based on newspaper speculation) made it specific.

D. USDOC Did Not Identify the Relevant Jurisdiction

42. Article 2.1 of the SCM Agreement sets forth the principles for determining whether a subsidy is specific to certain enterprises "within the jurisdiction of the granting authority."[29] In *US – Countervailing Measures (China)*, the Appellate Body stated that an essential part of the specificity analysis us identifying the relevant jurisdiction.[30]

1. USDOC did not identify the government entity that allegedly forgave debt

43. USDOC found that the "GOI" was the entity that provided a benefit to APP/SMG by allegedly forgiving debt. But USDOC knew that the GOI's law prohibited the sale of debt to an affiliate of the debtor. USDOC's theory of how the GOI conferred a benefit was that, in the APP/SMG asset sale, IBRA's procedures were violated and APP/SMG debt was sold to an affiliate of the debtor against the explicit rules imposed by the GOI. By allegedly allowing debt to be sold to an affiliate, the GOI forgave debt to the extent of the difference between the outstanding debt and the purchase price.

44. For USDOC's theory of how a benefit was conferred to work, the GOI had to know APP/SMG and Orleans were affiliated, otherwise there could not be a countervailable act. The GOI established that the bid package met the law's requirements. In other words, USDOC could not point to anything on the face of the transaction that violated IBRA's procedures. Instead, USDOC believed that an individual or individuals with authority to act on behalf of the GOI knew that Orleans was affiliated with APP/SMG and allowed the sale to proceed. The record, however, contained no evidence of this.

45. Admittedly, this is an unusual situation because USDOC's theory of a benefit being conferred is through the alleged violation of a law. In other words, GOI's law is not what conferred a benefit. Rather, it was the purported action of an individual or individuals who broke the law that conferred a benefit. Under these circumstances, it is imperative for USDOC to identify the government entity and the individual or individuals who allegedly forgave debt and thereby knowingly violated Indonesian law. By failing to do so, USDOC acted inconsistently with its obligations under Article 2.1 of the SCM Agreement.

IV. USITC'S FLAWED THREAT OF INJURY DETERMINATION

46. The USITC is the agency charged with determining whether a US industry is materially injured or threatened with such injury. In the underlying investigation, the USITC examined the 2007 to 2009 period and also looked at the first six months of 2009 and 2010 (the interim periods). The USITC found that the US industry was *not* materially injured by subject imports. The USITC found declining demand and the presence of non-subject imports broke the causal link between subject imports and the US industry's poor performance during the period of investigation. However, the USITC determined that those same factors made the US industry vulnerable and, within that context, subject imports *threatened* injury.

[27] See Indonesia FWS, para. 13.
[28] See Indonesia FWS, para. 83.
[29] Article 2.1, SCM Agreement.
[30] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.166.

47. The GOI challenges the consistency of the USITC's threat of injury determination with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors. The USITC's determination is also inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, because the USITC based its threat findings on conjecture and remote possibility. Finally, the USITC failed to exercise special care which is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

A. The USITC Did Not Establish a Causal Relationship Between the Subject Imports and the Alleged Threat to the Domestic Industry

48. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement contain three principles for establishing causation that the USITC's determination violates: 1) non-attribution, 2) a concrete examination of other factors using economic models or constructs, and 3) isolation of factors other than subject imports that caused injury.

1. The USITC Improperly Attributed the Effects of Other Factors to Subject Imports

49. Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement state that "[t]he injuries caused by [...] other factors must not be attributed to the dumped [or subsidized] imports." Investigating authorities must, in other words, ensure that the injurious effects of other factors are not "attributed" to dumped/subsidized imports.

50. The USITC improperly attributed the effects of three factors other than subject imports to the subject imports in the threat of injury analysis. Those three other factors were (i) declining demand, (ii) non-subject imports, and (iii) the expiration of a subsidy to US producers in the form of a tax credit, the so-called "Black Liquor" tax credit, provided to US producers for reusing by-products of pulp production ("black liquor") considered, from 2007 to 2009, as an alternative fuel derived from biomass benefitting from excise and income tax credits under the US Internal Revenue Code.

51. On the effects of declining demand for the material injury analysis, the USITC stated that the deterioration in the domestic industry's performance was caused by an economic downturn and a decline in demand.

52. On the effects of non-subject imports for the material injury analysis, the USITC found the increases in market share by the domestic industry and subject imports from 2007-2009 came at the expense of nonsubject imports.

53. On the effects of the tax credit for the material injury analysis, the USITC found it was a factor mitigating the significance of price depression by the subject imports because it spurred greater pulp production by domestic producers in 2009 and contributed to lower prices for fiber/pulp which is a key input to production of coated paper. The USITC also found that the tax credit benefited the domestic producers' costs and production-related activities.

54. To summarize, the USITC found that the economic downturn, declining consumption, non-subject imports, and the tax credit were all crucial factors breaking causation and mitigating the significance of subject imports in various ways during the period of investigation.

55. In its threat analysis, the USITC found that the US industry was "vulnerable" because consumption was likely to continue declining and a subsidy to the US industry in the form of a tax credit was expiring.

56. Recalling that the USITC determined declining demand and not subject imports was responsible for the trends described above, a prime reason the US industry was found to be vulnerable is declining demand, not subject imports. Likewise, another contributing factor to the US industry's vulnerability was expiration of the US tax credit for "black liquor", a factor unrelated to subject imports. Here, the USITC basically found that there is threat of injury not because of subject imports being subsidized by the GOI, but because of the expiry of a US subsidy to US paper producers. Effects on US paper producers caused by the US government itself can hardly be

attributed to paper exports from Indonesia. Indeed, the USITC candidly acknowledges that the condition of the US industry which was caused by other factors weighs heavily in its threat analysis. The USITC's threat analysis is, thus, riddled with non-attribution issues, in violation of Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

57. The USITC also failed to account for the role non-subject imports played in the US market. There was no question that subject imports gained market share at the expense of non-subject imports during the investigation period. Equally, there was no question that non-subject imports regained market share when subject imports declined in the first half of 2010. Despite those facts showing subject imports were swapping market share with non-subject imports, the USITC found that subject imports would gain share from the domestic industry. The USITC made no meaningful attempt at analyzing the degree to which market share would come from current suppliers that were non-subject imports. But the USITC made no attempt at analyzing the significance of this other factor which renders its determination inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

2. The USITC did not examine factors other than the allegedly dumped/subsidized products in concrete terms

58. As the Panel in *EC – Countervailing Measures on DRAM Chips* reasoned, Article 15.5 of the SCM Agreement requires the administering authority to make a "better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models."[31] Consequently, investigating authorities must be concrete in their analysis of other factors that cause injury apart from subject imports, and a mere listing of factors without further justification is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement.

59. The USITC applied a less rigorous and less concrete analysis in its threat analysis than it applied to evaluate material injury. In its material injury analysis, the USITC identifies the "black liquor" tax credit as a factor having an effect on US prices in 2007 – 2009. The USITC concludes that the significant price undercutting in that period is primarily because of the tax credit and not the subject imports. In other words, the USITC applied economic constructs and found US producers were using the existence of the tax credit to drive down prices. But in the context of the threat of injury analysis the USITC merely states that the loss of the credit in 2010 will have significant price diminishing effects in the future as a factor favoring an affirmative threat of injury determination. In contrast to its finding in the context of material injury, the USITC does not attempt to estimate what price effects expiration of the credit is likely to have, nor does it offer a quantitative analysis of the likely impact on the US industry.

60. The same deficiencies exist in the USITC's analysis of the role of declining consumption and the presence of non-subject imports. Despite undertaking a concrete examination of them in the present injury analysis, which led to the conclusion that those other factors broke the causal link between subject imports and the domestic industry's performance, the USITC does not engage in a meaningful examination of either factor in its threat analysis. The USITC devoted a single sentence to the likely imminent impact of a decline in demand. There is no way to evaluate whether the USITC's explanation is reasonable because its statement is altogether lacking analysis. Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement require more.

61. The USITC's discussion of non-subject imports is no more concrete. The USITC recognizes that non-subject imports gained market share from interim 2009 to interim 2010 and that non-subject imports were higher priced than subject imports. But the USITC concludes that subject imports will compete on price to regain the market share that they lost both to the domestic industry and to non-subject imports in interim 2010. This conclusory finding cannot be reconciled with the USITC's earlier finding about subject imports taking market share from nonsubject imports but not the domestic industry.

[31] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

3. The USITC did not isolate the injurious effects of allegedly subsidized/dumped imports from other factors

62. The Appellate Body stated in *US – Hot-Rolled Steel* that the "investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors."[32]

63. For purposes of its present injury analysis, the USITC isolated factors other than subject imports, including the economic downturn and declining demand. As a consequence, the USITC concluded there was not a sufficient causal nexus necessary to make a determination that subject imports are currently having a significant adverse impact on the domestic industry.

64. In its threat analysis the USITC, collapsed, rather than isolated factors other than subject imports with the likely effects of subject imports. The way the USITC did this was through its vulnerability finding. The USITC begins its vulnerability analysis by noting the downwards trends in virtually all of the domestic industry's performance indicators weighed heavily in its consideration of the impact of subject imports in the imminent future. But in its present injury analysis, the USITC had just found subject imports were not the cause of those downwards performance trends, rather it was the economic downturn and declining demand. The USITC also found that the expiration of the black liquor tax credit, another factor unrelated to subject imports, made the domestic industry vulnerable.

65. To comply with the non-attribution requirement, the USITC needed to do the opposite of what it did. Rather than finding the domestic industry's vulnerability made it more likely that subject imports threatened injury, the USITC should have analyzed the impact of just the subject imports on the domestic industry during the period of investigation, after isolating out the other factors and, based on that analysis, determined whether a threat of injury was likely.

B. The Findings of the USITC Were Improperly Based on Conjecture and Remote Possibility and Future Changes Were Not Clearly Foreseen and Imminent

66. Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement require an investigating authority (i) not to base its threat of injury findings on allegation, conjecture and remote possibility and (ii) to demonstrate that a change in circumstances, which will injure the industry in the future, is clearly foreseen and imminent.

67. The Appellate Body has explained what Article 3.7 of the Anti-Dumping Agreement requires. In *Mexico – HFCS*, the Appellate Body reasoned that investigating authorities must proceed to a "*proper establishment*" of the "clearly foreseen and imminent" events.[33] The Appellate Body reached a similar holding in *Mexico – Anti-Dumping Duties on Rice*.[34]

68. The USITC made two central findings that were based on conjecture or speculation regarding events which were not clearly foreseen and imminent: (i) subject imports would have adverse effects on US prices and (ii) subject imports would gain market share at the expense of the domestic industry.

C. The USITC Did Not Exercise "Special Care" in its Threat of Injury Determination

69. Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement provide that "with respect to cases where injury is threatened by dumped [or subsidized] imports, the application of anti-dumping [or countervailing] measures shall be considered and decided with special care . . . ."

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[32] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001: X, 4697, para. 226.

[33] See Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001: XIII, 6675, para. 85.

[34] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* para. 205 (emphasis added).

70. Indonesia claims that each of the above-identified deficiencies in the USITC's threat of injury determination renders that determination inconsistent with the United States' WTO obligations under Articles 3.5 and 3.7 of the Anti-Dumping Agreement and Articles 15.5 and 15.7 of the SCM Agreement. Equally, and independently of these other violations, those deficiencies render the USITC threat of injury determination inconsistent with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

71. In addition, the cumulative effect of the inconsistencies in the USITC's analysis resulted in a more robust and rigorous material injury analysis than threat analysis, which demonstrates the USITC did not exercise special care pursuant to Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement. By resolving all issues of what the future held against the exporters, the USITC failed to exercise special care and the threat of injury determination rested on a lower threshold than the material injury determination; thus, turning the duty to exercise special care on its head.

V. THE PROVISION OF US LAW THAT DEEMS A TIE USITC VOTE ON THREAT OF INJURY - THREE AFFIRMATIVE VOTES, THREE NEGATIVE VOTES – TO BE AN AFFIRMATIVE FINDING IS INCONSISTENT WITH US WTO OBLIGATIONS

72. *Section 771 of the Tariff Act of 1930*, as amended, mandates that if the six USITC Commissioners are evenly divided as to whether a determination on threat of injury should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. Whereas domestic petitioners only need three votes in favor of threat of injury, foreign exporters always need four votes to win. In other words, a tie or "divided Commission" consistently favors domestic petitioners. Besides contravening basic fairness principles, this provision of United States law is inconsistent with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement which specifically require that in threat of injury cases the application of AD or CVD measures "shall be considered *and decided* with *special care*". (emphasis added)

73. A law stating that a tie or "evenly divided" threat of injury decision means, in all cases, an affirmative determination that there is threat of injury is not a decision-making rule that exercises "special care". On the contrary, threat of injury cases are thereby "decided" in an openly biased manner that, rather than offering "special care" to the interests of all affected parties, consistently favors the interests of the domestic industry over those of exporters.

74. Importantly, Indonesia challenges the US law "as such" (not its application in a specific investigation). Moreover, Indonesia only challenges the tie vote provision in US law as it applies to threat of injury cases, not other USITC decisions. Last, Indonesia's claim is made within the context of Indonesia being a developing country Member.

A. "Deciding" Threat of Injury Cases With "Special Care" Requires, At a Minimum, Basic Protection of Interests, Even-Handedness and Reasonableness

75. Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement read as follows:

> With respect to cases where injury is threatened by dumped [or subsidized] imports, the application of anti-dumping [or countervailing] measures shall be considered and decided with special care.

76. "Consider" is defined as "*To view or contemplate attentively, to survey, examine, inspect, scrutinize*".[35] "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".[36] Hence, even if "considered" may refer to (or even be limited to) the ITC's substantive consideration of the requirements under the SCM Agreement, the term "decided" unequivocally includes the way the ITC as a body brings the question of applying or not applying countervailing measures in threat of injury situations "to a resolution or conclusion", that is, including the way the ITC resolves a tie vote in those situations. By limiting Articles 3.8 and 15.8 to "substantive

[35] Oxford English Dictionary, online at http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid.

[36] Oxford English Dictionary, online at http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid.

analysis"[37] the United States reads the word "decided" out of the Anti-Dumping and the SCM agreements.

77. The ordinary meaning of "shall be decided" with "special care" ("sera … décidée avec un soin particulier" in French; "decidirá con especial cuidado" in Spanish) in Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement suggests, at a minimum, the following inherent corollary principles: basic "protection of interests", "even-handedness" and "reasonableness." "Care" is defined as "oversight with a view to protection, preservation, or guidance",[38] "attention accompanied by protectiveness and responsibility,"[39]; "protective", in turn, is defined as "[h]aving the quality, character, or effect of protecting someone or something; preservative; defensive", "[o]f an association or organized group: formed to safeguard the rights and interests of its members"[40]; "responsibility," in turn, is defined as "[a] moral obligation to behave correctly towards or in respect of a person or thing"[41] and synonymous with "reasonableness."[42] When coupled with the term "special," the term "care" requires one to demonstrate a high level of protectiveness, responsibility and reasonableness. Further, "special care" needs to be interpreted in its immediate textual context: it must be exercised when considering and deciding the application of anti-dumping or countervailing measures, *particularly in threat of injury cases*.

78. By consistently favoring the interests of domestic petitioners over and above those of exporters -- domestic petitioners only need three votes in favor of threat of injury, foreign exporters always need four votes to win – the tie vote provision is not a "careful" decision-making rule, "protective" of the "rights and interests" of all those affected.

79. To consider and decide with special care "the application of [anti-dumping or countervailing] measures" in threat of injury cases includes all the steps required or leading up to the actual imposition of duties in threat of injury cases. What precise steps this includes may vary depending on the domestic laws of the investigating country in question. In some countries, the decision that substantive requirements are met may be "separate" from a decision to actually levy anti-dumping and countervailing duties. Under US AD/CVD law, however, once the ITC decides there is threat of injury (including by a split 3 to 3 vote), anti-dumping and countervailing measures must automatically be imposed. No discretion exists under US law not to impose anti-dumping and countervailing measures once the substantive requirements for such measures are found to be fulfilled. In other words, under US law, the decision that substantive requirements are met and the decision to impose duties are one and the same, and it is this ITC decision in a situation of a tie vote that the GOI challenges in this dispute.

80. Moreover, even if the Panel were to find that the "special care" requirement in Articles 3.8 and 15.8 applies only to what must be a separate decision of "application" of anti-dumping and countervailing duties *after* an earlier determination that the substantive requirements for such duties have been fulfilled then US law would *a fortiori* be in breach. Under US law no such separate decision even exists. As a result, such decision is not, nor can it ever, be taken with "special care" and a breach of Article 15.8 must be found. Put differently, "application of [anti-dumping and countervailing] measures" thus (narrowly) defined would then, under US law (including in a tie vote situation), be automatic and never leave any room for "special care" (that is, an assessment of whether or not to actually impose the duties) and, therefore, by definition, the US tie vote rule, leaving no scope for any "special care" in a separate decision on whether or not to apply AD/CVD duties, would violate Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

81. The treaty context of Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement confirms the need for basic protection of all affected interests, reasonableness and even-handedness in threat of injury determinations.

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[37] US FWS, para. 313.

[38] Oxford English Dictionary, <http://www.oed.com/view/Entry/27899?rskey=6I7Lh0&result=1#eid>.

[39] Merriam Webster's Collegiate Dictionary (11th ed. 2003), available at <http://www.merriam-webster.com/thesaurus/care>.

[40] Oxford English Dictionary, <http://www.oed.com/view/Entry/153138?redirectedFrom=protective#eid>.

[41] Oxford English Dictionary, <http://www.oed.com/view/Entry/163862?redirectedFrom=responsibility#eid>.

[42] Shorter Oxford English Dictionary (6th ed. 2007), available at <http://www.oxforddictionaries.com/definition/english-thesaurus/responsibility>.

82. The Appellate Body enunciated the concept of even-handed administration of discretion in the *US – Hot-Rolled Steel* case, brought on the basis of the Anti-Dumping Agreement; facing a claim against the 99.5 percent test of USDOC for determining when sales are in the ordinary course of trade.

83. In *US – Hot-Rolled Steel*, the Appellate Body examined Articles 2.1 and 2.2 of the Anti-Dumping Agreement, which list the circumstances under which an investigating authority can "consider" products as being dumped. "Consider" also appears in Articles 3.8 Anti-Dumping Agreement and 15.8 SCM Agreement, whereby "the application of anti-dumping [or countervailing] measures shall be *considered* and decided with special care."[43] The Appellate Body's decision recognizes that the standard of even-handedness generally underlies the WTO covered agreements and applies especially where members are given discretion to act in certain ways (here, to make a determination on the existence of threat of injury).

84. Applying the "even-handedness" requirement to the tie vote provision in threat of injury cases, there is a disadvantage imposed on exporters under the tie vote provision that is similar to that under the 99.5 percent test. In particular, the balance is tilted against exporters by requiring them to win a 2/3 majority in the USITC vote. That is, exporters must gain the votes of four Commissioners, whereas petitioners need only convince three of them. The tie vote provision therefore does not meet the standard of "even-handedness" established by the Appellate Body.

85. Contextual support can also be found in Article 3.1 of the Anti-Dumping Agreement which requires that "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on *positive evidence* … " (emphasis added). The counterpart provision in the SCM Agreement is in Article 15.1. Deeming a tie vote by the USITC to be an affirmative determination does not constitute a determination "based on positive evidence"; a balanced 3-3 result is basically restated as a 4-2 win for petitioners. Similarly, Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement require that investigating authorities conduct "an objective examination". In *US – Hot-Rolled Steel*, the Appellate Body explained that "[i]f an examination is to be 'objective', the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[44]

86. Article X:3(a) of the GATT 1994 provides additional contextual guidance supporting the interpretation that Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement require threat of injury determinations to be made in a reasonable, even-handed and impartial manner. Article X:3(a) requires that measures be administered in a "uniform, *impartial* and *reasonable* manner."[45] "Impartial" is defined as "favoring no one side or party more than another; without prejudice or bias; fair; just."[46]

87. Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) further requires that "[t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties." One such rule of international law is the principle of good faith. In this regard, the Appellate Body has said that the principle of good faith is "a general principle of law and a principle of general international law" and "informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements."[47] Applying the principle of good faith here, it cannot be acting in "good faith" to set up rules that are biased against foreign interests by "deeming" a determination to be affirmative when it is not. That is, the "divided Commission" rule tilts USITC determinations in petitioners' interests by deeming a tie vote result to be an affirmative determination.

88. Finally, as noted earlier, Article 15 of the Anti-Dumping Agreement provides additional support for Indonesia's claim as it relates specifically to threat of injury determination by a

[43] (Emphasis added).
[44] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[45] (Emphasis added).
[46] *Webster's New World Dictionary*, p. 703, available at <http://www.yourdictionary.com/impartial#websters.
[47] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 101.

developed country WTO Member (the United States) in respect of exports from a *developing* country WTO Member (Indonesia). Article 15 reads: "It is recognized that *special regard* must be given by developed country Members to the *special situation* of developing country Members when considering the application of anti-dumping measures under this Agreement."[48] Consequently, the "special care" requirement for threat of injury cases in Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement read in conjunction with Article 15 of the Anti-Dumping Agreement requires a degree of diligence higher than that displayed in threat of injury determinations involving developed countries.

B. "Special Care" Requires a Degree of Protection and Attention Over and Above that Required in Material Injury Cases

89. The Panel in *US – Softwood Lumber VI,* clarified the ordinary meaning of "special care" to mean investigating authorities must display greater care in threat of injury determinations, when compared to material injury findings.[49]

90. US law mandates that a tie vote in the material injury context is an affirmative determination.[50] By having the same forced result in material injury and threat of injury investigations when there is a tie vote, US law does not permit, indeed prohibits, a degree of attention in threat of injury cases over and above what is required in material injury cases.

91. The treaty context also suggests that the exercise of special care requires the exercise of additional diligence in threat of injury cases. Specifically, according to Article 7, Annex II to the Anti-Dumping Agreement investigating authorities must exercise special circumspection**.**[51]

92. "Special circumspection" bears obvious textual and linguistic similarities with "special care" in addition to finding itself in the same agreement, thus serving as interpretative context.[52] An analogy can thus be drawn between obtaining information from secondary sources and determining threat of injury: in both situations, the authorities face an empirical uncertainty and need further tools for clarification. In the case of "special circumspection," these tools are set out in the provision itself. They consist of additional steps for the verification of the information, such as crosschecking with other independent sources. Similarly, a degree of attention *over and above* that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury.[53]

93. Instead of embodying a degree of heightened caution in the face of uncertainty (*i.e.*, three reasonable minds who disagree), the "divided commission" provision forces a decision that is not based on employing additional tools for clarification.

C. Other Members' Practice Supports the Inconsistency of the USITC's Approach

94. Indonesia understands the Republic of Korea is the only other Member with a provision of law similar to the United States' in a threat of injury context (*i.e.* that a tie vote must be an affirmative determination). Indeed, a number of Members have adopted positions fundamentally different from that of the United States, which highlights the discordance of the measure at issue from other Members' practice and its inconsistency with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

95. Article 32 of the VCLT provides for recourse to the "circumstances of [a treaty's] conclusion." Therefore, it is appropriate for the Panel to rely on the laws of other WTO members as "factual circumstances"[54] and aids in interpreting the covered agreements.[55] Domestic laws

[48] (Emphasis added).
[49] Panel Report, *US – Softwood Lumber VI* , para. 7.33.
[50] See *19 U.S.C. § 1677(11)(A)*.
[51] (Emphasis added).
[52] Article 31(1) VCLT.
[53] Panel Report, *US – Softwood Lumber VI*, para. 7.33 (emphasis added).
[54] Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006: IX, 3915, para. 7.130, fn. 267.

providing for different approaches to the "special care" requirement by other Members should provide interpretative guidance to the Panel. Additionally, a Panel may look into laws that were enacted after the entry into force of the WTO Agreements as subsequent practice of Members by virtue of Article 31(1)(b) of the VCLT.

96. Domestic laws of other WTO members indicate that the "special care" requirement under Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement respectively, is generally perceived to entail a greater degree of diligence than that designated by the "divided Commission" provision of the measure at issue. Certain WTO Members have ensured against a tie by providing for an odd number of decision makers. For example, Canada's International Trade Tribunal consists of 7 members.[56] Having an odd number of decision makers ensures that the collective decision is taken in the exercise of higher diligence and in a reasonable and even-handed manner. South Africa's International Trade Administration Commission decides by majority, but in case of a tie, the presiding Commissioner's vote counts double.[57] Likewise, in Turkey, where the Board of Evaluation of Unfair Competition in Importation is faced with a tie vote, the Head of the Board has a double vote.[58] Argentina's National Commission for Foreign Trade is composed of five members but if all members do not participate and there is a tie, the Chairman has a casting vote.[59]

97. The same approach is embodied in the Statute of the International Court of Justice:[60] Article 55(2) provides that "[i]n the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote."

98. It is not protective of all affected interests nor reasonable or even-handed to appoint an even number of Commissioners and not provide for a proper, neutral mechanism to resolve tie votes. In the context of US safeguard investigations, if there is a tie vote, the US President may review the USITC's determination and deem it to be affirmative if he chooses. In effect, he acts as a tie-breaking vote. By contrast, with anti-dumping and countervailing duties, this approach is not taken even in threat of injury cases which require "special care".

99. By forcing an affirmative determination when there is a tie threat of injury vote, the measure at issue removes all discretion from the USITC and tips the balance in favor of the US industry. The fact that the US measure also appears to be unique among those of WTO Members further supports its inconsistency with Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement.

VI. CONCLUSION

100. Indonesia asks the Panel to find that the United States' measures, as set out above, are inconsistent with the United States' obligations under the GATT 1994, SCM Agreement, and Anti-Dumping Agreement. Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with the GATT 1994, SCM Agreement, and Anti-Dumping Agreement.

[55] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998: I, 9, para. 65; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998: V, 1851, para. 94; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005: XIX, 9157, paras. 308, 317.

[56] Canadian International Trade Tribunal Act (R.S.C., 1985, c. 47 (4th Supp.) § 3(1)).

[57] International Trade Administration Act (No. 71) 2002 § 12(6), Government Gazette Vol. 451, No. 24287.

[58] Regulation on the Prevention of Unfair Competition in Imports (1999), Government Gazette, No. 23861, Article 44.

[59] Presidential Decree No. 766/94, 12 May 1994, Article 11.

[60] Statute of the International Court of Justice, 33 U.N.T.S. 993.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

1. The findings of the United States Department of Commerce ("Commerce" or "USDOC") and the U.S. International Trade Commission ("the USITC", "the Commission" or the "ITC") in the antidumping and countervailing duty proceedings at issue in this dispute were well reasoned, amply supported, and fully consistent with the relevant provisions of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement" or "SCMA") and the *WTO Agreement in the Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Agreement" or "ADA"). Indonesia's challenge to the statutory provision governing tie votes in the Commission, moreover, reflects a fundamental misunderstanding of the special care obligation in ADA Article 3.8 and SCMA Article 15.8.

I. PRELIMINARY RULING REQUEST

2. In its first written submission, Indonesia raises an argument under the auspices of its SCM Article 2.1(c) and Article 14(d) claims, with respect to the log export ban, that in fact is a legal analysis of Article 1.1(a) of SCM Agreement. Article 1.1(a), which constitutes the "financial contribution" prong of defining a subsidy, is not one of the provisions enumerated in Indonesia's panel request – i.e. it is not the basis of any of Indonesia's claims.

3. Articles 6 and 7 of the DSU provide that the "request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," and that panels the matter referred to the DSB, make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Finally, "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

4. The Appellate Body has explained that 1) "it is well settled that the terms of reference of a panel define the scope of the dispute and that the claims identified in the request for the establishment of a panel establish the panel's terms of reference under Article 7 of the DSU"; and 2) "Article 6.2 of the DSU requires that the claims … must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint." The Appellate Body further stated in *EC – Bananas III*, "[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission."

5. Indonesia argues that the log export ban is a type of export restraint that is not a subsidy. Indonesia's argument and its heavy reliance on the panel report from *US – Export Restraints* pertains to whether an export restraint is a financial contribution within the meaning of Article 1.1(a), not, as Indonesia claims in the panel request, whether "USDOC improperly found that Indonesia conferred a benefit by banning log exports using a per se determination of price distortion based on purported government intervention [or] failed to determine the adequacy of remuneration 'in relation to prevailing market conditions for the good . . . in question in the country of provision.'" Similarly, Indonesia repeats the same in its first written submission with respect to SCM Article 2.1(c)'s "subsidy programme" requirement as it applies to the log export ban. An export ban cannot constitute a "government-entrusted or government-directed provision of goods" (i.e. a financial contribution), ergo, Indonesia argues, it is not a subsidy program within the meaning of Article 2.1(c). However, pleading an Article 2.1(c) claim in Indonesia's panel request does not satisfy the requirement to plead an Article 1.1(a) claim.

II. INDONESIA'S CLAIMS UNDER THE SCM AGREEMENT ARE WITHOUT MERIT

A. USDOC's Rejection of In-Country Prices As Benchmarks for Indonesia's Provision of Standing Timber for Less Than Adequate Remuneration Was Consistent With Article 14(d) Of The SCM Agreement

6. The chapeau of Article 14 refers to "any method" used by an investigating authority "to calculate the benefit to the recipient," and describes the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that the reference to "any" method implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit. The second sentence of Article 14(d) specifies that "adequacy of remuneration" must be determined "in relation to prevailing market conditions ... in the county of provision."

7. Although an investigating authority should first consider proposed in-country prices for the good in question, it should not rely on such prices if they are not market-determined as a result of governmental intervention in the market. Government intervention "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align." Although there is no market share threshold above which an investigating authority may conclude per se price distortion, the more predominant a government's role in the market, the more likely that role results in the distortion of private prices. The Appellate Body has explained that "[t]here may be cases … where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."

8. To evaluate the viability of an in-country price, USDOC considered the GOI's market share. Indonesia reported that in 2008, nearly all standing timber was harvested on public lands, with private forests accounting for only about 6 percent of the harvest. In addition, USDOC observed that the GOI controls approximately 99.5% of the harvestable forest land in Indonesia, *i.e.*, all but 233,811 of 57 million hectares. USDOC also examined whether the principal fees at issue, PDSH for plantation timber, were market-driven.

9. Clearly, private transactions in the relevant market are nominal. This is not a situation in which an investigating authority could be expected to find and cite to significant market determined activity or other factors that undercut the likelihood of price distortion. This is a situation in which the government is overwhelmingly predominant, and, for all intents and purposes, the sole provider of the input. Thus, Indonesia's imposition of a putative requirement to explain "how … market shares held by … [the government] … resulted in the government's possession and exercise of market power, such that … price distortion occurred [and] … private suppliers aligned their prices with those of the government-provided goods [or] … were market determined," is inapposite to the factual situation in this dispute.

10. USDOC's rejection of in-country price information was based on an analysis of the relevant facts before the agency. USDOC examined the GOI's predominant role in the standing timber, or stumpage, market during the period of investigation, accounting for almost 94 percent of the total supply. USDOC considered other relevant information submitted in the course of its investigation and identified additional grounds to support its finding of distortion of in-country prices for standing timber. The GOI's overwhelming market share was, justifiably, a major factor in that analysis, but USDOC assessed all of the evidence and identified other features of the market for standing timber that rendered it distorted. These included the GOI's ownership of virtually all harvestable forest land, the presence of a log export ban, the negligible level of pulp log imports, and Indonesia's low prices for logs relative to the surrounding region. Indonesia fails to identify what other record information was relevant to the distortion analysis, but not considered by USDOC. USDOC based its rejection of in-country benchmark data "on positive evidence on the record," and adequately explained and supported its conclusion.

B. Indonesia Fails to Prove Any WTO Breach With Respect to USDOC's Finding That the Log Export Ban Confers a Benefit at Less Than Adequate Remuneration

11. Indonesia has failed to establish any breach of the SCM agreement with respect to USDOC's finding that the log export ban conferred a benefit (timber inputs at less than adequate

remuneration). Indonesia argues that (1) the ban's ostensible purpose (conservation) and scope (downstream carve-out) reveal that it is not a subsidy; and (2) export restraints as a rule cannot constitute a subsidy. Nothing in the substance of these arguments has an actual connection with the obligations set out in Article 14(d).

12. USDOC was correct in its decision to determine that the benefit resulting from the log export ban to be the provision of inputs at less than adequate remuneration, measured by comparing the price APP/SMG paid for logs purchased from unaffiliated logging companies to what they would have been expected to pay under normal market conditions.

13. USDOC's analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in- country prices for logs. The sole in-country prices urged by the respondents were certain import data from Sabah, Malaysia into Indonesia, which were offered for both the stumpage and log export ban programs.

14. In addition, during the investigation, Respondents urged that the supply of logs in Indonesia was insufficient to meet demand, and thus, even without a ban, all domestic production would be consumed internally. USDOC explained that such reasoning ignored the essential fact "that without the ban domestic consumers would have to compete with foreign consumers." Furthermore, USDOC explained that the empirical evidence on the record rebutted the respondents' claim, and demonstrated distortion in the Indonesian market. Specifically, in the Malaysian export data available from the World Trade Atlas and as provided by the respondents' consultant, a large disparity existed between timber prices paid from within Indonesia and the prices paid by others purchasing from Malaysia. Thus, the World Trade Atlas data that USDOC relied on was not "aberrational," as Indonesia claims, but rather is consistent with the Malaysian export data, once imports to Indonesia are subtracted, that Indonesia provided in the underlying investigation.

C. In Applying Adverse Facts Available With Regard To The Debt Buy-Back, USDOC Acted Consistently With Article 12.7 Of The SCM Agreement

15. Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization ... and injury." Overall, Article 12.7 "is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation." Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement. Article 6.8 of the AD Agreement states that: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

16. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within "a reasonable period." "[I]f information is, in fact, supplied 'within a reasonable period,' the investigating authorities cannot use facts available, but must use the information submitted by the interested party." The SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. The Appellate Body has "recognize[d] that it is fully consistent with the Anti-Dumping Agreement for investigating authorities to impose time-limits for the submission of questionnaire responses."

17. In resorting to "facts available" under Article 12.7 of the SCM Agreement, the missing information also must be "necessary." This term "is meant to ensure that Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but rather is concerned with overcoming the absence of information required to complete a determination." If such "necessary" information is absent, "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record." An investigating authority must use those 'facts available' that 'reasonably replace the information that an interested party failed to provide', with a view to arriving at an accurate determination. Moreover, all substantiated facts on the record must be taken into account and a determination cannot be made on the basis of non-factual assumptions or speculation.

18. Finally, an interested party or Member's lack of cooperation is relevant to the investigating authority's selection of particular "facts available" under Article 12.7. ADA Annex II, paragraph 7, acknowledges that non-cooperation could lead to an outcome that is less favorable for the non-cooperating party. Non-cooperation creates a situation in which a less favorable result becomes possible due to the selection of a replacement of an unknown fact.

19. The domestic petitioners alleged that the GOI provided countervailable debt forgiveness when it sold approximately $880 million worth of APP/SMG debt for $214 million to Orleans, and petitioners also alleged that those two companies were affiliated, rendering the debt buy-back program as it pertained to APP/SMG constituted a financial contribution in the form of debt forgiveness.

20. USDOC had explained that "during verification, the Department met with an independent expert knowledgeable about the debt and the banking crisis in Indonesia," and that it was likely that Orleans was related to SMG/APP because "it [was] not uncommon for hedge funds to set up special purpose vehicles (SPVs) for the purpose of participating in one particular deal and that these SPVs could easily be established in a way that would make their ultimate ownership unknowable. USDOC also identified record evidence, including a World Bank report indicating that "some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency."

21. USDOC requested that, if the GOI disagreed with USDOC's prior CFS determination that Orleans was affiliated with APP/SMG, then the GOI must "provide documentation demonstrating that Orleans had no affiliation with APP/SMG or any of APP/SMG's other affiliated companies, or with any owners, family members or legal representatives of APP/SMG." In addition, USDOC asked the GOI to provide Orleans' registration and bid package, including Orleans' articles of association, and documentation regarding IBRA's internal procedures for reviewing and evaluating bids in general, and specifically under the PPAS.

22. The GOI provided the documents pertaining to the Orleans transaction, which "could not be located during the previous investigation." However, the GOI explained that the articles of association, as with the other documents submitted, did not disclose, or contain any information about, Orleans' ownership. In that same questionnaire response, the GOI explained how the PPAS bidding process functioned, including that "[t]he mechanisms implemented by IBRA – the required certificate of compliance, the buyers specific representation of non-affiliation in the asset sale and purchase agreement, and the opinion letter by outside counsel – all represent the procedures implemented by IBRA to ensure the prohibition against sale of debt to the original debtor was not happening."

23. USDOC requested information concerning other debt sales conducted under the PPAS and any guidance provided to IBRA officials when evaluating the bidders. USDOC highlighted that "failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available." In response, the GOI articulated that the "IBRA did not have any written internal due diligence guidelines for evaluating the documentation and other information submitted by potential bidders," but that "IBRA staff used the same basic approach to due diligence for all of the PPAS sales." However, with regard to USDOC's document request pertaining to other PPAS debt sales, the GOI explained: "These documents are not available at this time. Since those documents are unrelated to the APP/SMG transaction at issue in this investigation … the GOI is not sure of the relevance of these documents."

24. The GOI's statement did not allow USDOC to confirm the extent to which IBRA staff had endeavored in other transactions to ensure debtors were not allowed to buy back their own debt or to determine the owners of debt purchasers. This information was "necessary" within the meaning of Article 12.7 of the SCM Agreement because, without such PPAS transaction documents, USDOC could not determine whether claims that such efforts (beyond the requirement of certified statements) were not taken in the APG/SMG transaction were plausible or whether the lack of such an effort was typical.

25. Despite two requests, the GOI failed to provide necessary information within a reasonable period of time that would have assisted USDOC in evaluating whether the "IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders

are not affiliated with the debtor companies." The GOI had ample opportunity to provide the requested information, within USDOC's deadlines, for which the GOI could have requested an extension. But the GOI failed to provide this information.

26. Finally, in selecting from the facts available, USDOC determined that an adverse inference was warranted because when USDOC specifically sought documents pertaining to other PPAS transactions, which the investigating authority could "compare with the information [it] had for the Orleans transaction," the GOI twice failed to provide that necessary information. The GOI failed to cooperate by not acting to the best of its ability considering it had seven weeks' notice and still failed to provide it.

27. Indonesia faults USDOC for canceling a portion of the on-the-spot verification pertaining to the debt buy-back program. However, verification took place from June 28, 2010, through July 8, 2010, six days after the fifth supplemental questionnaire response deadline. USDOC had placed the GOI on notice in its verification outline that if the fifth supplemental questionnaire response specifically was "deemed unresponsive on some issues, those issues may be deleted from the verification agenda." That GOI response was non-responsive with regard to the bidding documents. It was entirely appropriate that USDOC canceled verification of the debt buy-back. Indeed, USDOC reasoned that "[p]roviding the opportunity to review the information at verification is not a substitute for providing the information for review beforehand." USDOC also explained that "verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted." Finally, USDOC articulated that "[b]esides the fact that neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions, the resources available at verification are completely different from those available at Department headquarters" in that there are substantially less personnel at on-the-spot verifications to "examine the information firsthand."

28. In addition, Indonesia claims that the "facts available" USDOC relied on in finding affiliation did not "reasonably replace" the missing information under Article 12.7. Underpinning Indonesia's argument is that USDOC unreasonably relied on "speculative" "newspaper articles and reports." The "facts available" refer "to those facts that are in the possession of the investigating authority and on its written record." An Article 12.7 determination "'cannot be made on the basis of non-factual assumptions or speculation.'" In this investigation, USDOC relied on "newspaper articles and reports suggesting that APP/SMG may have purchased its own debt, and that Orleans was an affiliate of APP/SMG." These documents were "on the record."

29. Indonesia opines that USDOC failed to employ a comparative approach to selecting facts available. Indonesia accuses USDOC of giving more weight to "speculative newspaper articles and rumor than the actual documents from the transaction," yet the documents from the APP/SMG debt sale provided no information on Orleans' ownership in the first place. Here, it would not have been practicable to comparatively evaluate record information to determine the "best" facts available. The question of whether APP/SMG and Orleans were affiliated was necessarily binary. Although the GOI placed information on the record to support that they were not affiliated, the GOI failed to satisfy that evidentiary burden through its repeated failure to provide all the information necessary to allow USDOC to make a determination.

D. The United States Acted Consistently with Article 2.1 of the SCM Agreement In Making Its *De Facto* Specificity Findings

30. The chapeau and paragraph (c) of Article 2.1 of the SCM Agreement state that "[i]n order to determine whether a subsidy … is specific to an enterprise or industry or group of enterprises or industries … within the jurisdiction of the granting authority, … other factors may be considered [notwithstanding the appearance of non-specificity]. Such factors include "use of a subsidy programme by a limited number of certain enterprises."

31. Article 2.1(c) addresses the principles for finding that a subsidy is *de facto* specific. Thus, where an investigating authority clearly substantiates, on the basis of positive evidence, that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement. This dispute solely involves Article 2.1(c) specificity determinations.

32. *Standing timber*. In *US – Countervailing Measures (China)*, the Appellate Body considered the significance of "programme" in paragraph (c) of Article 2.1, following "subsidy," and whether a "subsidy programme" (as distinct from a "subsidy") thus required the formalities of being reduced to writing or pronounced in some manner. In that case, SOEs consistently provided inputs at what USDOC found were less than adequate remuneration, pursuant to "unwritten measures." The Appellate Body underlined that, generally, "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy" or by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.

33. Here, the record supports that the provision of standing timber for less than adequate remuneration is a "subsidy program" in the form of "a plan or scheme." Indonesia explained to USDOC that "[t]o harvest wood products from the State Forest, a harvester must obtain a license," and that a Ministry of Forestry regulation sets forth the application requirements to obtain a stumpage license. This also constitutes a systematic series of actions.

34. Indonesia does not otherwise contest USDOC's de facto specificity finding and USDOC's finding that "the provision of stumpage is specific …because it is limited to a group of industries," is sound. Indonesia provided a listing of harvesting license approvals for a three-year period. USDOC had asked Indonesia to "identify each company, and its industry, that were approved for harvesting licenses in each year from 2005 through 2008." In response to another question concerning Indonesia's industrial classifications, Indonesia explained that "[w]ithin the category of large and medium companies, there are a total of 23 separate industry groupings," of which "the five industry groupings making use of timber account roughly [sic] 22 percent of the number of industry groupings, and approximately 23 percent of the output of all such groups." Paper production, in turn, constitutes two of the five users of timber, along with wood products, chemicals, and furniture. This evidence supports USDOC's de facto specificity finding.

35. *Log export ban*. Indonesia claims that USDOC failed to explain how the log export ban constituted a "a plan or scheme and systematic series of actions that confer a benefit." Indonesia argues that because the GOI discontinued the ban on chipwood exports before the start of USDOC's POI, the "downstream input for making pulp, including pulp itself, could be freely exported." During the investigation Indonesia informed USDOC that, pursuant to Government Regulation No. 6 of 2007, Indonesia had "begun the process of legalizing the export of forest products," but that authority had "not to date been exercised to formally implement this regulation." Indonesia also stated that Minister of Trade Decree No. 20/M-DAG/Per/5/2008, which referenced Regulation No. 6 of 2007, provided that "chipwood" may be exported, but that "logs (including pulpwood)" may not be exported. USDOC confirmed during its on-the-spot verification of Indonesia that "neither of these laws have been implemented."

36. Here, the "plan or scheme" is evinced by the log export ban itself. Having identified the "subsidy program," the existence of which was also demonstrated by, *inter alia*, USDOC's questions to the GOI during the investigation, USDOC then examined whether the log export ban was de facto specific. The Panel should reject Indonesia's argument that a subsidy program can only be demonstrated both by "a plan or scheme and systematic series of actions that confer a benefit." The latter is simply one way of demonstrating the existence of a plan or scheme.

37. *Debt buyback*. As discussed above, USDOC applied facts available on the issue of whether APP/SMG and Orleans were "affiliated." USDOC determined that "[b]ecause the debt was sold to an APP/SMG affiliate, in violation of the GOI's own prohibition against selling debt to affiliated companies … the sale was company-specific."

38. Indonesia claims that USDOC acted inconsistently with Article 2.1(c). The Panel should reject Indonesia's argument that an investigating authority must identify both "a plan or scheme and systematic series of actions that confer a benefit" for an Article 2.1(c) de facto specificity analysis. As the Appellate Body has explained, "the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1." Here, that "starting point" is the identified subsidy, namely, "debt forgiveness through APP/SMG's buyback of its own debt from the Indonesian Government." The APP/SMG debt buy-back constituted a plan or scheme as contemplated by the Appellate Body, and thereby constitutes a subsidy program consistent with Article 2.1 of the SCM Agreement.

39. Collectively, the documents on the record and findings of the investigating authority demonstrate that Indonesia was aware of Orleans' affiliation and obviously had knowledge of its own laws prohibiting the sale to an affiliated buyer. Therefore, Indonesia had in place "a plan or scheme" to provide a financial contribution, which resulted in a company-specific subsidy. This finding is consistent with Article 2.1 (c) and the Appellate Body's findings concerning the existence of a "plan or scheme." Indeed, the subsidy that USDOC identified is company-specific because only the specific company debtor is "eligible to receive that same subsidy."

40. *2.1 chapeau claims*. Indonesia claims that USDOC failed to identify the "relevant jurisdiction" of the granting authority with regard to the provision of standing timber for less than adequate remuneration, the log export ban, and the debt buy-back.

41. In *US – Countervailing Measures (China)*, the Appellate Body stated that: "an essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant jurisdiction is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level." However, if the investigating authority properly identifies the jurisdiction of the granting authority when analyzing the nature of a financial contribution, such a finding would satisfy the analysis contemplated under Article 2.1's chapeau. The Appellate Body also noted that the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination.

42. The jurisdiction of the granting authority for each subsidy is "discernible from the determination." More specifically, this was identified through USDOC's questionnaires to Indonesia, read in light of the coated paper final determination. With respect to the provision of standing timber for less than adequate remuneration, the jurisdiction of the granting authority is the Government of Indonesia. First, Indonesia's argument that USDOC failed to define "GOI" is simply false. USDOC defined the acronym "GOI" as an abbreviation for the Government of Indonesia. USDOC also identified the jurisdiction of the granting authority as Indonesia, evidenced by several statements in the final determination.

43. Indonesia likewise argues that USDOC failed to identify the granting authority as it pertained to the log export ban. Indonesia is incorrect for several reasons. First, Indonesia concedes in its first written submission that "the log export ban was enacted at the national level." Second, that finding is implicit in USDOC's final determination. Thus, it is readily "discernible from the determination" that USDOC understood the "granting authority" to be the national government of Indonesia, i.e., "the GOI."

44. Indonesia's argument that USDOC failed to "identify the government entity that allegedly forgave debt" is largely repetitive of arguments made under Indonesia's Article 12.7 claim. Indonesia failed to provide information pertaining to other PPAS debt sales, which USDOC determined was "necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities." Because USDOC could not determine whether the IBRA made further inquiries in this regard, USDOC resorted to facts available with adverse inferences in finding affiliation. Contrary to Indonesia's arguments, the granting authority was "discernible from the determination." USDOC found that "the GOI's sale of APP/SMG's debt to Orleans constituted a financial contribution, in the form of debt forgiveness." Despite the fact it had no obligation to do so, USDOC also identified the particular agency within Indonesia that provided the financial contribution, the IBRA, a national banking authority.

III. THE INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

A. Overview of the USITC Determination

45. In its determination, the Commission separately discussed the volume, price effects, and impact of the subject imports, first considering present material injury and then threat. In finding no present material injury, the Commission found that the increase in subject imports during the POI was significant both on an absolute basis and relative to apparent U.S. production and consumption. Analyzing threat, the Commission found that absent antidumping and countervailing

duty orders, a continuation of the increases in subject import volume that occurred during the POI was likely. The Commission noted the historic increase in the volume and market penetration of the subject imports from 2007 to 2009, in spite of the 21.3 percent decline in apparent U.S. consumption; found that capacity and production in the subject countries would likely increase imminently; and found that the subject producers were likely to utilize the additional capacity to increase shipments to the United States.

46. Throughout the POI, APP, the predominant producer and exporter of subject merchandise in China and Indonesia, had attempted aggressively to increase exports to the United States. In late 2008 − while U.S. demand was declining − APP informed Unisource, a leading U.S. distributor, that it desired to double its coated paper exports to the United States and was willing to cut prices to increase volume. When this attempt failed and APP lost the Unisource account, APP invested in its own distributor, Eagle Ridge, to retain and increase its presence in the U.S. market. Additionally, despite declining demand, the U.S. market was relatively large, and offered higher prices than China or other Asian markets. Exporters could easily increase their presence in the U.S. market due to their familiarity with the distribution network and the prevalence of spot market sales. Given the importance of price in purchasing decisions, aggressively priced subject imports would be able to quickly gain market share, or alternatively, force domestic producers to lower their prices substantially to retain volume.

47. Regarding price effects, the Commission found that there was predominant underselling by the subject imports during the POI. The Commission observed an apparent relationship between price declines for the subject imports beginning in the fourth quarter of 2008 and price declines for the domestic like product in early 2009 for products 1 and 4, which accounted for a majority of Chinese imports for which pricing data were reported. Domestic producers testified that they lowered their prices to compete with declining subject import prices, and numerous responding purchasers confirmed as much. The Commission concluded that these trends, together with the significant underselling, "show that subject imports depressed domestic prices at least to some extent for part of the period under examination," but did not find significant price depression, as it could not ascertain whether subject imports contributed significantly to the price depression in light of two other factors that contributed to the price depression: significant declines in consumption and the "black liquor" tax credit, which effectively served to lower domestic producers' input costs.

48. The Commission found that, as subject producers likely attempted to increase exports to the United States, they were likely to continue to use underselling and aggressive pricing to increase market share in the imminent future. Given projections that demand would decline moderately, there would not be increased demand that could absorb the increased volume. Factors other than subject imports that contributed to price depression and suppression during the POI would not play the same role in the imminent future. The Commission concluded that continued underselling by subject producers, combined with increased volumes of subject imports, would likely cause the domestic industry to experience significant price depression in the imminent future.

49. After analyzing the domestic industry's declining performance according to most measures during the POI, the Commission found an insufficient causal nexus between the declines and subject imports to conclude that subject imports had a current significant adverse impact on the industry. The record, however, indicated an imminent threat of material injury. The Commission found the domestic industry to be vulnerable to material injury, and that this vulnerable state made it likely that the industry would continue to experience declining performance in the imminent future as subject imports continued underselling the domestic like product to significantly increase their sales and market share. As the Commission explained, subject producers had demonstrated the ability and willingness to lower their prices to increase exports to the U.S. market, and would likely continue such behavior in the imminent future. The U.S. market could not accommodate the likely increase in subject import volume without subject imports taking sales from current suppliers including domestic producers, and causing material injury to the domestic industry.

50. The Commission considered whether other factors would likely have an imminent impact on domestic industry, in particular: declining demand for CCP and nonsubject imports. The Commission found that the modest decline in demand projected for 2011would limit sales opportunities and restrain prices, but was not of a magnitude that would render insignificant the likely impact of subject imports. Similarly, it found that nonsubject imports would not render

insignificant the likely impact of subject imports, as nonsubject import market share declined from 25.4 percent in 2007 to 16.1 percent in 2009 and nonsubject import prices were generally higher than subject import prices. The Commission observed that the domestic industry also gained 6.8 percentage points of market share during the interim period, and found it likely that, if preliminary duties were lifted, subject producers would seek to regain market share lost to both the domestic industry and nonsubject imports using low prices. The Commission concluded that, in light of the domestic industry's vulnerability and its findings that subject import volume would likely increase significantly at prices likely to depress and suppress domestic prices to a significant degree, material injury by reason of subject imports was likely to occur in the imminent future absent antidumping and countervailing duties.

B. The Commission Complied With ADA Article 3.7 and SCMA Article 15.7

51. Indonesia has failed to make a *prima facie* case that the United States breached ADA Article 3.7 and SCMA Article 15.7 obligations. Indonesia's arguments are based on the mistaken assumption that certain trends and factors during the POI, which influenced the Commission's negative present material injury determination, would continue. Yet several changes in circumstances made it likely that subject import volume would increase substantially in the imminent future: the projected increase in Chinese capacity of at least 1.5 million short tons during the 2009-11 period and APP's avowed determination to use low prices to increase substantially its exports of coated paper to the United States and establishment of Eagle Ridge as a means of doing so. Factors other than subject imports that had adversely affected domestic prices during the POI would not have the same effect in the imminent future, as the steep decline in coated paper demand during the POI moderated and the black liquor tax credit expired.

52. There is ample support for the Commission's finding that cumulated subject imports were likely to increase significantly in the imminent future, taking sales from existing suppliers such as the domestic industry. Indonesia does not challenge the Commission's finding that subject import volume and market share was likely to increase significantly, or the Commission's finding that subject producers possessed both the ability and the incentive to increase their exports to the United States significantly in the imminent future. Chinese producers would have at least 750,000 short tons of coated paper capacity available for export to the United States in 2011, equivalent to 38 percent of apparent U.S. consumption in 2009. Further, the record contained direct, unrebutted evidence concerning the dominant subject exporter's desire to increase sharply its presence in the U.S. market by reducing its already low prices.

53. The Commission reasonably explained that the increase in subject import volume and market share would likely take sales from current suppliers including the domestic industry. The Commission found that the significant increase in subject import volume between 2007 and 2009 came partly at the domestic industry's expense. Moreover, of the decline in subject import market share between interim 2009 and interim 2010 due to the investigations, the domestic industry captured 6.8 percentage points and nonsubject imports captured 6.0 percent. Clearly foreseen and imminent changes in circumstances placed subject producers in an even better position to rapidly increase their penetration of the U.S. market than during the POI.

54. The Commission also possessed ample support for its finding that the likely significant increase in subject import volume, driven by significant subject import underselling, would pressure domestic producers to lower their prices. The Commission based the finding in part on evidence that significant subject import underselling had depressed domestic prices during the POI to some extent. The Commission relied upon the relationship between subject import and domestic prices for products 1 and 4 during the period. Further, domestic producers testified that they reduced prices to compete with subject imports during the period, and numerous purchasers reported that domestic producers had lowered prices to meet subject import prices. The Commission also emphasized APP's willingness, evidenced by its late 2008 proposal to Unisource, to cut its already-low prices to increase substantially its exports to the United States.

55. Two factors other than subject imports that depressed domestic prices in 2009, sharply declining demand and the black liquor tax credit, would play a reduced or no role in the imminent future. The projected decline in domestic consumption was modest compared to the drop between 2008 and 2009. Expiration of the black liquor tax credit in 2009 meant that the program would no longer depress domestic prices.

56. There is no basis for Indonesia's assertion that subject import market share was unlikely to increase in the imminent future any more rapidly than during the POI. Indonesia ignores the changes in circumstances identified by the Commission that gave subject producers the ability and incentive to increase their penetration of the U.S. market in the imminent future more rapidly than during the POI. Similarly misplaced is Indonesia's claim that subject import market share would likely remain too low in the imminent future to adversely impact domestic prices. Indonesia does not contest that significant subject import underselling was likely to continue in the imminent future. Nor is there merit to Indonesia's contention that even a 12 percentage point increase in subject import market share in the imminent future (to 22 percent) could have no significant adverse impact on domestic prices, allegedly because such an increase could have no effect on prices in the other 78 percent of the market. Indonesia's argument is based on the fallacy that subject imports could adversely affect domestic prices only by capturing market share. As the Commission explained, however, "subject imports will put pressure on domestic producers to lower prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share." Indeed, the Commission found evidence that subject imports depressed domestic prices to some extent between 2008 and 2009 without taking any market share from the domestic industry. These facts supported the Commission's finding that continued subject import underselling would likely force domestic producers to lower their prices to defend their sales and market share.

C. The Commission Properly Established a Causal Link Between Subject Imports and the Threat of Material Injury to the Domestic Industry, Consistent with ADA Article 3.5 and SCMA Article 15.5

57. In concluding that the domestic industry was vulnerable to material injury, the Commission in no way attributed effects of declining demand or expiration of the black liquor tax credit to subject imports. It was in the next step of the Commission's analysis, considering whether the domestic industry was threatened with material injury by reason of subject imports, that the Commission considered other known causal factors and ensured that any injury caused by such factors was not attributed to subject imports.

58. The Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports by demonstrating that subject imports had injurious effects independent of those factors. The Commission first demonstrated a strong causal link between subject imports and the threat of material injury to the domestic industry, and then explained how other known causal factors did not detract from the link. The Commission found that the modest decline in apparent U.S. consumption between 2010 and 2011 would likely limit domestic producer sales opportunities and restrain potential price increases to some degree, but would not render insignificant the likely effects of subject imports. In drawing this conclusion, the Commission necessarily relied upon its analysis of demand projections and the likely volumes and prices of subject imports in preceding sections of the determination. The Commission also demonstrated that subject imports had injurious effects independent of nonsubject imports. Indeed, the Commission identified no injurious effects caused by nonsubject imports during the POI. The Commission also observed that nonsubject imports were generally priced higher than subject imports. Absent relief, the Commission found, subject imports were likely to compete on price to recoup the market share lost to both the domestic industry and nonsubject imports in interim 2010, resulting in a more price-competitive market. Based on all of these considerations, the Commission concluded that the likely effects of nonsubject imports on the domestic industry were not of a magnitude that would render insignificant the likely effects of subject imports.

59. Indonesia predicates its argument that the Commission's analysis of the projected decline in demand was insufficiently "concrete" on the misapprehension that the analysis consisted of a few sentences in the impact section of the Commission's determination. However, the Commission's analysis distinguishing the effects of subject imports from the effects of the projected decline in demand and nonsubject imports spanned the volume, price, and impact sections of the determination.

60. Similarly unpersuasive is Indonesia's claim that the Commission somehow breached the non-attribution requirement by failing to reconcile its finding that the likely increase in subject imports would take sales from the domestic industry with its alleged recognition that subject imports increased solely at the expense of nonsubject imports during the POI. The Commission did

not find that subject imports increased solely at the expense of nonsubject imports during the POI. Rather, it found that the increase coincided with declining domestic industry U.S. shipments. Indonesia claims that nonsubject imports would have benefitted the domestic industry by serving as a buffer between the industry and the likely increase in subject import volume. Having made no argument that nonsubject imports would injure the domestic industry, Indonesia fails to make a *prima facie* case that the Commission attributed injury from nonsubject imports to subject imports. Indonesia also is mistaken that the Commission somehow attributed injurious effects of the black liquor tax credit's expiration in 2009 to subject imports. Having expired in 2009, the black liquor tax credit was no longer a "known factor" that was "injuring the domestic industry at the same time as the dumped imports" in the imminent future for purposes of the Commission's non-attribution analysis. During the investigations, respondents did not argue that expiration of the credit would likely injure the domestic industry in the imminent future, or even make the industry vulnerable.

D. The Commission Complied With the Special Care Requirements Under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement

61. Indonesia's argument that the Commission's threat analysis was inconsistent with the special care requirement under ADA Article 3.8 and SCMA article 15.8 is purely derivative of its specific claims that certain aspects of the Commission's analysis were inconsistent with ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7. In *US – Softwood Lumber VI*, the Panel recognized that violations of the special care requirements will generally result from violations of the more specific obligations under ADA Article 3.7 and SCMA article 15.7. That panel explained that while it did not consider that a breach of the special care obligation could not be demonstrated in the absence of a breach of the more specific provision of the Agreements governing injury determinations, such a demonstration would require additional or independent arguments beyond the arguments in support of the specific violations. Indonesia made no independent argument that the Commission breached the special care requirements beyond its arguments in support of the specific breaches. Accordingly, for the same reasons that Indonesia fails to establish a *prima facie* case that the Commission breached ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7, Indonesia fails to make a *prima facie* case that the Commission breached the special care requirement.

IV. THE TIE VOTE PROVISION IS NOT INCONSISTENT, AS SUCH, WITH ARTICLE 3.8 OF THE ADA AND ARTICLE 15.8 OF THE SCMA

62. Articles 3 of the ADA and 15 of the SCMA set out substantive obligations that the decision-maker must abide by in conducting injury analysis. Nothing in these provisions curbs the discretion of a Member regarding its framework for assigning these responsibilities and for counting votes. There is accordingly no merit to Indonesia's claim that the "tie vote" provision of the U.S. statute conflicts with the ADA Article 3.8 and SCMA Article 15.8 obligation that investigating authorities consider and decide threat of injury with "special care."

63. The tie vote provision addresses one procedural aspect of the way that decisions are made, not the substance or rationale of any decision. The WTO Agreement does not impose obligations on Members with respect to such internal decision making procedures. The Appellate Body explicitly confirmed this in *US – Line Pipe*, finding that the internal decision making process of a Member is entirely within that Member's discretion, as an exercise of its sovereignty. Neither the ADA nor the SCMA require investigating authorities comprised of multiple decision-makers that decide injury investigations by vote, much less any particular approach to resolving issues arising from differences of opinion between individual members of a multi-member investigating authority. The ADA and SCMA instead prescribe substantive considerations to be examined when making determinations of injury or threat thereof.

64. The "special care" provisions of each agreement, moreover, come at the end of articles – SCMA Article 15 and ADA Article 3 – both of which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof. This placement is informative, showing that each "special care" provision concerns the substantive analysis that must be undertaken. This is confirmed by the fact that, where the ADA and SCMA do discuss procedural matters – in connection with things other than decision-making – they are explicit. Had the drafters wanted to prescribe the way that the

opinions of a multi-member body would be aggregated to ascertain the body's determination, they would have been similarly explicit.

65. The panel's discussion in *Softwood Lumber VI* shows that the special care provisions concern the substantive analysis applied by an investigating authority. Because investigating authorities must comply with the specific obligations under the AD and SCM Agreements in making threat determinations, it is in the satisfaction of those obligations that investigating authorities exercise special care under ADA Article 3.8 and SCMA Article 15.8. Even if an independent breach of the special care obligation were possible, the demonstration of such a violation would require "additional or independent arguments," which would necessarily have to relate to an investigating authority's "establishment of whether the prerequisites for application of a measure exist" in its written determination.

66. The drafting history of the "special care" provisions underscores that they concern the substantive standards for a threat determination, not procedure. The "special care" language evolved from text about the forecasted level of effect of dumping on domestic industry, demonstrating that the concept relates to the substantive standards used to assess whether a threat of injury exists. The ADA and SCMA "special care" language is simply a shorter version of an originally-more-detailed discipline that has always been about the substance of determinations.

67. The tie vote provision applies, if at all, only after the Commission has completed its analysis of threat factors and reached its determination, and the provision could therefore have no effect on the substantive analysis in the Commission's written determinations. Because determinations of threat made by three Commissioners can certainly reflect special care − and because whether such determinations reflect special care is unrelated to the number of Commissioners voting in the affirmative − the provision is certainly not inconsistent as such with the special care provisions.

68. Indonesia's arguments lack merit. Indonesia claims incorrectly that the tie vote provision somehow violates a "concept of even-handed administration of discretion" that the Appellate Body allegedly "enunciated" in *US − Hot-Rolled Steel*. The Appellate Body's finding was expressly limited to how to address sales to affiliates when determining normal value. Unlike Commerce's 99.5 percent test, which the Appellate Body found inconsistent with ADA Article 2.1 because it "systematically" increased margins of dumping published in determinations, the tie vote provision has no effect on the analysis in the Commission's threat determinations.

69. Whether or not other Members with investigating authorities comprised of multiple decision-makers may resolve tie votes differently than the United States in no way suggests that the U.S. approach is invalid. The variety of approaches to resolving or avoiding tie votes taken by different Members reflects that internal decision-making process is not prescribed by the ADA or SCMA. Indonesia's reference to its developing country status makes no sense in the context of its claim about the Commission's tie vote provision. Indonesia's arguments about ADA Article 3.1 and GATT Article X.3 are similarly illogical. Similarly, the principle of "good faith" in no way suggests that a discipline on how investigating authorities comprised of multiple individuals must address tie vote situations can be read into the "special care" provisions of the ADA and SCMA. Whether the Commission has exercised such care is purely a question of the reasoning provided in its affirmative threat determination. The tie vote provision represents a legitimate exercise of the United States' sovereignty over the decision-making process in antidumping and countervailing duty investigations. The Panel should reject Indonesia's claims.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INDONESIA AGREES WITH THE U.S. PRELIMINARY RULING REQUEST AND THE REPORTS IT CITES ARE NOT RELEVANT TO ITS CLAIMS

70. In its response to the U.S. preliminary ruling request, Indonesia highlights paragraphs 44, 45, and 79 of its first written submission, which, instead of clarifying how Indonesia's arguments pertain to benefit and specificity, underscore that Indonesia's arguments relate to an analysis of concerning financial contribution under SCM Agreement Article 1.1(a). The quote from the *US − Export Restraints* panel report excerpted in paragraph 44 references Article 1.1(a) alone. Similarly, paragraph 79 focuses on whether the GOI "directed" or "entrusted" log suppliers to sell at

suppressed prices. "Entrust" and "direct" are terms used in Article 1.1(a) – i.e., with respect to financial contribution – not Articles 1.1(b) or 14(d) on benefit, or Article 2.1 on specificity. While the United States agrees with Indonesia that it is not precluded from citing to any source – including disputes discussing financial contribution – Indonesia is citing to the analysis and conclusions on financial contribution, not benefit or specificity. Thus, these citations are not relevant to the claims that Indonesia has brought in this dispute.

II. INDONESIA'S CLAIMS UNDER ARTICLE 14 OF THE SCM AGREEMENT ARE WITHOUT MERIT

71. The facts attending Indonesia's provision of standing timber align closely with the record in *US – Anti-Dumping and Countervailing Measures (China)* and *US – Softwood Lumber IV.* Through concessions and licensing, the government directly provides standing timber which is used to make coated paper. The government owns virtually all of the harvestable forests in Indonesia and administratively controls the stumpage fees charged. This is a situation in which the facts demonstrate that the government's role as a supplier of the input in question is overwhelmingly predominant, and nearly exclusive. Through its setting of stumpage fees, Indonesia also effectively sets the price for standing timber. As the Appellate Body has noted, circumstances in which fewer elements of a market analysis will be necessary to arrive at a proper benchmark "include where the government is the sole provider of the good in question, and where the government administratively controls all of the prices for the goods at issue."

72. Indonesia asserts that USDOC's selection of an out-of-country benchmark based on Malaysia export data was "aberrational." USDOC selected the same benchmark data – species-specific World Trade Atlas statistics reflecting log exports from Malaysia – as an out-of-country benchmark for similar reasons as in its evaluation of the stumpage benefit. As explained, USDOC's analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in- country prices for logs. USDOC also explained that "without the ban domestic consumers would have to compete with foreign consumers." USDOC explained that a large disparity existed between timber prices paid within Indonesia and the prices paid by purchasers in Malaysia, according to the Malaysian export data available from the World Trade Atlas and as provided by the respondents' own consultant. Thus, the World Trade Atlas data that USDOC relied on was not "aberrational," as Indonesia argues, but rather is consistent with the Malaysian export data that Indonesia provided in the underlying investigation, after removing imports to Indonesia.

III. INDONESIA'S CLAIMS REGARDING ARTICLE 12 OF THE SCM AGREEMENT ARE WITHOUT MERIT

73. The necessity of the information that Indonesia failed to provide in connection with the debt buyback must be considered in light of the facts of this investigation. Indonesia provided Orleans' bidding documents. These documents contained no ownership information for Orleans. Thus, necessary information was missing for USDOC to analyze possible affiliation between APP/SMG and the successful bidder, Orleans. Considering the absence of ownership information, and also that the IBRA was legally prohibited from selling debt back to the original debtor or an affiliated party of the original debtor, USDOC alternatively sought to develop further the record so that it could analyze the due diligence procedures that the IBRA employed under the PPAS, including on affiliation.

74. Evident from Indonesia's reporting to USDOC was the substantial emphasis the IBRA placed on the bidding documents themselves in examining possible affiliation. Indonesia also asserted that the "IBRA did not have any written due diligence procedures for evaluating the documentation and other information submitted by potential bidders other than those listed in the terms of reference." USDOC reasonably requested the bidding documents for other PPAS sales to satisfy itself as to the accuracy of Indonesia's assertion that the IBRA would not sell the debt to an affiliated buyer and that the IBRA followed its own law with a level of diligence typical of other IBRA transactions. That is, with no baseline for comparison, USDOC could not confirm whether IBRA's due diligence procedures were followed, or whether the Orleans transaction was subject to less scrutiny of whether the bidder and debtor were affiliated when the government of Indonesia itself was proposing that USDOC accept that a lack of affiliation had been demonstrated on the basis of those procedures.

75. Instead of providing the information or seeking an extension, Indonesia stalled USDOC's investigatory process and Indonesia's promise to keep searching for the documents did not constitute a response to USDOC's information request. We underline that the decision as to what information was necessary to USDOC's investigation was not Indonesia's to make.

76. USDOC nevertheless provided Indonesia with another opportunity to cure its evidentiary failure. USDOC also reiterated that should Indonesia continue to fail to submit the requested information, it may resort to relying on the facts available. USDOC provided some flexibility to the GOI. Indonesia could have requested an extension. However, Indonesia chose not to. Given the reasonable period that Indonesia had − 7 weeks − "it was reasonable to expect the GOI to be more forthcoming with this information." The Appellate Body has recognized the importance of investigating authorities being able to set deadlines for the submission of information, and the timeline for this limited information request exceeds the 37 days under the "general rule" in Article 12.1.1 for replying to a full initial subsidy questionnaire.

77. USDOC determined that Indonesia had not acted to the best of its ability. Again, Indonesia had multiple opportunities to submit information on ownership and was aware affiliation would be key to the investigation. Indonesia was provided seven weeks to provide information on the other PPAS transactions. From Indonesia's response that the PPAS inquiry was not "relevant," the U.S. determination on the GOI's failure to cooperate is consistent with the Appellate Body's recognition that "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact."

78. Indonesia claims that the "facts available" USDOC relied on in finding affiliation did not "reasonably replace" the missing information under Article 12.7. Indonesia's argument is that USDOC unreasonably relied on "speculative" "newspaper articles and reports," while ignoring record evidence that demonstrated the companies' non-affiliation. This was not the case. The bid documents contained no ownership information. In this investigation, USDOC relied on several newspaper articles and reports - including a consultant's report received at verification in CFS - as facts available in finding APP/SMG and Orleans affiliated. This information was placed on the record in this investigation.

IV. INDONESIA'S CLAIMS REGARDING ARTICLE 2 ARE WITHOUT MERIT

79. Indonesia claims that USDOC acted inconsistently with Article 2.1(c) because USDOC cited to no supporting evidence "that the GOI or any regional, or local government entity had in place a plan, scheme, or systematic series of actions to confer a benefit." Indonesia again misunderstands the Appellate Body's analysis in US − Countervailing Measures (China). There, the Appellate Body underlined that, generally, "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms." In that dispute, which involved "unwritten measures," the Appellate Body envisioned that a subsidy program could be evidenced by "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises." However, here, the debt buyback constituted a written "plan or scheme." Imputing a requirement that the subsidy must be a "systematic series of actions" in all instances voids the definition of a subsidy under Article 1.1. A "subsidy" under Article 1 is not limited in nature to a series of financial contributions. In the fact-specific context where only the specific company debtor is "eligible to receive that same subsidy," the "limited number of enterprises" factor is relevant. The subsidy that USDOC identified is a company-specific measure, as only the specific company debtor is "eligible to receive that same subsidy."

V. INDONESIA'S CLAIMS REGARDING THREAT ARE WITHOUT MERIT

A. The Commission's Analysis was Fully Consistent with AD Agreement Article 3.7 and SCM Agreement Article 15.7

80. The Commission's analysis was based on facts and clearly foreseen and imminent changes in circumstances. This is true both with respect to the likely impact of subject imports on domestic industry sales volume and the likely price effects of subject imports. Indonesia's argument that the Commission provided no reasoned and adequate explanation for its finding that the likely significant increase in subject import volume would come partly at the domestic industry's expense is belied by the Commission's determination. Similarly, Indonesia's claim that the Commission

failed to provide a reasoned and adequate explanation for its analysis of the likely price effects of subject imports on the domestic industry is disproven by its determination, which was based on and articulated the relevant facts and clearly foreseen and imminent changes in circumstances. The Commission found it likely that significant subject import underselling would continue in the imminent future, as a means of capturing market share, and Indonesia does not contest this finding. The Commission also highlighted two changes in circumstances that would clarify the role of subject imports as a key driver of prices in the U.S. market in the imminent future: the expiration of the black liquor tax credit in 2009, and the projected moderation in the rate of the decline in CCP demand.

B. The Commission's Analysis was Fully Consistent with AD Agreement Article 3.5 and SCM Agreement Article 15.5

81. The Commission examined other known factors in a manner fully consistent with WTO obligations. An investigating authority's finding that an industry is vulnerable to material injury would reduce the magnitude of the change in circumstances necessary to cause the industry to experience material injury in the imminent future. For this reason, the Commission considered the domestic industry's vulnerability as part of its threat analysis. While recognizing that declining demand and expiration of the black liquor tax credit contributed to the domestic industry's vulnerability, the Commission in no way attributed the effects of these factors to subject imports or mentioned subject imports in its discussion of vulnerability. Acceptance of Indonesia's argument would create a Catch-22: factors other than subject imports that leave a domestic industry vulnerable would preclude attribution of any subsequent injury sustained by the industry to subject imports, but where the industry was not shown to be vulnerable, Indonesia would presumably take the position that subject imports could not threaten the industry.

82. The Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports. The Commission demonstrated that subject imports would have adverse effects on the domestic industry independent of the moderate decline in demand that was projected, relying partly on the analysis contained in previous sections of the determination. The Commission also demonstrated that subject imports had injurious effects on the domestic industry independent of nonsubject imports, which had no injurious effects on the industry during the POI, and were generally priced higher than subject imports. There is no merit to Indonesia's criticisms of the Commission's non-attribution analysis.

VI. THE TIE VOTE PROVISION IS FULLY CONSISTENT WITH AD AGREEMENT ARTICLE 3.8 AND SCM AGREEMENT ARTICLE 15.8

83. The tie vote provision is consistent with ADA Article 3.8 and SCMA Article 15.8. Neither contains text relating to a Member's internal decision-making structure or processes. The Appellate Body made clear that the internal decision making process of a Member is entirely within the discretion of that Member. Rather, panels are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in dispute settlement. Consistently with *US – Line Pipe*, the panel's analysis in *Softwood Lumber VI* shows that "special care" is about the substantive analysis used to make an affirmative threat determination. The tie vote provision concerns the internal decision-making process of the United States. When the provision applies, nothing under it would prevent the Commissioners voting in the affirmative from demonstrating in their written determination that they exercised special care in reaching an affirmative threat determination.

84. Canada, a third party, takes the position that the provision breaches the "objective examination" requirement of ADA Article 3.1 and SCMA Article 15.1. But Indonesia's panel request asserts no claims under ADA Article 3.1 and SCMA Article 15.1. Those provisions are thus outside the Panel's terms of reference, and Indonesia's First Written Submission made no argument concerning the "objective examination" provisions. The Panel may not accept Canada's invitation to opine on claims outside its terms of reference or to find a consequential breach of the "special care" provisions on the basis of such non-claims.

EXECUTIVE SUMMARY OF U.S. CLOSING ORAL STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

85. The standard of review for the panel has been articulated as not a *de novo* review, as the Panel is not the initial trier of fact. The Panel's task is not a mechanical search for magic words. Rather, the Panel should look at the determinations as a whole, in the context of the entire record, as the Panel evaluates whether the conclusions reached were reasoned and adequate.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF INDONESIA

I. INTRODUCTION

1. Indonesia has challenged findings made by two separate U.S. agencies, USDOC's subsidy determination and the USITC's threat of injury determination. In addition, Indonesia has challenged on an as such basis the provision of US law that requires a tie vote to be treated as an affirmative threat of injury determination.

2. With respect to USDOC's subsidy determination, Indonesia challenges USDOC's finding that the GOI provides standing timber for less than adequate remuneration and that the GOI log export ban confers a benefit. USDOC's benefit finding for both programs was based on a *per* se determination of price distortion based solely on the percentage of standing timber that is harvested from public forests in Indonesia. This is inconsistent with Article 14(d) of the SCM Agreement. In addition, the benchmark USDOC used was not for a similar good which is inconsistent with Article 14(d) of the SCM Agreement.

3. Indonesia also challenges USDOC's finding that the GOI knowingly allowed an affiliate of a debtor to buy back its own debt in violation of Indonesian law. USDOC relied on an adverse inference but only by ignoring the information Indonesia provided and creating a moving target through a series of additional burdensome and irrelevant requests. This was inconsistent with Article 12.7 of the SCM Agreement. The facts USDOC used to replace the missing information were not reasonable replacements because they were based on speculation which is inconsistent with Article 12.7 of the SCM Agreement.

4. USDOC's findings are also inconsistent with Article 2.1(c) of the SCM Agreement because USDOC did not determine that the collection of stumpage fees, the log export ban, or the alleged forgiveness of debt were part of a "plan or scheme" that confers a benefit.

5. Finally, USDOC's findings concerning the alleged debt forgiveness are inconsistent with Article 2.1 of the SCM Agreement because USDOC did not identify the jurisdiction allegedly providing a benefit, thereby calling into question the specificity analysis.

6. The USITC's threat of injury determination is inconsistent with US WTO obligations in several respects.

7. First, the USITC attributed adverse effects to the subject imports that were caused by other factors which is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. In its present injury analysis, the USITC found a number of factors explained the domestic industry's performance during the period of investigation. But in its threat of injury analysis the USITC attributed the effects of those other factors to subject imports.

8. Second, the USITC based its threat findings on conjecture and remote possibility which is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. The USITC made two findings that were based on conjecture, that subject imports would have adverse effects on US prices and would gain market share at the expense of the US industry.

9. Third, the USITC failed to exercise special care in making a threat of injury determination which is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement. The Commission reversed itself on every key finding it made in its present injury analysis which led to a no injury finding and then found against respondents to support a threat of injury determination. As Brazil aptly notes, "the assumptions considered by the USITC in order to reach a positive conclusion in the threat of injury determination seem to deviate from the direction pointed by the facts already evaluated previously during the material injury analysis."[1]

[1] See Brazil Response to First Panel Questions, para. 7.

10. US law contains a provision that mandates a tie vote be treated as an affirmative finding of threat of injury. This is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because it precludes the exercise of special care. A law that openly and consistently disadvantages respondents is biased on its face and violates the obligation to exercise special care in reaching an affirmative threat of injury determination.

II. THE PANEL SHOULD REJECT THE UNITED STATES' REQUEST FOR A PRELIMINARY RULING

11. The United States claims "Indonesia appears to be concerned about the particular words USDOC used in its explanations and the amount of space taken up by them."[2] According to the United States, this means Indonesia should have brought certain claims under Article 22 of the SCM Agreement.[3] The United States misunderstands the nature of Indonesia's claims.

12. The claims in paragraphs 33, 34, 41, and 42 of Indonesia's First Written Submission all relate to whether USDOC improperly based its finding of price distortion based on the GOI's purported dominance in the market. Indonesia's challenge has nothing to do with the words USDOC used. The claims in paragraphs 74, 78-79, and 81 of Indonesia's First Written Submission concern USDOC's failure to find a systematic series of actions to confer a benefit. Finally, the claim in paragraph 95 of Indonesia's First Written Submission relates to USDOC's finding that the GOI conferred a benefit based on the allegation of a knowing violation of Indonesian law.

III. THE UNITED STATES' DEFENSE OF ITS FLAWED SUBSIDY DETERMINATION

A. USDOC's Improper *Per Se* Determination of Price Distortion Based on Government Ownership Renders USDOC's Findings with Respect to the Provision of Standing Timber and Log Export Ban Inconsistent with Article 14(d) of the SCM Agreement

13. The Appellate Body has said that the question of price distortion must be based on an evidentiary finding and not a *per se* determination based on a government's predominance in the market.[4] While this governing principle should not be in serious dispute, the United States would have this Panel reach a finding that there are certain instances where a government's involvement in the market is so dominant that price distortion is inevitable.[5] In other words, the United States is asking the Panel to permit *per se* findings of price distortion in direct contravention of the Appellate Body's holding in *US – Countervailing Measures (China)*.[6] The Panel should reject this invitation, especially in light of USDOC's complete failure to acknowledge that 93 percent of the countervailed timber was planted, grown, and harvested from a plantation and was grown and harvested by the license holder.[7]

14. Indeed, the United States continues to demonstrate and convey an inaccurate depiction of the GOI's role.[8] For example, the United States claims that the facts of this dispute are more like those in *US-Softwood Lumber IV* "in terms of the government's role as a direct supplier of the input . . . ."[9] But the GOI does not sell standing timber.[10] Rather, the GOI grants concessions to companies to use the land that is the subject of the concession.[11] Moreover, the GOI only grants concessions on land that is heavily degraded, a fact USDOC has been aware of since its 2006/2007 investigation.[12]

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[2] See US Response to First Panel Questions, para. 28.
[3] See US Response to First Panel Questions, para. 29.
[4] See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.15.
[5] See Response by the Government of the Republic of Indonesia to the Questions from the Panel Following the First Meeting with the Parties, para. 8 (Indonesia's Response to First Panel Questions).
[6] See Appellate Body Report, *United States – Countervailing Duty Measures (China)*, para. 4.15.
[7] See Indonesia's Response to First Panel Questions, para. 8.
[8] See US Response to First Panel Questions, para. 31.
[9] See US Response to First Panel Questions, para. 31.
[10] See Opening Statement by the Government of the Republic of Indonesia at the First Meeting of the Panel (Indonesia Opening Statement), paras. 19-23.
[11] See Indonesia Opening Statement, para. 21.
[12] See Memorandum to David M. Spooner, Assistant Secretary for Import Administration from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration: Issues and Decision Memorandum for

15. In its Second Written Submission the United States claimed, for the first time, that "[t]he GOI retains title to the standing timber cultivated by private companies until the applicable stumpage fees are paid."[13] The United States' has no support for that conclusion in the record. As Indonesia has argued, the GOI was not providing standing timber. If the government does not own the good there cannot be a provision of goods pursuant to Article 14(d) of the SCM Agreement.

16. The United States has disavowed itself of USDOC's clear statement that the GOI's predominant role was the reason for resorting to a second tier benchmark[14] and defends the determination as based on more than just a *per se* finding of price distortion. The United States claims USDOC evaluated other features of the market that rendered the market distorted and that Indonesia did not identify other factors USDOC should have examined.[15] The other factors USDOC cites are merely variations of the same theme of the GOI's allegedly dominant market share.

17. Notably, the first factor the United States cites − the GOI's ownership of virtually all harvestable forest land − is not another factor at all.[16] With respect to in-country pricing information, the United States does not dispute that information was on the record showing the price per ton of acacia harvested from private land.[17] The United States repeatedly, and without justification, faults Indonesia for not providing information on in-country pricing data.[18] But why would Indonesia have prices from private transactions? Nor did USDOC attempt to gather information from companies APP identified as log suppliers. As Canada and China note in their respective responses to the Panel's questions, the investigating authority has an obligation to obtain evidence about in-country prices.[19]

18. The second "other" factor the United States cites − the existence of the log export ban − also ultimately comes back to the finding about the GOI's allegedly predominant role in the market.[20] But USDOC altogether failed to acknowledge that wood chips and pulp − the direct inputs in paper making − were not subject to the export ban during the POI.[21] The third "other" factor the United States cites − the negligible level of log imports − again relies on the finding about the GOI's ownership of harvestable land.[22] The fourth and final "other" factor the United States cites − alleged aberrationally low prices for logs in Indonesia relative to the surrounding region − does not show price distortion because USDOC was not even looking at the prices of comparable products.[23]

19. USDOC's analysis of log prices in Malaysia is fatally flawed because USDOC was unwilling to give fair consideration to any other evidence given its (mistaken) view of the GOI's market share. As the United States explains in its First Written Submission, USDOC determined that by removing exports from Sabah, Malaysia to Indonesia from the Malaysian export data, the Malaysian export data supported USDOC's determination that prices in Indonesia were distorted.[24] But USDOC had no reason to remove the export data from Sabah unless it was trying to prove what it had already concluded based on the GOI's ownership of harvestable forests. The price data from Sabah came from two sources: 1) actual transaction data for numerous sales of identical merchandise in 2008 and 2) export statistics reported by the Malaysian province of Sabah.[25] In rejecting this data, USDOC stated merely that shipments to Indonesia were not a suitable benchmark.[26] In other words, the GOI's share of harvestable forests served as the sole basis for USDOC's: 1) rejection of price data for actual transactions of identical merchandise and 2) conclusion that prices in

the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (Oct. 17, 2007), Exhibit IDN-26, p. 60.

[13] See United States Second Written Submission (US SWS), para. 25.

[14] See Final CVD Decision Memorandum, Exhibit IDN-10, p. 8.

[15] See US FWS, para. 43.

[16] See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

[17] See US SWS, para. 30.

[18] See US Response to First Panel Questions, paras. 35 & 39.

[19] See Canada Response to First Panel Questions, para. 5; China Response to First Panel Questions, para. 3.

[20] See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

[21] See Indonesia's Response to First Panel Questions, paras. 24-29.

[22] See US FWS, para. 61; see also US Response to First Panel Questions, para. 50.

[23] See US FWS, para. 67; see also US Response to First Panel Questions, para. 50.

[24] See US FWS, para. 62.

[25] See US FWS, Exhibit US-44, p. 12.

[26] See Final CVD Decision Memorandum, Exhibit IDN-10, p. 34.

Indonesia were distorted. As Brazil has noted, an investigating authority must be cautious about disregarding information provided by an interested party.[27]

B. USDOC's Improper Application of Adverse Facts Available Is Inconsistent with Article 12.7 of the SCM Agreement

20. USDOC found that a long defunct agency of the Government of Indonesia knowingly permitted an alleged affiliate of the APP/SMG group called Orleans to buy back the APP/SMG debt. The sole support for USDOC's finding of affiliation between Orleans and APP/SMG are two sentences from a newspaper article.[28]

21. The United States attempts to rely on an alleged unnamed expert but that expert's credentials were not even available to USDOC during the investigation because they had been redacted from the report and USDOC only had the redacted version. Even so, the supposed expert opinion is just as speculative as the newspaper article cited above because the expert had no direct knowledge and based his belief on rumours.

22. USDOC had all of the transaction documents from the APP/SMG sale, USDOC had IBRA's regulations and internal procedures, and it had Indonesia's verified statements in the questionnaire response that Indonesian laws and IBRA's regulations had been satisfied. USDOC even had its own expert's confirmation that this would have been all IBRA required.[29] This should have been the end of USDOC's inquiry. The United States had no reasonable basis to ask for more unless one accepts the proposition that an investigating authority has the unfettered ability to keep asking for information even after the question at issue has been definitively answered.[30] Indonesia respectfully submits that Article 12.7 speaks to this issue and says an investigating authority does not have such unfettered authority. Indeed, giving an investigating authority the ability to keep asking for more and more information would create a dangerous precedent whereby an investigating authority could force a party into an adverse facts available situation by virtue of increasingly burdensome requests.

23. One can even imagine that had Indonesia provided the documents USDOC requested concerning other transactions, USDOC would have said they were not sufficient. In fact, it does not require imagination at all. That is exactly what USDOC did after Indonesia provided all of the information USDOC requested about the APP/SMG sale. Indonesia respectfully submits that USDOC's resort to adverse facts available was unjustified based on the factual record as fully set forth in our First Written Submission and, thus, inconsistent with the United States' obligations under Article 12.7 of the SCM Agreement. In refusing to accept Indonesia's representations about the difficulties it had and was continuing to have in accessing information about a defunct agency, the United States' showed an utter lack of regard to Article 27 of the SCM Agreement.

24. USDOC's decision to cancel verification is evidence of the degree to which USDOC had already decided the affiliation question against Indonesia and demonstrates USDOC's commitment to making that decision stick. The United States claims it gave Indonesia ample time to respond.[31] On the question of the fairness of the timing, Indonesia asks the Panel to recall that USDOC requested information about other debt sales nearly 6 months after the original questionnaire. Indonesia also asks the Panel to recall that Indonesia was not able to locate complete information on the APP/SMG sale in the 2006/2007 investigation and it took Indonesia a considerable amount of time to locate complete information on the APP/SMG sale in the CCP investigation.

25. What the United States has not answered is why, despite the fact that USDOC was sending a team to verify the remainder of the GOI's questionnaire responses, USDOC would cancel just a portion of the verification. In fact, USDOC possessed all of the transaction documents from the APP/SMG sale, had all of the Indonesian laws and regulations, and was going to be able to talk directly to former IBRA officials. Had USDOC not already decided the issue of affiliation against Indonesia, verification would have been the perfect opportunity for USDOC to evaluate the

[27] See Brazil Response to First Panel Questions, para. 3.
[28] See US FWS, Exhibit US-40 (internal exhibit no. 33, p.2).
[29] See Exhibit US-81, p. 3.
[30] The United States appears to argue for such unfettered discretion. See US Response to First Panel Questions, para. 86.
[31] See US Response to First Panel Questions, paras. 95-113.

substantial information on the record and discuss it with former IBRA officials. Finally, it is important to recall that the basis for what amounted to a witch hunt by USDOC consisted of two sentences in a newspaper article and a so-called "expert's" speculation whose credentials were not part of the record in the CCP investigation and which the United States has refused to provide to the Panel.

26. The United States identifies two supposed "holes" in the record that needed to be filled. The first is the alleged lack of ownership information concerning Orleans.[32] As described above, Orlean's ownership information was not "missing" it simply was not part of the documentation IBRA required. As discussed above, the relevant question was whether Orleans was affiliated with APP/SMG and the transaction documents IBRA required showed it was not. The second alleged hole the United States identifies was the GOI's claim that IBRA accepted affirmations from the bidders that they were not affiliated with the debtor companies.[33] As discussed above, IBRA's regulations specified what documents were required and USDOC possessed those regulations and those documents from the APP/SMG sale. In addition, USDOC's purported expert explained that IBRA did not undertake extensive investigation on this. Further, the World Bank report which *preceded* the sale of the APP/SMG debt spoke of other affiliated debt buy backs suggesting IBRA did not inquire further.[34] Finally, had USDOC proceeded with verification, USDOC would have had the opportunity to ask former IBRA officials about the procedures that were followed on the subject of affiliation. In short, to the extent there was a hole in the record it was of USDOC's own making by cancelling verification.

27. The United States overstates the significance of differences between the PPAS and PPAS 2 terms of reference.[35] In fact, the differences highlight the limited relevance of the PPAS 2 transaction documents because they were part of a second round of bidding (known as PPAS 2) that occurred *after* PPAS (the original round of bidding in the APP/SMG debt sale occurred) – as USDOC was aware.[36] In the original round of bidding under PPAS, all bids except for the APP/SMG debt were below the floor price and no one placed a bid for the Texmaco Group's assets.[37] So while the PPAS 2 terms of reference may have been different from those of PPAS, the United States has not shown the PPAS terms of reference were different from one company to another.

28. Finally, the United States' argument that the SCM Agreement does not require verification is largely semantic. USDOC conducted an on-site verification of the GOI. By cancelling the debt buy back portion of the verification, USDOC merely refused to verify anything having to do with debt buy-back, even information that undeniably was on the record long before USDOC requested all of the PPAS 2 documents. The United States faults Indonesia for not providing the PPAS 2 document *after* USDOC cancelled verification on the debt buy back issue.[38] But this reading of the agreement would produce unreasonable and absurd results. According to the United States, a member would have to insist on providing every piece of rejected information or lose the right to a WTO challenge.

29. The third parties are largely in agreement with Indonesia. Brazil indicates that new information should be accepted at verification and that before cancelling verification, the investigating authority should consider whether verification could be used to obtain additional and more detailed information.[39] Canada agrees that nothing prohibits an investigating authority from accepting new information during the on-site verification.[40] Finally, the EU explained that it routinely accepts new information at verification and whether it will rely on it depends on the circumstances.[41]

[32] See US Response to First Panel Questions, para. 114.
[33] See US Response to First Panel Questions, para. 115.
[34] See para. 51 below.
[35] See US SWS, paras. 62-66.
[36] See Exhibit IDN-15, p. 5.
[37] See Exhibit IDN-15, p. 5.
[38] See US SWS, para. 78.
[39] See Brazil Response to First Panel Questions, para. 5.
[40] See Canada Response to First Panel Questions, paras. 7-11.
[41] See EU Response to First Panel Questions, para. 19.

C. USDOC's Failure to Make Specificity Findings in Accordance with Article 2.1 of the SCM Agreement

1. Article 2.1(c)'s Subsidy Program Requirement

30. The United States defends USDOC's finding of a "subsidy program" largely by focusing on the question of whether "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises" must be found in every instance.[42] Indonesia is not suggesting that an investigating authority must, in every instance, find evidence of both a plan and a systematic series of actions. But as the Appellate Body has recognized, it is not sufficient just to find that a financial contribution has been given to an entity.[43] Indonesia is arguing that because none of the programs in question confer a benefit, USDOC had to rely on more than just a finding of a mere alleged financial contribution.

31. As Indonesia noted in its First Written submission, the so-called provision of standing timber benefits the GOI because the GOI receives revenues from the use of the land.[44] Notably, because GOI is not providing timber, it is not reasonable to characterize the fees as payments for timber. In addition, the GOI receives services from the entities who hold licenses.[45] Because there is no written plan that confers a benefit, USDOC needed to look at whether a systematic series of actions conferred a benefit.

32. The log export ban, similarly, does not confer a benefit. Indonesia enacted the log export ban in 2001 to protect against deforestation.[46] The export ban never applied to pulp or wood chips. The United States continues to misapprehend the record on this point. As the United States acknowledges, the ban never applied to pulp.[47] The United States is mistaken when it states that the ban applied to wood chips.[48] As Indonesia has explained, the log export ban never applied to wood chips, which fall under HS 4401.[49] The United States agrees that wood chips fall under HS 4401 but claims they also fall under HS 4404.[50] As Indonesia has explained, chipwood − not wood chips − falls under HS 4404 and the ban was amended in 2003 to allow the export of chipwood.[51] USDOC appears to have mistaken the fact that the 2008 Decree No. 20/M-DAG/Per/5/2008 reflected the fact that products falling under HS 4401 and HS 4404 *already* were excluded from the ban as discussed above. The further steps the United States discusses about legalizing the export of forest products relate to the complete repeal of the ban,[52] which did not occur. Under those circumstances, where the law does not confer a benefit, USDOC needs to find a systematic series of actions that confer a benefit.

33. The alleged debt buy back is perhaps the most extraordinary finding by USDOC of the existence of a subsidy program. All of the written materials suggested no benefit was conferred. In fact, Indonesian law made it illegal for an affiliate to purchase its own debt.[53] USDOC found the existence of a subsidy program based on a violation of the law. Put differently, the Indonesian law, itself, was not the subsidy program. Instead, it was the violation of the law that USDOC found was a subsidy program. But in the absence of a written law, USDOC needed to find a systematic series of actions that conferred a benefit which it did not do. Rather, USDOC found a single illegal act (based on newspaper speculation) made it specific.

2. The Chapeau of Article 2.1's Requirement to Identify the Jurisdiction

34. USDOC's specificity finding for the alleged debt forgiveness rested on speculation from a newspaper article. But other newspaper articles suggested debt was sold to affiliates a number of times. At bottom, USDOC specificity finding rests on a conclusion, albeit unsupported, that

[42] See US FWS, paras. 174 (standing timber), 183 (log export ban), and 193 (debt forgiveness).
[43] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.143.
[44] See Indonesia FWS, para. 77.
[45] See Indonesia FWS, paras. 76-77.
[46] See Indonesia FWS, para. 13.
[47] See US Response to First Panel Questions, para. 67.
[48] See US Response to First Panel Questions, para. 65.
[49] See Indonesia Response to First Panel Questions, para. 25.
[50] See US Response to First Panel Questions, para. 69.
[51] See Indonesia Response to First Panel Questions FSM, para. 26.
[52] See US Response to First Panel Questions, paras. 70-71.
[53] See Indonesia FWS, para. 83.

Indonesia knowingly and deliberately violated Indonesian law. The United States argues that the jurisdiction was discernible from the determination.[54] But that misses the point. On the one hand, USDOC claims the debtor is affiliated with the purchaser based on two sentences in a single newspaper report. On the other hand, USDOC finds that the law was broken only with respect to the APP/SMG debt, despite other newspaper articles (and a World Bank report that preceded the APP/SMG sale),[55] related to other sales, implying that IBRA sales more generally (without any mention of APP whatsoever) may have allowed affiliates to buyback debt, indicating there was more than one instance of an affiliate of debtor buying back debt. USDOC cannot have it both ways. If newspaper reports are sufficiently credible to find a government violated its own law – Indonesia disagrees that they are – then newspaper reports are also sufficient to refute USDOC's specificity finding that the APP/SMG debt was the only instance where an affiliate bought back its own debt. In these circumstances, USDOC must identify exactly what individual or individuals acted on behalf of the GOI to violate Indonesian law.

35. Citing to a World Bank report, the United States argues debt buy-backs under the PPAS would have been specific even if other debtors bought back debt from affiliates.[56] But the provision of the World Bank report the United States relies on *was not discussing sales under the PPAS*, it was discussing sales of *small loans* of which there were some 300,000 NPLs.[57] Finally, it is worth noting that the World Bank report is dated November 4, 2003,[58] more than a month before the December 8, 2003 announcement of the sale of the APP Group assets.[59] Obviously the speculation in the World Bank report about affiliates repurchasing debt does not relate to APP.

IV. THE UNITED STATES' DEFENSE OF ITS FLAWED THREAT OF INJURY DETERMINATION

36. The following key are points before the Panel with respect to the USITC's threat of injury determination: 1) whether the USITC established a causal connection between the subject imports and the threat of injury to the domestic industry as required by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement; 2) whether the USITC based its findings on conjecture and speculation in contravention of Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement; 3) whether the cumulative effect of the individual flaws in the USITC's determination render it inconsistent with Article 3.8 of the Anti-dumping Agreement and Article 15.8 of the SCM Agreement.

A. The USITC's Failure to Establish a Causal Connection Is Inconsistent with Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement

37. As Indonesia set forth in its First Written Submission, Articles 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement contain three principles which the USITC's determination violates: 1) non-attribution, 2) concrete examination of other factors, and 3) isolation of factors other than subject imports that caused or threaten injury.[60]

38. With respect to non-attribution, the United States acknowledges that the vulnerability finding weighed heavily in the USITC's "consideration of the impact of subject imports on the domestic industry in the imminent future."[61] Indonesia submits this demonstrates violation of the non-attribution principle because subject imports were not what caused the domestic industry to be vulnerable. The USITC found that the domestic industry was vulnerable because all of its performance indicators exhibited a downward trend during the period of investigation.[62] Importantly, subject imports were not the cause of the downward trend, otherwise the USITC would have found present injury rather than a threat. Two factors, unrelated to subject imports, were the sole underpinnings of the USITC's vulnerability finding: declining demand and expiration of the black liquor tax credit. In the paragraph of its determination in which it analyses vulnerability the USITC expressly identifies declining demand as the cause of the domestic

[54] See US FWS, para. 221.
[55] See para. 51 below.
[56] See US Response to First Panel Questions, para. 83.
[57] See Indonesia Response to First Panel Questions, para. 49.
[58] See Exhibit US-40, p. 38 of pdf.
[59] See Exhibit US-33, p. 110 of pdf; see also US Response to First Panel Questions, n. 109.
[60] See Indonesia FWS, para. 99.
[61] See US FWS, para. 246.
[62] See USITC Opinion, Exhibit IDN-18, p. 38.

industry's declining performance.[63] The USITC then discusses the black liquor tax credit noting it had propped up the domestic industry during the period of investigation but, because of its expiration, would no longer help the domestic industry which was another factor making the domestic industry vulnerable.[64] There may be investigations where a vulnerability analysis suggests subject imports caused the domestic industry to be vulnerable − but this was not one of them. By heavily weighing the threat posed by subject imports in the context of a domestic industry which was vulnerable because of declining demand and an expiring tax credit, the USITC violated Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

39. The United States claims that the USITC never found the black liquor subsidy yielded a net benefit.[65] Whether the subsidy was included in operating income or had a one-time financial benefit misses the point. The subsidy affected normal market conditions, including pricing and costs and production-related activities.[66] The USITC failed to give any consideration or devote any of its threat analysis to the fact that subject imports likely would respond differently in a market without the subsidy. The USITC exacerbated its error by finding "*it likely that subject imports would be priced aggressively so as to regain market share lost in interim 2010 due to the pendency of the investigations*."[67] In other words, the USITC credited the lifting of the preliminary measures as a threat factor.

40. The USITC also claims that expiration of the subsidy was not a known other factor causing injury.[68] But the USITC found that the expiration of the subsidy meant "any benefit that the domestic industry received from it in 2009 will not continue into the imminent future."[69] The subsidy's expiration, along with declining demand, made the domestic industry vulnerable to injury.[70] In other words, the expiration of the subsidy was a known other factor that made the domestic industry worse off than when the subsidy was in place. Consequently, the United States' claim that the subsidy's expiration was not a known other factor causing injury is a distinction without a difference.

41. With respect to conducting a concrete analysis of factors other than subject imports, the United States argues that no specific methodology is required and that injury caused by other factors need not be quantified.[71] Indonesia is not suggesting that the United States must use a particular economic model or must quantify the effects of the black liquor tax credit's expiration, or of non-subject import and subject import market share swaps, or of declining consumption. But where an investigating authority's present injury analysis is more concrete and rigorous than its threat analysis, there is a clear inconsistency with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement and disregard for the special care requirement when making a threat of injury determination.

42. For example, the USITC's present injury findings contain a volume analysis consisting of precise measurements of the volume of subject imports, non-subject imports, domestic industry shipments, and market share.[72] The USITC's present injury findings contain a pricing analysis based on four pricing products.[73] Finally, the USITC's present injury findings contain an impact analysis that is based on several trade and financial performance indicators.[74] Yet the USITC concluded that none of the precise measures was sufficient to demonstrate a causal link between subject imports and injury to the domestic industry.[75] But by applying less precise, amorphous standards phrased in general terms like "increasing volumes of low-priced imports,"[76]"will take sales from current suppliers such as the domestic industry,"[77] and "will gain additional U.S. market

[63] See USITC Opinion, Exhibit IDN-18, p. 38.
[64] See USITC Opinion, Exhibit IDN-18, p. 38.
[65] See US Response to First Panel Questions, para. 129.
[66] See USITC Opinion, Exhibit IDN-18, p. 33.
[67] See US FWS, para. 244. (Emphasis added)
[68] See US Response to First Panel Questions, para. 134.
[69] See USITC Opinion, Exhibit IDN-18, p. 38.
[70] See USITC Opinion, Exhibit IDN-18, p. 38.
[71] See US FWS, para. 304.
[72] See USITC Opinion, Exhibit IDN-18, pp. 26-27.
[73] See USITC Opinion, Exhibit IDN-18, pp. 31-33.
[74] See USITC Opinion, Exhibit IDN-18, pp. 35-38.
[75] See USITC Opinion, Exhibit IDN-18, p. 38.
[76] See USITC Opinion, Exhibit IDN-18, pp. 38.
[77] See USITC Opinion, Exhibit IDN-18, pp. 38.

share in the imminent future,"[78] the USITC concluded subject imports would be a cause of injury in the future.

43. With respect to the need to isolate injurious effects, the United States responds that the USITC was merely repeating the domestic law standard when the agency stated that it did not need to isolate injury caused by other factors and that the USITC, in fact, performed a non-attribution analysis.[79] Indonesia does not doubt that the USITC was restating the domestic law standard and that is why it is troubling. Irrespective of whether the USITC examined other factors, the key question is with what degree of rigor did the USITC do so, especially in the context of a threat analysis? Indonesia respectfully submits that the analysis was without sufficient rigor.

44. For purposes of its present injury analysis, the USITC isolated factors other than subject imports, including the economic downturn and declining demand.[80] As a consequence, the USITC concluded there was not a "sufficient causal nexus necessary to make a determination that subject imports are currently having a significant adverse impact on the domestic industry."[81]

45. In its threat analysis the USITC, collapsed, rather than isolated factors other than subject imports with the likely effects of subject imports. The way the USITC did this was through its vulnerability finding. The USITC begins its vulnerability analysis by noting the downwards trends in virtually all of the domestic industry's performance indicators "weigh heavily in our consideration of the impact of subject imports in the imminent future."[82] But in its present injury analysis, the USITC had just stated found subject imports were not the cause of those downwards performance trends, rather it was the economic downturn and declining demand. The USITC also found that the expiration of the black liquor tax credit, another factor unrelated to subject imports, made the domestic industry vulnerable.[83]

46. To comply with the isolation component of the non-attribution requirement, the USITC needed to do the opposite of what it did. Rather than finding the domestic industry's vulnerability made it more likely that subject imports threatened injury, the USITC should have analyzed the impact of just the subject imports on the domestic industry during the period of investigation, after isolating out the other factors and, based on that analysis, determined whether a threat of injury was likely.

47. In short, the USITC found a threat of injury not based on subject imports but because of the expiration of a tax credit, a decline in consumption, and an increase in imports that had declined because of the investigation. In reaching an affirmative threat of injury determination, the USITC attributed those effects to subject imports and violated US obligations under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

B. The USITC Relied on Conjecture and Speculation in Contravention of Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement

48. Indonesia has challenged the USITC's threat determination as inconsistent with Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement because it is based on conjecture or speculation regarding events which were not clearly foreseen and imminent. The specific findings at issue are that subject imports would have adverse effects on US prices and would gain market share at the expense of the domestic industry.[84] The defences the United States offers are without merit. First, the United States claims that the USITC did not find the increase in subject import volume was innocuous for the domestic industry pointing to the finding that import volumes were significant and domestic shipments declined.[85] Yet the USITC concluded, in spite of those two facts, that there was no causal connection between subject imports and the domestic industry's condition − even when subject imports were at their peak

[78] See USITC Opinion, Exhibit IDN-18, pp. 38.
[79] See US FWS, n. 630.
[80] See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701-TA-470-471 and 731-TA-1169-1170 (Final), Pub. 4192 (Nov. 2010) (USITC Opinion), Exhibit IDN-18, p. 37.
[81] See USITC Opinion, Exhibit IDN-18, p. 38.
[82] See USITC Opinion, Exhibit IDN-18, p. 38.
[83] See USITC Opinion, Exhibit IDN-18, p. 38.
[84] See Indonesia FWS, para. 124.
[85] See US FWS, para. 263; US Response to First Panel Questions, para. 137.

market share.[86] In addition, a decline in shipments (as opposed to market share) could be caused by declining demand. Indeed, domestic shipments declined less than demand.[87]

49. Second, the United States makes much about the existence of a new distributor called Eagle Ridge, even claiming that it was established to double exports to the United States.[88] In reality, Eagle Ridge was established in response to APP's loss of business with Unisource.[89] Unisource was a major paper distributor.[90] APP had hoped to expand its business with Unisource but lost the account instead.[91] If anything, Eagle Ridge is evidence of an attempt to recoup lost sales, not evidence of a major, planned expansion of sales.

50. The underlying support is a single declaration that is questionable in a number of respects. One, the declaration is evidence that lower prices do not automatically mean exporters will gain market share. Indeed, Unisource dropped APP as a supplier.[92] This contradicts the USITC's conclusion about the likelihood of lower priced subject imports gaining market share.[93] Two, the declaration states that the conversations about doubling imports occurred in 2008. Even if the declarant was truthfully and accurately relaying his conversations, the USITC's record showed that from 2008 to 2009 imports from China increased by seven percent and imports from Indonesia increased by fifteen percent – hardly doubling.[94] Recall, too, that the USITC found that the increase in subject imports from 2008 to 2009 did not materially injure the domestic industry. Three, the declaration is from a company official who is a competitor of APP and had a deep interest in seeing orders imposed.

51. Third, the United States refers to the domestic industry's market share gain of 6.8 percentage points from subject imports.[95] But that was not a market share gain in the traditional sense of competing for customers. Rather, subject imports abruptly left the market which the USITC attributed to the pendency of the investigation.[96] Under those circumstances, a void simply needed to be filled and it says nothing about whether subject imports would compete with the domestic industry for market share if orders were not imposed.

52. Fourth, the United States refers to new capacity coming online in China as evidence of imminent increases in the volume of subject imports.[97] This was speculative and not imminent. The USITC found that after accounting for the additional capacity and projected Chinese consumption growth, there would be 900,000 metric tons of excess capacity from 2009-2011.[98] The USITC also found that consumption in the rest of Asia was likely to exceed capacity growth by 160,000 tons from 2009-2011.[99] In other words, there would only be 740,000 metric tons available for export to the rest of the world. But the USITC did not undertake any further analysis on other markets, excluding the United States, to which the Chinese industry might export. The USITC appears to assume, without support or explanation, that the Chinese industry will export all of its excess capacity to the United States in an ambiguous 2009-2011 timeframe which also calls into question the imminence of the alleged increase.

53. Contrary to the United States' suggestion, Indonesia does not concede that the Chinese producers possessed 740,000 metric tons of capacity.[100] Indonesia was merely citing to the figures on which the USITC relied. Table VII-2 of the USITC's report, on which the United States also relies for projections,[101] shows that the Chinese industry projected very little excess capacity in

[86] See USITC Opinion, Exhibit IDN-18, pp. 37-38.
[87] See US Response to First Panel Questions, para. 137 (noting domestic shipments declined by 10.4 percent at the same time apparent U.S. consumption "plummeted" by 14.7 percent).
[88] See US FWS, para. 282.
[89] See USITC Opinion, Exhibit IDN-18, p. 24.
[90] See USITC Opinion, Exhibit IDN-18, p. 29.
[91] See US FWS, n. 612.
[92] See USITC Opinion, Exhibit IDN-18, p. 29.
[93] See USITC Opinion, Exhibit IDN-18, p. 35.
[94] See USITC Opinion, Exhibit IDN-18, Table C-1.
[95] See US FWS, para. 301.
[96] See USITC Opinion, Exhibit IDN-18, p. 27.
[97] See US FWS, para. 282.
[98] See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.
[99] See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.
[100] See US Response to First Panel Questions, para. 154.
[101] See US Response to First Panel Questions, para. 154.

2011.[102] The point Indonesia was making is that the USITC undertook no analysis of other markets to which the Chinese industry might export. Further, the Chinese industry had excess capacity during the POI.[103] If the USITC's theory were correct, i.e., that the Chinese industry would get rid of excess capacity by exporting to the United States, then the Chinese industry would not have had excess capacity in any year of the POI.

54. Indonesia has demonstrated the inconsistency between the USITC's present injury finding that subject imports had not had adverse price effects despite underselling and the threat finding that subject imports likely would have adverse price effects.[104] At the heart of the United States' defence is the argument that the expiration of the black liquor tax credit and a more moderate decline in consumption would no longer obscure the adverse effects subject imports were having on domestic prices.[105] But this is pure speculation. To the extent that the black liquor tax credit and declining consumption were affecting pricing behaviour throughout the period of investigation, as the USITC finds they were, the USITC lacks any basis to make a projection about how subject imports would perform in a market where those factors were not operating to lower prices. In other words, those same factors that the USITC found were driving down the domestic industry's prices may be, indeed, likely were, responsible for driving down subject import prices. In short, the USITC's conclusion about a threat of injury based on price depression is based on speculation and, thus, inconsistent with Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement.

55. Indonesia has argued that the USITC did not point to facts that were going to change in the imminent future such that subject imports would take significant share from the domestic industry. As a factual matter, there was no correlation between subject import volumes and the decline in the domestic industry's shipments. The volume of the domestic industry's shipments declined in each year of the period of investigation, including from 2007 to 2008, when the volume of subject imports also declined.[106] Indeed, the USITC found declining consumption and the economic downturn were responsible for the decline in the domestic industry's shipments.[107]

56. The United States also relies on the increase in production capacity in China,[108] which as addressed above the USITC improperly concluded would all be used to export to the United States during the 2009-2011 timeframe. In addition, the United States relies on the establishment of Eagle Ridge as evidence of likely increases in subject import volumes.[109] But as addressed above, Eagle Ridge was established because APP lost a major customer. This was a negative development. While the United States points to the fact that subject import volumes increased even after APP lost the account,[110] there is no evidence on the USITC's record to support that conclusion. The United States cites to page 26 of the USITC's report which reports that the volume of subject imports increased from 2008 to 2009.[111] But Eagle Ridge was not even started to be established until the second half of 2009.[112] The only way to see the impact of APP's loss of Unisource on subject import volumes would be to examine monthly imports before and after. Data for whole year 2009 could mask a large volume of imports before the business was lost and a decline thereafter. Indeed, the USITC even noted that import volumes were particularly high in January 2009.[113] The USITC even appears to have had the data to perform this analysis but, for whatever reason, chose not to do so.[114]

57. The United States argues that the USITC "*found it likely that subject imports would be priced aggressively so as to regain market share lost in interim 2010 due to the pendency of the*

[102] See USITC Opinion, Exhibit US-1, Table VII-2.
[103] See USITC Opinion, Exhibit US-1, Table VII-2.
[104] Indonesia FWS, paras. 125-126.
[105] See US FWS, para. 279.
[106] See USITC Opinion, Exhibit IDN-18, Table C-3.
[107] See USITC Opinion, Exhibit IDN-18, p. 37 ("The deterioration in almost all of the domestic industry's performance indicators between 2007 and 2009 coincided with the economic downturn and a sharp decline in demand for CCP.").
[108] See US FWS, para. 264.
[109] See US FWS, para. 265.
[110] See US FWS, para. 265.
[111] See USITC Opinion, Exhibit IDN-18, p. 26.
[112] See USITC Opinion, Exhibit IDN-18, p. 24.
[113] See USITC Opinion, Exhibit IDN-18, p. 30, n. 193.
[114] See USITC Opinion, Exhibit IDN-18, p. 30, n. 193 (referencing a document containing monthly import statistics for the period of investigation).

investigations."[115] If this reasoning is sufficient, a threat finding will be compelled in nearly every case because the investigating authority can start an investigation, observe a decline in subject imports once preliminary measures are imposed, and then infer subject imports will increase significantly to regain lost market share. Under that simplistic analysis, why should exporters even bother to defend themselves? As the EU stated, "[i]t would . . . mean that it would be within the control of the authority whether a change of circumstances would occur (by imposing preliminary duties) or not (by not imposing preliminary duties). This cannot be correct."[116]

58. The United States also relies on the increase in production capacity in China and the establishment of Eagle Ridge.[117] As discussed above, neither point supports a finding of an imminent likely increase in the volume of subject imports. Finally, the United States claims the USITC did not have to "pinpoint the precise volume of sales that subject producers were likely to capture from non-subject imports instead of the domestic industry."[118] But if the USITC did not attempt such an analysis, as the United States concedes it did not, Indonesia respectfully submits that the USITC's conclusion is, by definition, nothing more than conjecture, which is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

C. The USITC Did Not Exercise Special Care in its Threat of Injury Determination

59. The United States relies solely on the panel's statement in *US – Softwood Lumber VI* to defend the inconsistencies Indonesia identified in the USITC's threat determination as also being inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[119] The reasoning, in turn, on which the United States hangs its defence consists of the following: "[W]e believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations."[120] This Panel should reach a different result and one that is grounded on something more concrete than a mere "belief." Indeed, the panel did not cite any authority to support its view. Further, the panel's view would mean that a single action or finding could not violate more than one WTO obligation which is not the case. For these reasons, this Panel should find that the specific violations Indonesia has identified also violate Articles 3.8 Anti-Dumping Agreement and 15.8 of the SCM Agreement.

60. Indonesia also has argued the USITC violated the special care requirement by resolving all key issues against respondents. The United States attempts to dismiss this argument by relying on its defences to the specific violations Indonesia identified.[121] The same panel in *Softwood Lumber VI* on which the United States relies also stated that "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury."[122]

61. Indonesia has argued that the each individual deficiency constitutes a violation of the duty to exercise special care pursuant to Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[123] Indonesia has argued that the cumulative effect of the deficiencies also amount to violations.[124] The United States argues that the claims must go beyond those made under other provisions of the Anti-Dumping and SCM Agreement.[125] In Indonesia's view, there is no textual evidence that arguments made under other Articles cannot also constitute a violation of Articles 3.8 and 15.8. Indeed, neither the panel in *US Softwood Lumber VI* nor the United States offer such evidence.

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[115] See US FWS, para. 244. (Emphasis added).
[116] See European Union's Responses to the Questions from the Panel to the Third Parties following the Third-Party Session, para. 36; see also Responses of Brazil to the Panel's Questions to the Third Parties, para. 10.
[117] See US FWS, para. 271.
[118] See US FWS, para. 272.
[119] See US SWS, para. 147.
[120] See Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004 ("*US-Softwood Lumber VI*"), para. 7.34.
[121] See US SWS, para. 148.
[122] See *US – Softwood Lumber VI*, para. 7.33.
[123] See Indonesia FWS, para. 131.
[124] See Indonesia FWS, para. 132.
[125] See US Response to First Panel Questions, para. 157.

V. THE TIE VOTE PROVISION OF UNITED STATES' LAW IS INCONSISTENT WITH THE DUTY TO EXERCISE SPECIAL CARE

62. Indonesia has challenged, on as such basis, *Section 771 of the Tariff Act of 1930* as contravening basic fairness principles and the special care provisions of Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.[126] The effect of the law, which the United States does not dispute, means foreign exporters always need four votes to win a threat of injury determination while domestic petitioners only ever need three. The United States responds that the tie vote provision is strictly a matter of internal decision-making that does not interfere with individual commissioners' exercise of special care.

63. The United States response boils down to one point: that Articles 3.8 and 15.8 only address "substantive obligations" that, in this case, individual USITC Commissioners must abide by when conducting the threat of injury analysis; in the US view, the Anti-Dumping and SCM Agreements provide complete discretion as to the "internal-decision making procedure" of how the USITC adds up individual votes and comes to a final decision.

64. Nowhere does the text of Articles 3.8 and 15.8 draw a line between substantive and procedural conduct. On the contrary, these provisions explicitly refer to both the "consideration" of threat of injury measures and the "decision" itself related thereto. Hence, meaning must be given to this, pursuant to the principle of effective treaty interpretation (*effet utile*) and Article 31.1 of the VCLT. The Panel cannot read either "considered" or "decided" out of the WTO agreements, nor can it equate "considered" with "decided" on the assumption that they mean the same thing.

65. "Consider" is defined as "*To view or contemplate attentively, to survey, examine, inspect, scrutinize*".[127] "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".[128] Hence, even if "considered" may refer to (or even be limited to) the ITC's substantive consideration of the requirements under the SCM Agreement, the term "decided" unequivocally includes the way the ITC as a body brings the question of applying or not applying countervailing measures in threat of injury situations "to a resolution or conclusion", that is, including the way the ITC resolves a tie vote in those situations. By limiting Articles 3.8 and 15.8 to "substantive analysis"[129] the United States reads the word "decided" out of the Anti-Dumping and the SCM agreements.

66. WTO members must exercise "special care" not only in their substantive analysis or consideration, but also in how the final determination is "decided". Indonesia does not contest, in this dispute, that the individual USITC members may have cast their individual vote after considering the matter "with special care". That is not the issue in dispute. Indonesia claims that the way US law tallies these individual votes to come to a final "decision" in the event of a 3 to 3 vote is contrary to the "special care" obligation. As Canada points out in its third party submission[130], this "special care" obligation in Articles 3.8 and 15.8 must be interpreted in the light of the "objective examination" requirement in Articles 3.1 and 15.1 which, according to the Appellate Body, mandates an "examination *process*" that "must conform to the dictates of the basic principles of good faith and fundamental fairness" and precludes investigating authorities from conducting their investigation "in such a way that it becomes more likely that, as a result of the … evaluation *process*, they will determine that the domestic industry is injured".[131] As Canada puts it, the "structural bias" of the US tie vote rule "blatantly favours petitioners and prejudices respondents", "cannot be consistent with the obligation to conduct an 'objective examination'" and

[126] See Indonesia FWS, paras. 133-165. The relevant provision of United States law has been codified at *19 U.S.C. § 1677(11)(B)*.

[127] Oxford English Dictionary, online at http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid.

[128] Oxford English Dictionary, online at http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid.

[129] US FWS, para. 313.

[130] Canada, Third Party Submission, paras. 39-44.

[131] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, paras. 193 and 196 (emphasis added).

is also "manifestly inconsistent with the obligation to exercise 'special care' in the context of threat of injury determinations".[132]

67. The US relies on the Appellate Body report in *US – Line Pipe*. But that decision reversed a panel finding that the ITC should have issued discrete safeguard determinations on either serious injury or threat of serious injury. It is in that context that the Appellate Body finding that the Agreement on Safeguards "does not prescribe the internal decision-making process" for safeguard determinations must be read. Moreover, Indonesia is not arguing that the Anti-Dumping or SCM agreement mandate a specific "internal decision-making process", be it a unitary decision by a single entity or individual, or a decision by a multi-member body. WTO members are, indeed, free to pick either option. What Indonesia claims, however, is that once a WTO member has decided to make determinations by a multi-member body (as the US did), and decides to put 6 members on that body, to then mandate an affirmative finding of threat of injury even if the votes are tied 3 to 3, is *not* a determination "decided with special care".

68. To accept the US artificial bifurcation between "substance" and "procedure" would imply that WTO members can set up a multi-member body to make threat of injury determinations and then decide that all determinations by that body will be presumed affirmative as soon as one individual on, for example, a 15 member body decides in favour of petitioners. It is hard to see how such determinations would be "decided with special care". If a WTO member decides, like the US did, to give decision-making power to a body composed of 6 individuals, acting in a commission, it cannot then mandate an affirmative determination by that body as soon as one of these 6 individuals considers there is a threat of injury, even if that one individual is contradicted by the other 5. Yet, that is exactly what the US argument in this dispute would allow for.

69. "Special care" in threat of injury cases implies both an absolute standard and a relative one as compared to present injury determinations. In absolute terms, and irrespective of what happens in present injury cases, threat decisions must be made not using standard due diligence and attention, but additional, extra care or protection. Stating that one side (petitioners) only need three votes to win, the other side (exporters) need four, simply does not meet this heightened standard. The obligation of "special care" implies also extra carefulness as compared to present injury cases. This extra or special care can be expressed in many ways, both substantive and procedural. It does obviously not mandate (as the EU third party submission seems to imply) that for threat cases respondents must win with fewer votes than what they normally need in present injury cases. Indonesia is not claiming here that USITC voting rules in threat cases must be skewed in favour of respondents or be more favourable to respondents than in present injury cases. The only claim Indonesia is making in this dispute is that mandating an affirmative threat of injury determination where USITC votes are tied 3 to 3 is systematically discriminating petitioners and anything but a decision taken "with special care". For the US to state, at para. 349 of its FWS, that "there is nothing partial … about the manner in which the Commission resolves tie vote situations" is simply not credible.

VI. CONCLUSION

70. Indonesia brought this case not only to redress several U.S. violations of its WTO obligations but because Indonesia believed it had been treated unfairly. In the USDOC proceedings, USDOC inaccurately portrayed Indonesia as providing standing timber to paper manufacturers at distorted prices. As Indonesia has demonstrated, nothing could be further from reality.

71. USDOC found Indonesia's log export ban was designed to promote downstream industries in spite of the clearly expressed purpose of the law to prevent illegal logging. The fact that the law may not have been 100 percent successful is not evidence of a hidden intent but, rather, the pervasive nature of the problem the law is trying to solve.

72. Perhaps the most remarkable and most disturbing USDOC finding concerns the express claim by USDOC that the Government of Indonesia broke its own law by allowing an affiliate to buy back debt. As Indonesia has demonstrated, USDOC cites no actual evidence this occurred, just two speculative sentences from a single newspaper article.

[132] Canada, Third Party Submission, paras. 44 and 47.

73. In the USITC proceedings, one of the unfavorable factual findings the Indonesian exporters faced was not because of a subsidy that Indonesia bestowed on them, but because of a subsidy the United States government was taking away from its domestic industry.

74. Finally, Indonesia challenges a provision of U.S. law that always operates in favor of the U.S. domestic industry and against exporters/respondents. The law, not the Commissioners, determines a threat of injury exists.

75. Indonesia submits that as much as this case is about violations of U.S. WTO obligations, it is also about basic questions of fairness.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. INDONESIA'S ARGUMENTS CHALLENGING USDOC'S FINDINGS THAT THE PROVISION OF STANDING TIMBER AND THE LOG EXPORT BAN PROVIDED INPUTS AT LESS THAN ADEQUATE REMUNERATION ARE BASELESS AND SHOULD BE REJECTED

A. Indonesia's Factual Arguments with Respect to the Operation of the Standing Timber Program and Log Export Ban Are Not Supported by the Evidence That Was Before USDOC in the Underlying Investigation

1. ***Indonesia's arguments about stumpage licensing and royalties relate to financial contribution, not LTAR, and are not supported by record evidence.*** For the first time at the panel's December 6, 2016 meeting, Indonesia asserts that it provided only land access, and not standing timber, to the extent that logging companies cultivated timber under government concessions rather than clearing pre-existing timber. This argument is not germane to issues of adequacy of remuneration, but instead Indonesia essentially argues that USDOC analyzed the wrong financial contribution. As the United States has explained, however, Indonesia has not presented a claim under Article 1.1(a) and accordingly Indonesia has no basis for asking the Panel to examine issues related to financial contribution. Second, Indonesia points to no record evidence in the Coated Paper investigation that supported this assertion. For example, Indonesia did not raise USDOC's supposed "fundamental misconception of the nature of the alleged subsidy program" during the entirety of the underlying investigation. The Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as reviewer of agency action" and not as "initial trier of fact."

2. Indonesia's new argument is contradicted both by record evidence and prior representations by Indonesia. USDOC learned in the underlying investigation that logging companies can obtain timber from GOI land in three ways: harvesting pre-existing timber from the natural forest, clear-cutting pre-existing timber to establish an area as a future plantation, or harvesting cultivated timber on a plantation. Whether timber is pre-existing or cultivated, the harvesting company must pay species-specific "PSDH" cash stumpage fees as a royalty for harvesting the timber. It is this stumpage rate that USDOC was examining for consistency with market principles. The GOI regulated timber plantations in a manner consistent with providing standing timber. To obtain an "HTI license" to operate a timber plantation on GOI land, a logging company must meet a number of regulatory requirements and pay a concession fee. Rather than payment of a lease based on a given acreage, the concessionaire pays stumpage fees on the volume of wood harvested from the land. GOI officials accompany logging company officials into the fields at the time of the harvest to check the accuracy of the company's volume reporting. The GOI retains title to the standing timber cultivated by private companies until the applicable stumpage fees are paid. Only then are the logs officially the property of the logging company and permitted to exit the collecting area. The royalties are tied to stumpage, not land use. GOI "provided" standing timber even where it was grown by the concessionaire. USDOC understood the nature of the GOI's financial contribution, and characterized it in a manner consistent with the fact that the GOI provided both cultivated and pre-existing timber. For instance, USDOC stated that the GOI "allowed timber to be harvested from government-owned land," and noted the percentage of the harvest during the period of investigation attributable to or accounted for by government land. These conclusions were clearly articulated in the determination. To determine whether standing timber provided a benefit, USDOC properly assessed whether the GOI's stumpage fees were set in accordance with market principles. The factors identified by USDOC in its analysis of distortion of the market for standing timber apply equally to both pre-existing and cultivated timber. The GOI administratively set the applicable PSDH fee, which applied equally to pre-existing and cultivated timber, without regard for market principles. Therefore, USDOC analyzed the correct measure and the relevant factors in its assessment of whether the market is distorted so that recourse to an out-of-country benchmark was necessary.

3. ***Contrary to Indonesia's assertions, USDOC considered all relevant pricing information***. The Appellate Body has explained that the investigating authority's analysis of whether in-country prices provide a proper benchmark "will vary depending upon the circumstances of the case … including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record." Pursuant to Article 12.1 of the SCM Agreement, investigating authorities may require "Interested Members and all Interested Parties" to supply evidence, and must ensure that such parties have notice and "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." The SCM Agreement does not obligate investigating authorities to collect data from non-interested parties, who in any event lack the incentive to respond.

4. USDOC asked both the GOI and APP/SMG to report stumpage fees paid for timber on private land. Neither responded to these questions with information on such fees. The GOI stated that it did not collect price information on timber harvested from private land. APP/SMG reported payments to the GOI of PSDH, DR, and PSDA fees, and none to private owners. APP/SMG provided a partial response to a separate USDOC question regarding whether APP/SMG had an arrangement to harvest private timber, and to indicate whether the arrangement was with an unaffiliated party, and if so, to provide a copy of the relevant contracts and other documents. APP/SMG responded that its cross-owned company Wirakarya Sakti, PT (WKS) "purchased a small quantity of logs from private individuals in villages from the Jambi region, who individually grow trees on their private land" around the perimeter of WKS' plantations. APP/SMG did not identify whether these individuals were affiliated with it, and did not provide any documentation regarding the arrangement. Neither did APP/SMG report any actual payments to such private individuals. APP/SMG responded to the initial questionnaire's remaining questions that applied both to arrangements for timber harvested from public and private land as if the private arrangement did not exist.

5. In the first supplemental questionnaire, USDOC asked whether APP/SMG's initial questionnaire response had included "the total fees paid or total fees accrued for all timber harvested by APP/SMG cross-owned companies in the POI." In response, APP/SMG provided "detailed payment data for the timber harvested during annual 2008," which again did not reflect any payments to private individuals by WKS. Accordingly, the purported price of 20,000 IDR per ton of acacia to private individuals was 1) based on "a small quantity"; 2) was not reflected in the stumpage payment records APP/SMG provided to USDOC; 3) was not substantiated by any contract or other documentation; 4) was not confirmed to be arms-length; and 5) was based on an atypical type of commercial activity – i.e., was arranged merely because the private individual's land abutted the cross-owned company's plantation. In addition, APP/SMG did not characterize the payment as a stumpage fee, instead stating that it was a "pure rental payment," while providing conflicting information regarding whether it was the private individuals or WKS that grew the timber. The information had limited probative value and was of questionable reliability. Neither APP/SMG nor the GOI argued that the information should be considered with respect to evaluating the viability of using an in-country price as a benchmark.

6. The Issues and Decision Memorandum summarized the key issues and evidence among a record spanning thousands of pages, and did not purport to discuss each and every bit of information on the record, especially information of little probative value, and for which no argumentation was submitted. Consequently, there is no basis for Indonesia's statement that USDOC "had information on in-country prices but chose not to examine it."

7. The other purported evidence of in-country prices that Indonesia says USDOC failed to consider was not on the record of the underlying countervailing duty investigation. Rather, Indonesia has submitted to the Panel documents pertaining to APP/SMG affiliates' sales and purchases of logs, which was presented in the *antidumping* duty investigation of coated paper from Indonesia *but not in the CVD investigation.* Indonesia has no legal basis for arguing that USDOC somehow failed to comply with the SCM Agreement by not considering a document never filed in the CVD proceeding.

8. USDOC did not, as Indonesia argues, "refuse to consider evidence relating to factors other than government market share." Indonesia fails to identify a factor or facet of the domestic market that USDOC refused to consider. The mere existence of a private price does not establish that such a price is market-determined or otherwise suitable as a benchmark, particularly where the record has been analyzed and found to be replete with evidence of market distortion and the

government's role is "so predominant that price distortion is likely and other evidence carries only limited weight."

9. ***Indonesia's explanation for its claim that wood chips were not within the scope of the log export ban is inconsistent with its statements to USDOC and is of no relevance.*** As Indonesia concedes, its case brief and questionnaire response incorrectly identified wood chips as being excluded from the ban under a 2007 regulation, i.e., Government Regulation No. 6 of 2007. Because Indonesia had also stated, and USDOC had verified, that the 2007 regulation had not been implemented, USDOC reasonably determined that that wood chips remained subject to the log export ban. Indonesia never informed USDOC of its view, shared for the first time in the response to the Panel's questions that wood chips did not fall within the scope of the 2001 decree reinstating the prohibition on log exports. Similarly, it did not offer the explanation of Indonesia's HS codes that it has provided the Panel. USDOC was informed that the 2008 decree providing for the export of timber chips and the underlying 2007 regulation, were not yet in effect at its on-site verification, it had no basis to conclude that the GOI permitted export of "timber chips." Additionally, whether wood chips were covered by the ban during the period of investigation has little relevance. USDOC did not countervail APP/SMG's purchases of wood chips, or any other downstream product. Those products are distinct with distinct market considerations.

B. Indonesia's Economic Theories About Whether Its Provision of Standing Timber and Log Export Ban Suppressed Log Prices and Distorted the Market Are Not Supported by Qualitative or Quantitative Analysis

10. Indonesia's arguments lack any analysis or facts – empirical or otherwise – to support them. Without proof and analysis, this exercise is hypothetical and academic. The issue here is not whether new economic theories can be developed and elaborated during a WTO proceeding, but a question of whether USDOC's determination was based on record evidence and adequately explained. And here, the record evidence speaks for itself. USDOC examined log prices, which refute Indonesia's theories because they show that Indonesian log prices remained well below prevailing regional prices. USDOC also noted that the volume of log imports into Indonesia was negligible. In examining the export ban specifically, USDOC further found that had the ban not been in place, domestic log customers would have had to compete with foreign buyers.

C. Indonesia Has No Basis for Claiming That USDOC Ignored Evidence or Did Not Act in Good Faith

11. USDOC issued unabridged questionnaires (and multiple supplemental questionnaires), conducted verification, and addressed the respondents' comments in detail. Indonesia fails to identify what additional process it should have received from USDOC. It is entitled to disagree with USDOC, but that USDOC found the GOI's ownership of virtually all forest land significant on its merits does not indicate that USDOC was "blinded" to other evidence. Similarly, it is entitled to disagree with USDOC's conclusions considering the viability of using log import prices to Indonesia as a benchmark, but that does not indicate that USDOC gave the proffered evidence "no weight." Indonesia's own data provided empirical support for the benchmark that USDOC employed to evaluate adequacy of remuneration. Indonesia was required to provide complete, accurate responses to USDOC's questions, and accordingly, its excuse that it did not correct USDOC's supposed misconception of the financial contribution element of the provision of standing timber program because the *CFS* decision indicated that "USDOC was not interested" rings hollow. Indonesia's argument that USDOC did not address private, domestic prices for standing timber is foreclosed by its failure to build a record that would support its claims. In the context of a case in which APP/SMG expended significant effort to develop evidence concerning import prices to Indonesia and argue for their applicability, it strains credulity for Indonesia to argue that reliable domestic private prices were available, but it did not attempt to provide them because of a formality like some perceived instruction from USDOC.

II. INDONESIA'S ACCOUNT OF USDOCS ACTIONS IN APPLYING FACTS AVAILABLE IS NOT LEGALLY OR FACTUALLY SOUND

A. Indonesia's Description of the Factual and Procedural Circumstances Surrounding USDOC's Actions is Erroneous

12. Contrary to Indonesia's assertions, during the CCP investigation, Indonesia did not cooperate to the fullest, and did not provide complete and timely information. Further USDOC did not change course midstream to inquire into areas unrelated to the investigation and into which Indonesia could not possibly have been expected to look. These matters are made clear by the timeline of events the United States presented during the first Panel meeting.

13. In addition, as Indonesia itself acknowledges, USDOC inquired about only four debt sales out of thousands of transactions the IBRA conducted or oversaw. Indonesia's complaint that the supplemental questionnaire contained multipart questions and required translation of documents provided is not convincing. To the contrary, these are standard elements of any questionnaire in a trade remedies investigation. Furthermore, the records should have been timely found − especially given that although IBRA had dissolved, Indonesian law required recordkeeping for a period of years that extended further back than the IBRA's dissolution.

14. Moreover, the limited information on the additional terms of reference and bid protocol that Indonesia provided to USDOC in response to the supplemental questionnaire actually appears to undercut Indonesia's assertions. The document revealed that the "PPAS 2" terms of reference were different than those which governed the APP/SMG sale. This is shown by a comparison between the "PPAS 2" terms of reference submitted in response to the supplemental questionnaire and the APP/SMG terms of reference and accompanying bid protocol. The United States also notes that document containing the "PPAS 2" terms of reference represented only one document from one of four other PPAS transactions. Other necessary information remained missing, namely, the actual bidding documents. The identities of the bidders in the other PPAS sales revealed nothing about how the IBRA approached possible affiliation in those other transactions. The bidding documents themselves were needed to understand whether the IBRA approached possible affiliation any differently in the APP/SMG debt sale compared to other sales under the PPAS.

B. Indonesia Urges the Panel to Adopt Legal Standards That Have No Textual Basis.

15. Article 15 of the AD Agreement is plainly irrelevant. The measure at issue here is USDOC's countervailing duty determination, and Indonesia's claims are under the CVD Agreement.

16. Indonesia has no basis for asserting that Article 27 modifies Article 12.7 in the event the subsidizing Member is a developing country. Interpretation of treaty provisions begins with the ordinary meaning of the terms themselves. Nothing in Article 27 states that Article 12.7 is somehow modified. Likewise, nothing in Article 12.7 of the SCM Agreement incorporates or cross references the obligations of Article 27 of the SCM Agreement. Indonesia's proposed interpretation is also unsupported by relevant context. To the contrary, the relevant context further supports that Article 27 does not modify Article 12.7. In particular, the relevant context here is the detailed nature of the obligations set out in Article 27. That is, the drafters of Article 27 were explicit and precise in stating which provisions in the SCM Agreement would be affected by the developing country status of a subsidizing Member. Article 27 contains technical modifications and qualifications to other provisions of the SCM Agreement for developing country Members' subsidies subject to certain disciplines under the Agreement, including some pertaining to the conduct of countervailing duty proceedings. It contains certain express carve-outs and qualifications to application of other articles of the SCM Agreement to developing country Members, but contains no limitation or prohibition to an investigating authority having resort to Article 12.7. Had the SCM Agreement drafters wished to include a qualification to Article 12.7 for developing country Members in Article 27, they could have done so. The fact that Article 27 is narrowly tailored with regard to "[s]pecial and [d]ifferential [t]reatment" for developing country Members, reflects the drafters' intention that "special regard" be given to developing country Members under certain, but not all, provisions of the SCM Agreement. Any "special regard" to be given to developing country Members under the SCM Agreement is contained in Article 27's specific rules. This conclusion

comports with the interpretive principle that "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."

17. The United States also disagrees that "Article 15 of the Anti-Dumping Agreement applies *mutatis mutandis* to the application of CVD measures under the SCM Agreement, including Article 12.7 thereof." There is nothing in Article 12.7 that references or incorporates any aspect of AD Agreement Article 15; there is therefore no legal basis to − as Indonesia argues − apply Article 15 of the AD Agreement to one or more provisions of the SCM Agreement. Even were Indonesia's argument to be construed as asserting that Article 15 is context for Article 12.7, the argument fails. Both agreements have "special and differential treatment" provisions. In this circumstance, it would be inappropriate to augment the rules in one agreement by using the "context" of another set of rules in another agreement to add substantive rights or obligations to the first agreement. Second, a circumstance in which the AD Agreement has provided relevant context for the SCM Agreement is one in which both agreements have provisions on use of facts available. The AD Agreement, of course, has a separate annex on facts available, which is absent in the SCM Agreement. In those circumstances, the Appellate Body has looked to Annex II of the AD Agreement for "additional context" in interpreting the facts available provisions of the SCM Agreement. Thus, the situations of use of facts available and special and differential treatment are different. Where both agreements have explicit text of their own governing a specific matter, Indonesia has provided no basis for reading into the SCM Agreement an obligation that may exist in the AD Agreement. Even with respect to Annex II of the AD Agreement, the Appellate Body has explained that it is not incorporated into the SCM Agreement. We also agree with the European Union that "Indonesia has [not] specifically explained or demonstrated how its status as a developing country Member would be of relevance in the context of this particular dispute under Article 12.7" of the SCM Agreement.

18. ***Indonesia is incorrect in arguing that USDOC's decision to allegedly refuse to accept certain documents on the affiliation issue at verification was inconsistent with obligations under the SCM Agreement.*** In any event, Indonesia never attempted to submit these documents at the verification, or afterwards. Additionally, Indonesia's argument is undercut by the fact that Article 12.6 supports USDOC's decision to cancel verification regarding the debt buy-back, and, by implication, USDOC's choice not to solicit the missing information at verification. Article 12.6 of the SCM Agreement is prefaced by the word "may." In the context of analyzing the similarly-worded Article 6.7 of the AD Agreement, panels have found that this term is precatory; it "makes clear that on-the-spot verifications in the territory of other Members are permitted, but not required." Based on the presence of "may" in Article 12.6, USDOC was not required to perform an on-the-spot verification of Indonesia under the SCM Agreement. The United States agrees with certain third parties' statements that an investigating authority has the discretion to accept new or clarifying information at verification, but this is not required in every instance.

19. The Appellate Body explained in *China − HP-SSST (Japan)* that "[c]ircumstances will vary, and investigating authorities have some degree of latitude in deciding whether to accept and use information submitted by interested parties during on-the-spot investigations and thereafter." USDOC appropriately exercised its discretion in deciding to cancel verification pertaining to the debt buy-back. When Indonesia failed for the second time to provide the bidding documents for the other PPAS sales, there remained only a few days prior to the outset of verification. The United States explained why it was important to have these documents prior to verification. Furthermore, only a few months remained at that point to complete the investigation. During that time, USDOC had to conduct verification of Indonesia and of APP/SMG, prepare and issue verification reports for both respondents, solicit and accept case and rebuttal briefs from interested parties, analyze all arguments raised in those briefs, and prepare the final determination and respond to all arguments raised by interested parties in their briefs.

20. An investigating authority may satisfy itself as to the accuracy of submitted information "by conducting on the spot investigations . . . '[i]n order to verify information or to obtain further details.'" This obligation does not extend to "circumstances provided for in paragraph 7." The Appellate Body has explained that "it would not be possible for investigating authorities to 'satisfy themselves as to the accuracy of the information' in circumstances where interested parties refuse access to, or otherwise do not provide, such information." The Panel should not interpret an investigating authority's obligations to include seeking "further details" regarding information necessary to its determination, where the party in possession of that information previously failed to provide it within a reasonable time. If this were required, then an authority would need to

satisfy itself as to the accuracy of *information that was never provided*, and this would nullify the qualifying language in Article 12.5 of the SCM Agreement.

III. INDONESIA'S ARGUMENTS IN SUPPORT OF ITS SPECIFICITY CLAIMS CONTINUE TO LACK MERIT

A. Indonesia's Article 2.1(c) Claims Conflate the Separate Prongs of a Subsidy Analysis

21. ***The requirements of Article 2.1(c) are not superfluous.*** Indonesia charges that none of the subsidy measures at issue meet the requirements of de facto specificity because they do not confer a benefit. Whether a benefit has been conferred is a separate legal element from specificity. Indonesia simply ignores that USDOC examined the issue of benefit at length in its determinations, in USDOC's benefit analysis, not in its specificity analysis. Also, Indonesia's argument appears to be premised on the contention that for a subsidy program to exist, the subsidizing Member must have adopted a specific written plan. This premise is incorrect. Nothing in the SCM Agreement states or even implies that a subsidy program must be embodied in a written plan.

22. ***Indonesia Misconstrues the Appellate Body's Specificity Findings in* US – Countervailing Duties (China)**. The Appellate Body was looking at unwritten measures in *US – Countervailing Measures (China)*. The situation here is fundamentally different. The subsidies here are evidenced by specific documents laying out a "plan or scheme." When that is the case, there is no additional need to look for additional evidence of a program in the form of a "systematic series of actions." The United States also notes that even in the absence of written evidence, it is an overstatement to conclude that an investigating authority must in every case find a "systematic series of actions" to support its definition of a subsidy program. This reads too much into the Appellate Body's finding in that case.

23. The provision of standing timber for less than adequate remuneration, the log export ban, and the debt buyback, all constituted written plans or schemes. There was no need for USDOC to additionally consider whether each subsidy constituted a "systematic series of actions" under Article 2.1(c). With respect to the provision of standing timber for less than adequate remuneration and the log export ban, both programs were reduced to writing.

24. With respect to the debt buy-back, the subsidy itself − the financial contribution and benefit − stems from the forgiveness of debt, regardless of whether it violated Indonesian law. Both the existence of the regulation and its violation informed the "subsidy programme" analysis. Other relevant documents also described the program. The IBRA issued "terms of reference" in "early December 2003," which "sets out the process for bidder registration, due diligence, and submission of bids." The IBRA also developed "a specific set of bid protocols for the bidding," which "described in some additional details the specific procedures that would be followed for the auctioning of the APP/SMG debt." Those protocols also prohibited debt purchases from affiliated companies. Thus, collectively, these documents constituted a written plan or scheme.

25. Because affiliate Orleans purchased affiliate APP/SMG's debt, only the specific company debtor is "eligible to receive that same subsidy." If an unaffiliated company had purchased APP/SMG's debt, there would be no financial contribution or benefit because there would be no debt forgiven. The debt buy-back's structure demonstrates that, as a matter of fact, it was de facto company-specific. A subsidy that is limited to one enterprise is clearly one that is provided to "a limited number of certain enterprises" as defined in Article 2.1(c). Indeed, USDOC explained that "[a] benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it." Indonesia's contention that the buyback was not company-specific because it consisted of "multiple companies" misses the point. The terms of reference list the debt of "the APP Group," "which comprises" five companies and their subsidiaries. All of these companies form the "APP Group" (or APP/SMG) and the debt for sale was aggregated. For purposes of Article 2.1(c), APP/SMG constituted a "single company" whose debt was for sale.

26. ***Indonesia's suggestion that a written plan or scheme must evince an intent to confer a benefit is incorrect***. The Appellate Body has acknowledged that "overarching purpose" is a factor to consider in determining whether a measure is part of a subsidy scheme, but it does not follow that a subsidy cannot be de facto specific under Article 2.1(c) unless the intent of the

measure is clear in the plan or scheme. Contrary to Indonesia's argument, the SCM Agreement does not require that a finding of specificity is contingent upon intent. Even where the written instruments do not on their face evince the exporting Member's explicit intention to grant a subsidy, those documents can still evince a written plan or scheme if those instruments actually convey financial contributions that confer benefits upon certain enterprises or industries. That is the case here. As discussed above, the licensing regime pertaining to the provision of standing timber for less than adequate remuneration is set forth in writing through regulations and other government documents that make it possible for certain enterprises to acquire standing timber. The log export ban compelling logging entities to sell domestically is set forth in law. The PPAS bid package that enables buyers to bid on the debt and the regulation and terms of reference that prohibit an affiliated sale all are reduced to writing.

B. USDOC Identified the Relevant Jurisdiction of the Granting Authority for the Debt Buyback Pursuant to the Chapeau of Article 2.1

27. Indonesia's remaining arguments are unpersuasive. The jurisdiction of the granting authority was "'discernible from the determination.'" Indonesia does not dispute that USDOC identified the particular agency within Indonesia that provided the financial contribution, the IBRA, which Indonesia reported "was responsible for administering the program," and which "the GOI created." These findings are all that is relevant.

28. Prior to its opening statement at the first Panel meeting, Indonesia never pointed to the newspaper article as supporting its specificity arguments in any way. In any event, the points Indonesia cites are not mutually exclusive. USDOC determined that certain information on the record of this investigation, including newspaper articles and a World Bank report, could be relied on as available facts under Article 12.7.

IV. USITC'S THREAT DETERMINATION IS CONSISTENT WITH ARTICLE 3 OF THE AD AGREEMENT AND ARTICLE 15 OF THE SCM AGREEMENT

A. The Commission's Vulnerability Analysis Was Consistent With Article 3 of the AD Agreement and Article 15 of the SCM Agreement

29. The Commission's analysis of the domestic industry's vulnerability to material injury in the imminent future was fully consistent with the non-attribution requirement under ADA Article 3.5 and SCMA Article 15.5. In *Egypt – Rebar*, the panel recognized that "[s]olely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset."

30. The Commission thus logically prefaced its threat analysis with a consideration of the condition of the domestic industry at the end of the period of investigation, which was necessarily the point of departure for its consideration of the likely impact of subject imports on the industry in the imminent future. The conclusion that the domestic industry was vulnerable was based on industry's condition at the end of the period of investigation. In its material injury analysis, moreover, the Commission expressly found that subject imports contributed to the domestic industry's declining performance during the period of investigation. The Commission noted that the domestic industry's financial indicators in 2009 may have been even worse but for the temporary existence of black liquor tax credit payments in that year. The Commission considered the black liquor tax credit (BLTC) as a one-time event that might have obscured the full extent of the domestic industry's vulnerability in 2009. The Commission found that non-renewal of the credit eliminated a factor that had contributed to lower domestic like product prices in 2009, thereby obscuring the contribution of subject imports to price depression in that year. Given this, and the moderation of declining demand, the Commission found that subject imports would be a key driver of domestic prices in the imminent future.

31. After it found the domestic industry vulnerable, the Commission then assessed whether the domestic industry was threatened with material injury by reason of subject imports, and in doing so considered other known causal factors and ensured that any threat from such factors was not attributed to subject imports. Indonesia's argument appears to constitute nothing more than opposition to consideration of the vulnerability of a domestic industry in connection with threat

analysis. Indonesia's logic, moreover, seems to suggest that a finding of threat cannot be made absent a finding of present injury – if vulnerability could be found only based on injury from subject imports, present injury caused by subject imports would be a pre-requisite.

B. The Commission's Non-Attribution Analysis is Consistent With Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement

32. The Commission separated and distinguished the effects of other known factors that were at the same time threatening the domestic industry, consistent with the non-attribution requirement of ADA Article 3.5 and SCMA Article 15.5. At the outset, the ITC established a causal link between subject imports and the threat of material injury. The Commission then explained that subject imports threatened injury independent of other known causal factors. While recognizing that the moderate decline in demand projected for 2011 and 2012 would limit the domestic industry's sales opportunities and restrain price increases to some extent, the Commission reasoned that the decline would not discourage subject imports from significantly increasing their penetration of the U.S. market, given their aggressive pursuit of market share during the period of investigation despite declining demand, substantial new capacity to produce increased subject imports, and the attractiveness of the U.S. market. The Commission also explained that the projected moderation of declining demand in 2011, coupled with the non-renewal of the black liquor tax credit – which depressed prices in 2009 – would likely make the significant increase in aggressively-priced subject imports a key driver of domestic like product prices in the imminent future, likely depressing them to a significant degree.

33. The Commission explained that the likely effects of nonsubject imports on the domestic industry were not of a magnitude that would render insignificant the likely effects of subject imports, based on the declining market share of nonsubject imports during the period of investigation and their higher prices relative to subject imports. Indeed, the Commission identified no injurious effects caused by nonsubject imports during the period of investigation, and respondents did not argue that nonsubject imports posed any threat of material injury.

34. Indonesia concedes that respondents did not argue before the Commission that expiration of the BLTC would injure the domestic industry in the future. Rather, before the Commission, respondents asserted that the BLTC's existence depressed prices, and the Commission found that the credit's existence depressed prices in 2009. The Commission also noted that the credit would no longer do so for subsequent years as it was not renewed. The Commission also noted that the domestic industry's financial indicators in 2009 may have been even worse than they were but for the temporary existence of BLTC payments in that year – a one-time factor that would not repeat. To the extent that the tax credits yielded any benefit to the industry, the Commission considered the BLTC as a one-time event that might have obscured the full extent of the domestic industry's vulnerability in 2009.

C. The Commission's Threat Analysis Was Based on Facts and Changes in Circumstances

35. Indonesia's criticisms of the Commission's findings are based on a misreading of the Commission's determinations, and do not withstand scrutiny. The Commission thoroughly explained how APP's establishment of Eagle Ridge supported its finding that subject import volume was likely to increase significantly in the imminent future. The Commission noted that in November 2008, APP indicated to Unisource, a major purchaser, that it intended to double its exports of CCP to the United States from 30,000 short tons a month to 60,000 short tons per month, and was willing to reduce its already low prices to do so. After Unisource declined APP's offer and dropped APP as a supplier in 2009, APP invested in the establishment of Eagle Ridge as a means of retaining and growing its U.S. market presence.

36. The Commission supported with facts its conclusion that subject producers had both the ability, through excess capacity, and the incentive to increase significantly their exports to the United States. Relying on authoritative RISI data, the Commission found that Chinese producers would likely possess 740,000 metric tons of excess capacity in 2011, equivalent to 815,709 short tons, even after satisfying all projected consumption growth in China and Asia. Given this massive level of excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009, Chinese producers could have significantly increased their exports to the United States from 2009 levels

using a fraction of their excess capacity. Chinese producers themselves projected that exports to third country markets would increase by only 43,578 short tons, or 7.5 percent, between 2009 and 2011.

37. The record facts also supported the Commission's conclusion that subject producers had the incentive to use their excess capacity to increase significantly their exports to the United States. In particular, the Commission found that APP, the leading exporter of CCP from China and Indonesia, was even in 2008 determined to double its exports to the United States from 2008 levels by reducing its already low prices, and established its own distribution network, Eagle Ridge, to retain and increase its market presence. The Commission also found that the United States represented a highly attractive market to subject producers because prices in the United States were higher than in China or other Asian markets, the U.S. market was large and well understood by subject producers, and the prevalence of spot sales and private label products would facilitate their increased shipments to the U.S. market.

38. The Commission's finding that subject imports were likely to depress domestic like product prices to a significant degree was also supported by facts in the record. The Commission found that significant subject import underselling was likely to continue in the imminent future, thereby increasing demand for subject imports, because subject imports pervasively undersold the domestic like product throughout the period of investigation. In considering the likelihood of price depression, the Commission first noted that domestic like product prices were flat in interim 2010, and that the moderate decline in demand projected over the next two years meant that increased subject import volume could not be absorbed by additional demand. The Commission then explained that the reduced influence of factors other than subject imports on domestic prices, meant that subject imports would become a key driver of U.S. market prices in the imminent future, noting that subject imports led domestic prices downward between 2008 and 2009. The Commission further found that subject producers were likely to use aggressive prices to increase their exports to the United States significantly and recoup market share lost in interim 2010 based on their substantial excess capacity, the attractiveness of the U.S. market to subject producers, APP's stated intention to double its exports to the U.S. market from 2008 levels using low prices, and establishment of Eagle Ridge. As a consequence, the Commission concluded that subject imports would likely pressure domestic producers to lower their own prices to compete for sales and defend their market share, particularly given the prevalence of spot sales and the propensity of purchasers to quickly switch suppliers.

39. Nor was there any inconsistency between the Commission being unable to find significant adverse price effects in the present injury context and the Commission's price effects findings in its affirmative threat determinations. The Commission found that the moderation in declining demand and expiration of the black liquor tax credit would leave the likely significant increase in subject import volume as a key factor influencing market prices going forward. Coupled with the likely intensification of subject import competition, these developments left the Commission's well able to find that subject imports were likely to depress domestic prices to a significant degree in the imminent future.

40. The Commission cited two changes in circumstances that made it likely that subject import competition would intensify in the imminent future. First, the Commission found that the massive excess capacity that Chinese producers were likely to possess in 2011, equivalent to 815,709 short tons or 36.3 percent of apparent U.S. capacity in 2009, would give them the ability and the incentive to increase their exports to the United States significantly. Second, the Commission found that towards the end of the period of investigation, APP expressed its determination to double exports to the United States over 2008 levels by reducing its already low prices, and established Eagle Ridge to retain and expand its sales in the U.S. market.

41. Facts also supported the Commission's finding that the likely significant increase in subject import volume would come partly at the domestic industry's expense. The Commission found that the significant increase in subject import volume during the period of investigation coincided with a decline in the domestic industry's U.S shipments. The Commission found that subject producers were likely to use aggressive pricing in order to fill their massive excess capacity and recoup the market share lost during the interim period due to the pendency of the investigations, including 6.8 percentage points of market share lost to domestic producers. The Commission explained, moreover, that subject producers were likely to do so, given, among other things, their massive excess capacity, the attractiveness of the U.S. market, the establishment of Eagle Ridge, and

APP's determination even in 2008, before the massive increase in Chinese producers' capacity, to use lower prices to double exports from 2008 levels (this doubling in and of itself would result in an increase in APP shipments equivalent to over 109 percent of the volume of non-subject import shipments in 2009). The ITC concluded that, in a market with slightly *declining* demand, the likely significant increase in subject import volume, driven by significant subject import underselling, would likely force domestic producers to either lower their prices or relinquish market share to subject imports. The Commission had ample reason for concluding that the likely significant increase in subject import volumes above the levels occurring during the period of investigation was likely to cause material injury.

D. The Commission Complied With the Special Care Requirement of Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement

42. For the same reasons that Indonesia fails to establish a *prima facie* case that the Commission violated ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7, Indonesia fails to make a *prima facie* case that the Commission breached the special care requirement.

V. THE TIE VOTE PROVISION OF THE U.S. STATUTE IS NOT INCONSISTENT WITH ARTICLE 3.8 OF THE ADA AND ARTICLE 15.8 OF THE SCM AGREEMENT

43. In *U.S. – Line Pipe*, the Appellate Body made clear that the internal decision making process of a Member is within the discretion of that Member, and hence not subject to dispute settlement. As the Appellate Body explained in *Thailand – H Beams*, "the focus of Article 3 [of the ADA] is thus on *substantive* obligations that a Member must fulfil in making an injury determination." Not only do the ADA and SCMA not "mandate a specific 'internal decision-making process,'" they do not limit Members' discretion in establishing decision-making processes at all. As the Appellate Body explained, it is "the determination itself" that matters, and it "is of no matter … whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member."

44. The tie vote rule is not like a substantive test that automatically excludes all low priced sales. The tie vote rule operates—if at all—only *after* the substantive analysis and reasoning has occurred. Nor is there any relevance to the fact that the tie vote rule determines the outcome in the infrequent circumstances where it applies. Countless aspects of an authority's structure and decision-making procedure can occasionally affect the outcome of an investigation. But they do not change the fact that the determination's substance is the analysis in the determination itself.

45. The Vienna Convention on the Law of Treaties (VCLT) is clear that the terms of an agreement must be read "in their context" and not in isolation. Viewed in context, the meaning is clear. Special care in "consider[ing] and decid[ing]" the application of measures in cases involving threat of injury requires firm analytical grounding of both an investigating authority's consideration of whether a domestic industry is threatened with material injury and of the authority's ultimate decision on whether such a threat exists. In other words, the investigative and analytical steps that result in a measure must reflect special care both in "consider[ing]" often complex factual records, as well in decid[ing] the ultimate issue of whether material injury is in fact threatened. Special care in both "considering" and "deciding" can thus be reflected in the substantive analysis of the determination. The term "decided" in no way suggests that the reach of the provision extends beyond substantive analysis.

46. When the context of the provision is considered, it is clear that the provision requires special care in the substance of the decision, and that Articles 3.8/15.8 are not addressed to the procedure used for ascertaining the final result of a vote. The "special care" provisions of each agreement are parts of SCMA Article 15 and ADA Article 3. The drafting history confirms the reading that is apparent from an understanding of the words in context and in light of the structure of the agreement: that the special care provisions concern the substantive analysis underlying a threat determination and not an investigating authority's decision-making procedure.

47. The absurd results that would follow from Indonesia's position further confirm that special care does not apply to voting procedure. A reading of the special care provision suggesting coverage of vote tabulation would necessarily imply structural requirements for any investigating authority assigned to assess the existence of threat. It would, for instance, call into question the

WTO-consistency of any authority in which a higher level official has the authority to override a negative recommendation on threat from one or more lower level officials. A view of "special care" as implicating decision-making procedure could not logically be limited to the context of multi-Member authorities, and thus would instead necessarily cover the process used by a single-decision maker to gather and accept or reject the views of staff. Indonesia's understanding of how special care is reflected would also require intrusive examination of the decision-making process of individual decision-makers. If Articles 3.8 and 15.8 discipline the manner in which the ultimate decision-making act is undertaken, determinations of threat of material injury could be subject to challenge in WTO dispute settlement on grounds such as that the decision-maker was not fully engaged in consideration of the matters at issue. Such an absurd and intrusive result clearly could not have been what the drafters intended. Indonesia's proposed understanding of Articles 3.8 and 15.8 also implies that a threat of injury determination requires a higher voting majority than an injury determination.

48. The vote aggregation practices of four other Members cited by Indonesia are irrelevant. Indonesia's attempt to defend the point's legal relevance is unavailing, and reflects misunderstanding of the VCLT and the Appellate Body's understanding of the import of post-agreement developments. Further, the variety of approaches to resolving or avoiding tie votes taken by different Members simply serves to underscore that the internal decision-making process is not prescribed by the ADA or SCMA. Equally meritless is Indonesia's defense of its invocation of developing country status.

49. Nothing about the tie vote provision precludes the application of special care in any proceeding involving threat of material injury. In the event that the Commission makes an affirmative threat determination, regardless of the vote tally, those Commissioners voting in the affirmative will draft a written determination explaining their reasons, which may then be reviewed by a WTO panel for consistency with the ADA and SCMA. Accordingly, even in the event of a tie vote, nothing in the tie vote provision would prevent the Commission from issuing an explanation for its affirmative threat determination that is fully consistent with the ADA and the SCMA, including the special care requirement. For Indonesia's as-such claim against the tie vote provision to succeed, Indonesia would have to establish that the tie vote provision compels the Commission to violate the special care provision. Yet the Commission retains the discretion under the tie vote provision to issue affirmative threat determinations that comply fully with the special care provision, even in the event of a tie vote. Looking to the substantive analysis ensures that trade remedies have an appropriate substantive underpinning, regardless of the number of members of a multi-member investigating authority that endorsed the determination.

50. A requirement to use "special care," even if included in some hypothetical treaty provision explicitly addressed to the process of administrative decision making, would not rule out a procedure in which a tie vote resulted in a certain outcome. Under the ordinary meaning of "special care," there would be no basis to conclude that a tie-breaking rule somehow means that a State had provided some sort of reduced level of care in its administrative process. An administrative decision does not reflect any less care just because it results from a tie-breaking procedure. A tie vote rule is simply a means of anticipating and resolving in a uniform manner a possible situation (that is, a tie vote) that could occur when a decision is taken by an even number of people.

51. Indonesia's panel request asserts no claims under AD Agreement Article 3.1 or SCM Agreement Article 15.1. The claim that Canada seeks to have the panel resolve is thus fundamentally different from the one raised by Indonesia, and outside the panel's terms of reference. In any event, there is nothing about the tie vote provision that is inconsistent with the "objective examination" requirement in Articles 3.1 and 15.1. Like the remainder of Articles 3 and 15, this requirement does not serve as a discipline on decision-making procedure. Moreover, the tie vote rule certainly causes no "disregard[]" for any vote when applied in the threat context. The rule is simply a means of anticipating and resolving in a uniform manner a possible, albeit not common, situation that could occur when a decision is taken by an even number of people.

EXECUTIVE SUMMARY OF U.S. OPENING ORAL STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INDONESIA'S CLAIMS REGARDING THE COUNTERVAILING DUTY DETERMINATION ARE WITHOUT MERIT

52. Whatever name Indonesia wishes to use for its stumpage program, USDOC's well-reasoned determination properly found that this program confers a subsidy. This stumpage program is very similar to the description of how Canadian provinces administered their stumpage programs in *US − Softwood Lumber IV*. The panel and Appellate Body in that case found that Canada's stumpage regime constituted a subsidy. The fact that Indonesia now relies upon − namely, that plantation owners may undertake tasks associated with growing and harvesting cultivated timber (versus "pre-standing" timber) − changes nothing. Moreover, it is irrelevant whether the land for which concessions were granted is degraded. Rather, the salient point is that without the government's provision of timber for less than adequate remuneration, the logging companies would have had to procure it at market price. This conclusion was drawn from the record evidence and was reasoned and adequate.

53. USDOC, in accordance with Article 12.1 of the SCM Agreement, asked the interested parties to provide evidence of private sales that could be used to establish in-country benchmarks. Indonesia responded that it did not collect or maintain information that could be used for that purpose − i.e., the only data available was aggregate data, not species-specific data. APP/SMG provided partial information about a single, private arrangement, but its payment records do not support the existence of this arrangement. Furthermore, APP/SMG never provided any underlying documentation that USDOC requested or argued that this arrangement was relevant to USDOC's benchmark analysis. Clearly, Indonesia and APP/SMG are the parties in the best position to provide data that pertains to activity in their jurisdiction and sourced from primary sources in the Indonesian language. The GOI and APP also had direct access to other parties with whom they have commercial relationships or ties; and in APP/SMG's case, its own company records. Indonesia has not explained why USDOC is likely to succeed where the interested parties failed through requests for information from non-interested parties who have no obligation or incentive to cooperate. By analogy, the Appellate Body's finding in *US − Wheat Gluten* is that investigating authorities do not have "an open-ended and unlimited duty to investigate all available facts that might possibly be relevant." The question is not whether Indonesia might have conducted the investigation differently, or weighed the facts differently, but whether the USDOC provided a reasoned and adequate explanation for its determinations.

54. With regard to Indonesia's Article 12.7 claim, it must be recalled that the bidding documents pertaining to the other PPAS sales were necessary for USDOC to have a baseline for understanding whether the IBRA's due diligence procedures − of which there were no formal written procedures − were applied more deferentially for the APP/SMG debt sale than other sales. USDOC was only requesting those documents because Orleans' ownership information was already missing from the record. Thus, USDOC relied on the news articles, report, and expert summary evidence in finding the companies affiliated. They must be viewed collectively and not piecemeal for what they represent. Read together, this evidence suggests that the IBRA was allegedly allowing debtors to buy back their debt through third parties, and with specific regard to the Orleans transaction, that there were "long-running creditor suspicions that APP/SMG has been surreptitiously been buying back its debt." Indonesia also claims that the independent expert summary is, on its face, speculative. Indonesia bases this claim on the diction in the report that the expert "believed the speculation" that affiliated parties are buying back debt. The word "speculation" in this excerpt refers to others' opinions, which was one element of the evidence examined by the expert. Nothing in the report, which examined diverse sources of information, supports the view that the expert's own opinion was speculation.

55. Indonesia has not challenged the evidence upon which USDOC relied in finding the debt buyback de facto company-specific. Indonesia's Article 2.1(c) challenge in this dispute is whether a subsidy program exists as a precursor to USDOC's de facto specificity analysis. With regard to the issue Indonesia has challenged here, the subsidy program's existence in the form of a plan or scheme is comprised of the terms of reference, the bid protocol, and other documents stipulating the conditions of sale.

II. SYSTEMIC CONCERNS WITH INDONESIA'S ARGUMENTS

56. First, Indonesia raises arguments that are tantamount to requests for a *de novo* review of the factual record. Second, Indonesia relies on supposed legal principles that are not applicable to the facts in this dispute, and/or that lack any basis in the covered agreements. Third, Indonesia's arguments and theories have continued to change during the course of these Panel proceedings and are untimely.

III. INDONESIA'S CLAIMS REGARDING THREAT OF MATERIAL INJURY ARE WITHOUT MERIT

57. Indonesia's second written submission reinforced that Indonesia's claims concerning the threat determination rest on misreading of the ITC's well-reasoned determination and on misunderstanding of the WTO disciplines concerning threat. The ITC based its finding that the industry was vulnerable on the industry's weak condition at the end of the period of investigation, according to most measures of industry performance. Having established the baseline condition of the industry, the Commission proceeded to consider the questions of threat and non-attribution. It is obvious that the impact of subject imports going forward will depend on the baseline condition of the domestic industry. Indeed, it is unclear as a matter of logic how one could construct a hypothetical, imaginary domestic industry where the only factor bearing on its performance was subject imports. Indonesia's alternative approach is also inconsistent with the requirement that investigating authorities address threat in the context of the economic factors set out in ADA Article 3.4 and SCMA Article 15.4 "to establish a background against which to evaluate the effects of future dumped and subsidized imports." Acceptance of Indonesia's position would as a practical matter eliminate the possibility that an investigating authority could ever find threat of material injury.

58. Indonesia's second written submission contains numerous mischaracterizations of what the Commission actually found. These mischaracterizations form the foundation for Indonesia's claims that the Commission's analysis was flawed, or failed to account for relevant factors. As explicitly set forth in the determination, the Commission based its vulnerability finding on the domestic industry's declining performance during the POI, and not on declining demand or expiration of the BLTC. The Commission, moreover, noted connections between subject imports and the domestic industry's declining shipments and prices. It is simply not the case that BLTC was an aspect of "normal market conditions." To the contrary, the credit paid benefits in only one year, 2009, and the Commission properly took that into account. During the investigation, Indonesian respondents themselves argued that the credit harmed the domestic industry in 2009 by reducing prices, and the Commission agreed.

59. The Commission considered the totality of the evidence and issued a well-reasoned determination. APP itself stated − before losing the Unisource account − that its goal was to double shipments to the United States by reducing its already low prices. APP lost Unisource as a distributor after Unisource refused to assist, and Eagle Ridge provided a vehicle to accomplish APP's stated goal notwithstanding the loss of Unisource. That APP did not immediately realize its goal of doubling shipments in no way detracts from the Unisource affidavit. Likewise, that the domestic industry's market share gain in 2010 resulted from preliminary duties in no way undermines its significance, nor was that gain remotely the only basis for the Commission's view that subject import volumes would increase significantly in the absence of orders.

60. Facts supported the Commission's conclusion that subject imports were likely to increase significantly in the imminent future, in significant part at the expense of domestic producers. The Commission found that subject imports adversely affected the domestic industry during the period of investigation. The Commission explained that subject producers would be in a better position to take sales from domestic producers in the imminent future than they were during the 2007-2009 period due to clearly foreseen and imminent changes in circumstances; namely, the excess capacity that Chinese producers were likely to possess in 2011, and APP's establishment of Eagle Ridge. The Commission found it likely that subject producers would use their massive excess capacity to increase exports to the United States significantly based on their familiarity with the large U.S. market; the higher prices available there, relative to China and other markets in Asia; the prevalence of spot sales and private label products in the U.S. market, which would enable subject producers to quickly gain market share; and crucially, APP's stated intent to double its exports to the U.S. market by reducing its already low prices. Because demand was projected to

decline, the significant increase in subject import volume that was likely would necessarily take sales from existing suppliers, including the domestic industry.

IV. THE ITC'S TIE VOTE PROVISION IS FULLY CONSISTENT WITH AD AGREEMENT ARTICLE 3.8 AND SCM AGREEMENT ARTICLE 15.8

61. The special care obligation applies to the substantive requirements for a determination of threat; it does not relate to an investigating authority's decision-making procedure. The specific placement of the special care provisions within the AD and SCM Agreements, as well as the text of other portions of those agreements, make this clear. Nothing in the text of the ADA or SCMA requires investigating authorities to make affirmative threat determinations by majority vote, or to treat tie votes in any particular way. This is confirmed by the fact that, where the AD and SCM Agreements do discuss procedural matters − in connection with things other than decision-making − they are explicit. It is further confirmed by the drafting history. The process of determining the outcome where members of a multi-member body disagree is, as the Appellate Body explained in *US − Line Pipe,* "entirely up to WTO Members in the exercise of their sovereignty."

62. "View[ing]," "contemplat[ing] attentively," "survey[ing]," "examin[ing]," "inspect[ing]," and "scrutinize[ing]," all involve non-decisional consideration and analysis. This understanding of consideration is confirmed by the language of Articles 3.7/15.7, which notes factors which must be "consider[ed]." By contrast, "deciding" − "bring[ing] to a resolution or conclusion" − involves assessment of the ultimate question. In other words, the special care requirement speaks to both the substantive analysis of the ultimate question and the way that underlying or intermediate issues were viewed, contemplated, or scrutinized. Understanding that the requirement is about substantive analysis is fully consistent with the wording of Articles 3.8/15.8 even when it is taken in isolation.

63. The logic of Indonesia's arguments would not permit a unitary decision-maker to determine threat. A single, politically motivated individual's vote would result in a threat determination in that context − even if countless professional staff serving under the political decision maker concluded that threat had not been established. However, the number of decision makers at an investigating authority or the means of resolving disagreements among them are not addressed by the AD Agreement or SCM Agreement. Those agreements have detailed provisions on the substance of determinations to ensure that they are adequately grounded.

EXECUTIVE SUMMARY OF SELECTED RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING

I. "AS APPLIED" CLAIMS WITH RESPECT TO THE USITC'S THREAT OF INJURY DETERMINATION

64. This proceeding is a review of whether the ITC based its threat determination on positive evidence on the administrative agency record, and whether ITC presented a reasoned and adequate explanation for its determination. This proceeding is not a *de novo* review, where disputing parties are entitled to present oral testimony on what may or may not have occurred with respect to the market. The Commission's threat analysis was supported by facts and clearly foreseen and imminent changes in circumstances.

65. Indonesia's claim that the Commission breached the special care requirement is derivative of its claims of "specific violations" under ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7. Having failed to establish a *prima facie* case that the Commission committed any of the specific violations alleged under ADA Article 3.5 and 3.7 or SCMA Article 15.5 and 15.7, Indonesia has also failed to establish a *prima facie* case that the Commission breached the special care requirement. There is no basis for suggesting that Articles 3.8 or 15.8 require an investigating authority to resolve some percentage of issues − or "key" issues − in an AD or CVD investigation in favor of respondents instead of resolving each based on analysis of the facts and application of the applicable legal standards. To the extent that Indonesia is attempting at this point to assert any independent argument with respect to the Commission's analysis of any subject, the moment for doing so has long passed. But in any event, the Commission cited ample factual support for its analysis.

II. "AS SUCH" CLAIMS UNDER ARTICLES 3.8 OF THE ANTI-DUMPING AGREEMENT AND 15.8 OF THE SCM AGREEMENT CONCERNING SECTION 771 OF THE TARIFF ACT OF 1930

66. With respect to ADA Article 3.8 and SCMA Article 15.8, the obligation is not that the investigating authority must reach a negative determination in the presence of finely balanced facts, but rather that the investigating authority is to consider and decide the application of duties in threat cases with special care. Deciding with special care in the context of finely balanced facts does not imply reaching a negative determination. Rather, one decides with special care by thinking carefully about the decision − evaluating relevant considerations thoroughly to reach a well-reasoned conclusion. So long as an investigating authority's decision reflects this kind of reasoning, there is no reason that "special care" would require one outcome or another in a situation presenting finely balanced facts.

67. To prevail on an as-such claim, the complaining Member has the burden of establishing that the statute mandates a WTO-inconsistent result, and that absolutely no discretion is providing to administering authorities to take decisions that comply with WTO rules. The text of the agreement requires consideration and decision with special care; what it does not require is that special care be reflected in each step of the decisionmaking process. So long as the obligation to apply special care at some point in the decisionmaking process is not *precluded* by the statutory provision at issue, then there is no legal basis for finding that the statutory provision requires a breach of the obligation stated in Articles 3.8/15.8. The U.S. statute at issue does not forbid the Commissioners from exercising special care in their threat determinations. Accordingly, and leaving aside that a tie breaking rule does not involve "special care" or "regular care", the U.S. statute cannot be in breach of Articles 3.8/15.8, because the statute fully allows the decisionmakers to apply "special care" in every other aspect of the process. Any finding that Articles 3.8/15.8 applied to *each step* in the decisionmaking process, and that a tie vote rule was somehow inconsistent with "special care," would amount to substantial over-reach by the WTO dispute settlement system. It would not be credible for the DSB to find that ADA Article 3.8 and SCMA Article 15.8 could be expanded from beyond their plain text to support a determination that the United States' choice to apply special care at the stage of Commissioners' decisionmaking was somehow inconsistent with the ADA and SCMA.

68. The "special care" provisions of the ADA and SCMA do not discipline decision-making procedure. However, even if ADA Article 3.8 and SCMA Article 15.8 were deemed to set out a requirement that could be satisfied by means of a particular decision-making rule, the tie vote provision would still be fully consistent with the discipline, as there would be no need for any particular decision-making rule − and certainly no need for any particular rule concerning the handling of tie vote situations − to satisfy the requirement. The rule would be satisfied in any particular case provided that the requisite analytical rigor had been applied.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF BRAZIL

INTRODUCTION

1. In Brazil's oral statement and answers to the Panel's questions, the following aspects were highlighted:

i) Whether export restrictions can be considered to accord a financial contribution in the sense of Article 1.1(a) of the SCM Agreement

2. In Brazil's view WTO law does not authorize equating the economic effects of export restrictions applied to inputs with the granting of a subsidy to the upstream market. While it is likely that export restraints will result in increased supply of the restrained good, this is not sufficient, in and of itself, to establish government entrustment or direction.

3. Brazil does dispute that that export restraints can be associated with a subsidy. Whether there is entrustment or direction in the provision of goods subject to export restraints needs to be assessed on a case-by-case basis and cannot be inferred from a mere reference to the declared policy objective of the export restriction of adding value to a Member's exports.

ii) To which extent the predominant presence of the Government in the market would authorize the rejection of in-country prices as benchmark under Article 14(d) of the SCM Agreement

4. Price distortion is a determinant factor to allow the departure of an in-country benchmark, as recorded by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. However, a mere finding of the government's substantial presence in a given market is not a definitive feature to allow for the use of an out-of-country benchmark.

5. In cases where the government has a predominant presence in the market as a provider of goods, it is likely that private suppliers would align their prices with those of the government in order to maintain their market share. However, the distortion analysis that the investigating authority has to make should be performed on a case-by-case basis. Other evidence could be analysed when market conditions, including quality, availability, marketability, transportation and other conditions of purchase or sale, as described in Article 14(d) of the SCM Agreement, would allow a private supplier to deviate from the government given price and still maintain its market share.

6. Where the dominant presence of the government occurs in the initial stages of the chain of production, investigating authority should demonstrate the passing through effect in order to disregard domestic prices of the input. It is necessary to assess whether the price paid by the downstream producer for the input was effectively lower than it would have been in the absence of the government's dominant presence in the initial stages of the production chain. In some circumstances, the subsidy to the upstream producer may not result in lower prices charged to the downstream producer. Therefore, as per Article 14(d) of the SCM Agreement, there would not be a provision of goods for less than adequate remuneration, and thus no benefit would be conferred to the downstream producers.

iii) The standard under Article 12.7 of the SCM Agreement with regard to the use of "facts available"

7. Brazil considers that the "adverse facts available" methodology recurrently employed by the United States is based on a biased interpretation of Article 12.7 of the SCM Agreement. Article 12.7 does not grant investigating authorities a blanket authorization to "select" facts available to worsen the situation of the respondents. Although it indeed was conceived to "ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation"[1], as the United States recalled, it does not permit departing from the facts available to arrive at biased conclusions, in disfavour of the investigated party. The objective and

[1] US FWS p. 102.

rationale of Article 12.7 is to allow for the replacement of the missing necessary information with a view to arriving at an accurate determination[2].

8. It follows that the correct legal standard of this provision requires, first and foremost, a comparative evaluation of all available evidence with a view to selecting the best information that "reasonably replaces the information that an interested party failed to provide"[3]. The proper application of Article 12.7 also requires a connection between what is required from the investigated party and what is necessary to carry out an investigation. Although the investigating authority enjoys some level of discretion in conducting an investigation, it is not allowed to submit questions that are irrelevant or extraneous to the matter at hand, that are "not necessary", and then, when informed about such irrelevance or impertinence, simply reaches the conclusion that an interested party was non-responsive or that there was no cooperation, thus triggering the use of adverse facts available. The conditions under Article 12.7 to rely on "facts available" are limited and must be interpreted accordingly. As the Appellate Body had clarified "Article 12.7 is not direct at mitigating the absence of 'any' or unnecessary" information but rather is concerned which overcoming the absence of information required to complete a determination".[4] The information required in this sense must be reasonable and in line with the necessity of the investigation, otherwise the burden to the investigated country is heavier than it should be.

9. Moreover, in what concerns the submission of new evidence at verification, Brazil considers that additional clarifications may be submitted at the beginning of the on-the-spot verification and may be taken into account whenever it can be verifiable without excessive difficulties. Additionally, investigating authorities are required to consider new evidence presented at verification whenever this evidence represents the "best information available". As the Appellate Body has explained in para 4.419 of *US – Carbon Steel (India),*

> "It would frustrate the function of Article 12.7, namely, to "replac[e] information that may be missing, in order to arrive at an accurate subsidization or injury determination", if certain substantiated facts were arbitrarily excluded from consideration. In addition, we note that the participants agree that Article 12.7 should not be used to punish non-cooperating parties by choosing adverse facts for that purpose. Rather, the participants agreed at the oral hearing that the function of Article 12.7 is to replace the missing "necessary information" with a view to arriving at an accurate determination."

10. In Brazil's view, investigating authorities would not be justified in refusing to accept a piece of evidence at verification because it was arguably not provided in a timely fashion, and, at the same time, relying on evidence that do not "reasonably replace the information that an interested party failed to provide".[5] Therefore, the need to rely on the "best information available" when making a determination serves as relevant context for the interpretation of the obligations of investigating authorities regarding whether to allow new evidence during verification.

11. Furthermore, the failure to provide information must be assessed in light of the amount and the specificity of information required by investigating authorities. In other words, the investigating authority should evaluate the amount of information required, the efforts applied by the interested party in gathering this information and what was in fact presented. The investigating authority must take into account that companies and Members may face some difficulties, such as complex organizational structure or legal constraints that may hinder the timely provision of the information requested.

12. In situations such as these, and considering the extent of the information requested, the assessment of compliance with Article 12.7 should take into consideration the effort applied by the interested party to provide the information. When investigating authorities require a large amount of information, an equivalent large amount of effort will be required from a given country or company to provide such information. Thus, even though the information supplied may not be ideal in all aspects, this should not justify its disregarding - even less so resorting to facts that have no connection with the investigation - provided that the interested party has acted to the best of its ability.

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[2] AB Report. *United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.419.

[3] US FWS p. 109.

[4] AB Report US – *United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.416.

[5] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice* (DS 295), para. 294.

iv) The analysis of causation and change of circumstances in the threat of injury determination

13. On the matter of causation, Brazil finds that considering the lifting of preliminary duties among the factors that account for a change in circumstances is difficult to reconcile with a strict analysis of causation. For one thing, whenever preliminary duties are lifted, an increase of imports into the domestic market is likely to happen. It is only natural that market will progressively return to the situation before the imposition of the duties. In this situation, one cannot properly speak of a change in circumstances.

14. In addition, Brazil considers important that the Panel assess whether differences between the market situation and the behaviour of subject imports during the period of investigation, on the one hand, and the situation predicted to take place in the future, on the other hand, would amount to a change in circumstances. As Brazil sees it, the data on the record[6] show that the market situation and the behaviour of subject imports were not expected to experience significant change. One could notice that a similar situation to the one foreseen for the future periods has already happened during the period of investigation. In said period, none of the effects relied on by the Commission for the positive determination of threat of injury, price suppression and gain of market share for the subject imports, occurred.

v) The obligation to consider and decide with special care in Article 3.8 of the ADA and 15.8 of the SCM

15. Brazil is of the opinion that voting procedures are an internal matter left to the discretion of each WTO Member, and, as a rule, are not directly addressed by the ADA and SCM Agreements. This understanding was corroborated by the Appellate Body in *US – Line Pipe*. However, Brazil considers that what is at stake in this dispute are not voting procedures *per se*, but rather the determination of the step in the US process of analysis in which the application of anti-dumping measures should be considered and decided with special care.

16. In Brazil's view, the ADA distinguishes the moment of fulfilment of substantive requirements and the moment of the application of anti-dumping measures. The text of the ADA substantiates this understanding. First, the negotiators of the ADA chose to treat these two topics into two separate articles: article 5, Initiation and Subsequent Investigation; and article 9, Imposition and Collection of Anti-Dumping Duties. As Article 9.1 specifies, once the requirements for the imposition of duties are fulfilled, there are still two separate decisions to be made: whether or not to impose an anti-dumping duty and the amount of the anti-dumping duty to be imposed (full margin or lesser duty).

17. For reference, in the Brazilian trade remedies system, this separation can be clearly observed, since there are two different institutions responsible for the anti-dumping, subsidies and safeguard investigations and for the decision about the application of the measures.

18. Brazil acknowledges the legislation of some Members, such as the US, may not distinguish between the moment of the fulfilment of the substantive requirements and that of the application of the measure. However, this does not exempt those Members from the obligation of considering and deciding the application of anti-dumping duties with special care, even if it happens in the same moment as the fulfilment of the substantive requirements.

19. What is before the Panel is whether the Commission is voting on the application of anti-dumping measures or on the fulfilment of substantive requirements. The former would entail the duty to exercise special care. As the Appellate Body has found "a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury"[7]. Independently of when those two determinations happen (in the same moment in time or not), the duty to exercise special care still exists.

20. Based on this understanding, Brazil finds that a rule providing that a tie vote shall always result in the application of anti-dumping duties seems not to be in line with the obligation to exercise special care under Article 3.8 of the ADA.

[6] U.S. FWS, Exhibit US-1, table C-3.
[7] *US – Softwood Lumber VI (Panel)*, para. 7.33.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF CANADA

I. INTRODUCTION

1. Canada intervenes in these proceedings because of its systemic interest in the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) that are raised in this dispute. Canada's submissions address the following issues: the rejection of in-country prices as benchmarks under Article 14(d) of the SCM Agreement, the treatment of export restraints as a subsidy, the use of facts available under Article 12.7 of the SCM Agreement, and the inconsistency of the United States International Trade Commission (USITC) tie vote rule with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

II. THE UNITED STATES DEPARTMENT OF COMMERCE ACTED INCONSISTENTLY WITH ARTICLE 14(D) OF THE SCM AGREEMENT IN RESORTING TO AN OUT-OF-COUNTRY BENCHMARK

2. With respect to the appropriate benchmark, in the Coated Paper investigation the U.S. Department of Commerce (USDOC) rejected in-country standing timber prices and instead resorted to Malaysian pulp log export prices. It justified its decision summarily in the following two sentences: "the [Government of Indonesia] clearly plays a predominant role in the market for standing timber. As such, we determine that there are no market-determined stumpage fees in Indonesia".

3. This justification is insufficient to warrant resort to an out-of-country benchmark under Article 14(d) of the SCM Agreement.

4. The Appellate Body has indicated that an investigating authority must establish price distortion in a market based on the particular facts underlying each countervailing duty investigation before rejecting in-country prices on that basis. Even where evidence indicates that the government is a predominant supplier of goods, evidence other than government market share must be considered and analyzed before an investigating authority can conclude that there has been market distortion. This may include evidence regarding the structure of the relevant market, the type of entities operating in that market and their respective market share, any entry barriers, and the behavior of the entities operating in that market.[1]

5. The Appellate Body has therefore cautioned against equating government predominance with price distortion. Yet, this is precisely what the USDOC did in the Coated Paper investigation.

III. EXPORT RESTRAINTS DO NOT CONSTITUTE A SUBSIDY

6. Regarding export restraints, Canada notes that Indonesia's panel request does not contain a claim that the USDOC improperly found that Indonesia's log export ban constitutes a financial contribution. Accordingly, Canada requests that the Panel make no findings with respect to whether Indonesia's log export ban constitutes a financial contribution.

7. That said, Canada disagrees with the U.S. position that export restraints can constitute financial contributions.

8. Previous panels have considered different forms of export restraints. None has found them to constitute financial contributions. Moreover, the panel in *US – Countervailing Measures (China)*

[1] Depending on the factual circumstances of a given case, different types of evidence may establish that the remaining portion of the market is not influenced by the predominant presence of the government as a supplier. For example, evidence regarding the manner in which the government sets prices for the goods it supplies may indicate that the market is not influenced by its predominant presence. In particular, a government that sets prices in a market-determined manner, such as through an auction mechanism, would not, despite its predominant presence in the market, distort private prices in that market.

indicated that allegations predicated solely on the existence of the export restrictions and their suppressing effect on prices were an insufficient basis on which to even initiate a countervailing duty investigation.

IV. THE USE OF FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT IS SUBJECT TO RIGOROUS CONDITIONS

9. In terms of the use of facts available in the Coated Paper investigation, Canada notes that the USDOC applied adverse facts available to conclude that Asia Pulp and Paper/Sinar Mas Group (APP/SMG) and Orleans were affiliated companies, which would mean that APP/SMG was effectively allowed to repurchase its own debt at a discounted rate.

10. When deciding whether the USDOC's use of facts available is consistent with Article 12.7 of the SCM Agreement, the Panel should pay particular attention to four elements of the applicable legal framework.

11. First, Article 12.7 limits the use of facts available to replace necessary information that is missing from the record of the investigation. In this case, the Panel must determine whether detailed information pertaining to unrelated Government of Indonesia debt sales was necessary for ruling on the affiliation between APP/SMG and Orleans.

12. Second, Article 12.7 requires that, before being entitled to apply facts available, an investigating authority afford a reasonable period of time for an interested party to respond to a request for information. The Panel must therefore determine whether the USDOC gave enough time to the Government of Indonesia to respond to the requests for information at issue.

13. Third, in applying Article 12.7 to the facts of this case, the Panel should also take into account the fact that Article 12.7 is informed by the due process rights set out under Article 12 of the SCM Agreement, and the detailed guidance on the application of facts available set out under Annex II of the Anti-Dumping Agreement. In accordance with these protections, an investigating authority must take due account of the difficulties experienced by interested parties in supplying information requested. An investigating authority must also refrain from rejecting information on the basis that it is not ideal in all respects, if an interested party acted to the best of its ability.

14. Fourth, whether an investigating authority is affirmatively required to accept information provided at on-site verification will ultimately depend on the factual circumstances of a given case. The Appellate Body in C*hina – HP-SSST (Japan) / China – HP-SSST (EU)* indicated that an investigating authority's latitude to reject information provided at on-site verification or thereafter is constrained by the obligation to ensure that the information relied upon is accurate and by the legitimate due process interests of the parties to an investigation.

V. THE TIE VOTE PROVISION OF THE U.S. STATUTE IS INCONSISTENT WITH ARTICLE 3.8 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.8 OF THE SCM AGREEMENT

15. With respect to Indonesia's "as such" claim, Canada recalls that U.S. law mandates that all tie votes among the six USITC Commissioners are resolved in favour of an affirmative finding of injury. This rule is inconsistent with key provisions of the Anti-Dumping and SCM Agreements concerning injury investigations.

16. Article 17.6 of the Anti-Dumping Agreement mandates that investigating authorities conduct an "unbiased and objective" evaluation of facts on the record. With respect to injury determinations, Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement also require that investigating authorities base their findings on positive evidence and conduct "an objective examination" of the relevant evidence concerning dumping or subsidization.[2]

[2] The "objective examination" obligation in Articles 3.1 and 15.1 is contextually relevant to the special care requirement in Articles 3.8 and 15.8 because it informs the operation of all of the substantive rules governing injury determinations in Articles 3 and 15. In other words, the obligation to conduct an objective examination must be read into all of the rules governing injury determinations. This was confirmed by the Appellate Body in *Thailand – H-Beams* and by the panel in *US – Softwood Lumber VI*.

17. The Appellate Body has repeatedly indicated that conducting an "objective examination" entails evaluating facts in an "even-handed" manner without prejudging the outcome of an investigation. It is settled law that an investigating authority must not favour the interests of any interested party, or group of interested parties, when making injury determinations.

18. The tie vote rule cannot be reconciled with the "objective examination" requirement. It effectively creates two different standards for petitioners and respondents that appear before the USITC: affirmative injury determinations only require the support of three USITC Commissioners while negative injury determinations require the support of four. In the event of a tie, the vote of one of the Commissioners in favour of a negative injury determination is effectively disregarded. In Canada's view, this structural bias, which blatantly favours petitioners and prejudices respondents, is clearly inconsistent with the requirement to conduct an "objective examination".

19. With respect to Indonesia's claim under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, Canada submits that a legal rule that precludes an "objective examination" is also manifestly inconsistent with the obligation to exercise "special care" in the context of threat of injury determinations. Indeed, given that the exercise of "special care" presupposes that an investigating authority has already exercised the level of care required when making all determinations of injury, a failure to conduct an "objective examination" in a threat of injury determination also necessarily entails a failure to exercise "special care".

20. Canada recognizes that voting procedures for injury determinations are internal matters left to the discretion of each WTO Member, as neither the Anti-Dumping Agreement nor the SCM Agreement contains specific rules with respect to the organizational structure of investigating authorities. This general principle is consistent with the Appellate Body's decision in *US – Line Pipe*. Yet, in that case, the Appellate Body recognized that while a WTO Member has considerable discretion with respect to the internal organization of its investigating authority, it still must structure its authority and establish its decision-making rules in a manner that results in WTO-compliant determinations. In other words, matters of internal procedure are disciplined to the extent they impact the substance of an investigating authority's final decision.

21. Indeed, accepting the U.S. position that the decision-making procedure at the USITC is immune from the application of the Anti-Dumping and the SCM Agreements would lead to the unreasonable conclusion that it would be permissible for the United States to mandate an affirmative injury determination if only one of the six USITC Commissioners voted for such a determination.

22. This cannot be the case. The obligations pertaining to injury determinations are borne by the investigation authority as a whole. When making a determination, an investigating authority must respect all of the obligations in Articles 3 and 15. Accordingly, if a voting procedure, or any other internal arrangement, prevents the investigating authority from conducting an objective examination and, consequently, from exercising special care, its threat of material injury determination cannot be consistent with the Anti-Dumping and SCM Agreements.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

I. CONCERNING THE ALLEGATION OF USDOC'S FLAWED SUBSIDY DETERMINATION

A. Concerning the alleged inconsistency with Article 14(d) SCM due to USDOC's improper per se determination of price distortion

1. Under Article 14(d) SCM the primary benchmark for the determination of benefit is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions. However, prior Appellate Body Reports have accepted that the market of the subsidizing Member may be so distorted by the government's predominant role in it, that no market conditions in the country of provision exist as the government effectively determines the price at which private suppliers sell the same or similar goods.

2. The EU considers that the extent to which an investigating authority needs to carry out an analysis of the market structure depends on the particular market characteristics. An in-depth market analysis of the market structure is not required in each and every case. The higher the market share of the government the more likely it becomes that the government is predominant and that prices in the subsidizing Member's market are distorted. While an investigating authority must also consider evidence relating to factors other than government market share, such other evidence will carry only limited weight in case of very high government market shares.

3. The EU considers that the Appellate Body's statements in *US – Anti-Dumping and Countervailing Duties (China)* provide for the possibility that an investigating authority may - exclusively based on a government's predominant role - find price distortion, depending on the circumstances of the particular case. This may be the case, for example, where no other evidence is available or where the government is the sole supplier of the good in question or effectively controls private prices, in which case there is no private price available.

4. Market share is a key factor to demonstrate a government's predominance, although not necessarily the only factor. The higher the market share of a government (possibly in combination with other factors), the more likely predominance becomes and the less weight other evidence carries. In situations in which a government has a 100% market share it is predominant and there is also price distortion as there are no private prices. It follows that no price distortion analysis on the basis of in-country data collected by the authority is required.

5. In situations in which a government holds less than 100% but very high market shares (e.g., 90-95%) and is found to be predominant (on the basis of market shares, possibly in combination with other evidence on record), this may also in itself be sufficient to find price distortion in case no other relevant evidence is on record. If other evidence is on record, it must be considered by the authority. No price-distortion analysis on the basis of in-country data collected by the authority is required by the authority to reject in-country prices if predominance can be established.

6. In view of these considerations, the EU takes the position that the Panel may take into account (i) how predominant the Indonesian government's role was, (ii) whether other evidence was available to the USDOC, (iii) how relevant (strong) such other evidence was and (iv) whether the USDOC considered such other evidence. The EU notes that in view of the factual circumstances (notably high market shares) it does not consider that the USDOC was under an obligation to ask for pricing data of private suppliers and government prices in order to carry out a price distortion analysis.

B. Concerning the alleged inconsistency with Article 12.7 SCM due to USDOC's improper application of an adverse inference to find the Indonesian government knowingly sold debt to an affiliate of the debtor in contravention of Indonesian law

7. ***Status as developing country.*** The EU does not consider that Indonesia has specifically explained or demonstrated how its status as a developing country Member would be of relevance in the context of this particular dispute under Article 12.7 SCM. It should not be presumed that the preparation of responses to questionnaires will always be influenced by the development status of a Member. Indonesia did not allege any concrete difficulties arising from its invoked status as a developing Member that would have hindered it from providing the requested information.

8. ***Good faith arguments.*** The EU takes the position that the use of facts available under Article 12.7 is not excluded or restricted in case an interested party is able to provide a good faith explanation (reason) for not being able to provide certain documents (e.g. destruction by fire). Otherwise the purpose of Article 12.7 SCM - to "overcome a lack of information" and to enable investigating authorities to continue with the investigation and make determinations - could be easily nullified through "good faith" arguments e.g. of lost or destroyed documents that will be difficult for investigating authorities to verify and rebut. However, when assessing evidence and when using facts available (including the drawing of adverse inferences), the investigating authority may in its overall analysis take into account the underlying reasons for the non-provision of relevant information.

9. Similar considerations apply in case of "difficulties" encountered by the company in providing information. It is correct that Article 12.11 ADA – which informs Article 12.7 SCM - requires an investigating authority to take "due account of any difficulties experienced by interested parties". There is no guidance in the case law on how such difficulties should be taken into account in practice. The EU considers that practical difficulties could be solved e.g. by providing an extension of the deadline to reply or by limiting the request to information that is strictly necessary, where appropriate. Furthermore, the fact that a party made good faith efforts to provide the information can be taken into account, as explained above, in the overall assessment of the available evidence. However, irrespective of the nature and extent of the difficulties, Article 12.7 remains applicable.

C. Concerning the alleged inconsistency with Article 2.1(c) SCM due to USDOC's failure to demonstrate the existence of a subsidy program

10. The EU notes that the case law cited by Indonesia, according to which an investigating authority must demonstrate the existence of a "plan or scheme" and "systematic series of actions" for a *de facto* subsidy refers to a case in which no "written instrument" existed at all regarding the subsidy. In such situations, the need may indeed arise to prove the existence of a subsidy programme through other means than through direct documentary evidence. However, in situations in which the subsidy programme is manifested in writing, e.g. through laws, decrees or other written documents (here e.g. for the log export ban and the provision of standing timber), there is no need to systematically require, in addition, a plan or systematic actions. The plan and the systematic actions may in such situations be expressed in the documents themselves.

11. The EU would disagree with a proposition that where only one company is eligible to receive the subsidy, there is no need to otherwise base a finding of specificity on the factors listed under Article 2.1(c). The EU sees no basis for such an interpretation in the wording of Article 2.1(c) which makes no distinction between a subsidy granted to one company versus a subsidy granted to more than one company. The phrase "limited number of certain enterprises" also covers the situation of the smallest number, i.e. one.

D. Concerning the alleged inconsistency with Article 2.1 SCM due to USDOC's alleged failure to identify the relevant jurisdiction

12. The EU considers that Indonesia's claim is based on an erroneous reading of the case law. An investigating authority must not in each and every case precisely determine the government entity that administers the subsidy nor, if a central government is administering the subsidy, must it assess the implementation of the subsidy at regional or local level. It suffices if the investigating authority makes an adequate finding whether the jurisdiction covers the entire territory of the Member or is limited to a designated geographical region and this will normally also identify the granting authority. The jurisdiction of the granting authority must be "discernible from the determination". The EU considers that it was clear from USDOC's determination that "GOI" referred to the Government of Indonesia and hence to the national (or central) government as opposed to any local or regional government. The jurisdiction of the granting authority therefore was the entire territory of Indonesia. The EU does not consider that Indonesia's claim under Article 2.1 SCM has legal merit.

II. CONCERNING USITC'S ALLEGED FLAWED THREAT OF INJURY DETERMINATION

A. Concerning USITC's alleged failure to establish causation between the subject imports and the threat of injury under Articles 3.5 ADA / 15.5 SCM

13. The EU considers that the two factors that broke the causal link for present injury are either not present (i.e. the Black Liquor Tax which expired in 2009) or are not present to the same degree (i.e.

the decline in demand which was forecast to be less pronounced for 2010-2012 than for 2007-2009) as regards threat of injury. Hence it could be argued that there was a change in circumstances as required under Article 15.7. However, the EU points out that there is a certain contradiction between the USITC's finding that in 2007-2009 subject imports took away market share from non-subject imports and that in 2010-2012 subject imports will take away market share (also) from domestic producers.

14. The EU considers that the removal of the US Black Liquor Tax − as tax credit temporarily counter-acting the effects of the subsidy − could not be qualified as the genuine and substantial cause of the injury as claimed by Indonesia. At the same time, the lifting of preliminary duties, without more, cannot be considered a change of circumstances within the meaning of Article 15.7 SCM.

15. ***Alleged failure to carry out a "concrete" analysis.*** The EU recalls that under the case law there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidised and non-subject imports respectively. The EU agrees. It does not consider that a "concrete" (i.e. quantitative) analysis was required by USITC.

16. ***Alleged failure to isolate injurious effects.*** The EU recalls that no particular method or approach is prescribed under the case law for the isolation of injurious effects. The EU considers, on the basis of the available information, that USITC's analysis would *prima facie* appear to conform to the requirements of Article 15.5 SCM. The non-attribution factors at issue − notably the predicted modest consumption levels and the non-subject imports - were recognised as possibly causing threat of injury to domestic producers. Their effects were separated and distinguished by USITC from the effects of the subject imports. Ultimately, they were not considered to be so significant as to break the causal link, i.e. detract from the hypothesis that the subsidised imports are causing threat of injury. A qualitative explanation was provided for that conclusion.

B. Concerning the claim under Articles 3.7 ADA and 15.7 SCM that USITC's findings were improperly based on conjecture and remote possibility

17. The EU considers that Articles 3.7 ADA / 15.7 SCM necessarily presuppose a certain degree of speculation regarding a finding of threat of injury as the future, even the imminent future, can never be predicted with absolute certainty. This interpretation is also supported by the texts of Articles 3.7 ADA / 15.7 SCM which state that threat of injury shall not *merely* be based on allegation, conjecture or remote possibility. Whether a finding of threat of injury is "sufficiently" based on facts on record and adequately explained is a question that will have to be determined on a case-by-case basis.

18. As a general matter, the EU considers that, under normal circumstances and absent significant market developments, solid evidence of pricing behaviour in the past may serve as a reasonable indicator of future pricing behaviour as was done by USITC. However, the EU also points out that the USITC's finding that subject imports would gain market share from domestic producers seems to be little supported by the facts as set out in the determinations since USITC found that the subject imports' (and domestic producers') increase of market share in 2007-2009 "came at the expense of non-subject imports".

C. Concerning the claim under Articles 3.8 ADA / 15.8 SCM that USITC did not exercise "special care" in its threat of injury determination

19. The EU recalls that a previous panel stated that an inconsistency under the special care provision of Articles 3.8 ADA / 15.7 SCM could only be invoked as a separate violation under particular circumstances, namely when specific additional or independent arguments would be brought compared to arguments made under the specific ADA / SCM provisions. The EU agrees with this position and does not consider that Indonesia's arguments are sufficiently "independent".

III. CONCERNING THE ALLEGED AS SUCH CLAIM UNDER ARTICLES 3.8 ADA / 15.8 SCM

20. The EU considers that the special care provisions of Articles 3.8/15.8 do not refer to procedural aspects such as voting requirements. Notably, Articles 3.8/15.8 refer to the "consideration" of the − substantive - conditions for threat of injury under Articles 3.7/15.7 and to the − also substantive − discretionary "decision" by an authority whether to impose a measure or not under Articles 9.1/19.2. The texts of Articles 3.8/15.8 do not make reference to any procedural provisions such as Article 6 ADA or Article 12 SCM. Nor can the term "decision" in Articles 3.8/15.8 be interpreted to include procedural decision-making aspects since the term "decision" in Articles 3.8/15.8 and Articles 9.1

ADA/19.2 SCM does not refer to procedural but only to substantive aspects, namely the discretionary power of authorities to abstain from imposing measures (e.g. in view of public interest considerations).

21. Voting procedures are an internal matter that is left to the discretion of each WTO Member. The EU finds implicit support for its position in the fact that even though the SCM and ADA Agreements do provide for certain procedural rules (e.g. Articles 6 ADA and 12 SCM) they do not contain rules as to how authorities must organise their decision/making process. This interpretation is also supported by the Appellate Body in *US – Line Pipe*.

22. By basing its claim on the special care provisions, Indonesia is essentially arguing that in case of injury threat determinations a different (higher) standard must apply for voting requirements than for "normal" injury determinations (e.g. if a 4-3 majority is required for present injury, a 5-2 majority would be needed for threat of injury). Such a position would likely affect the voting systems of almost any Member and cannot be correct.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes the opportunity to present its views as a third party in this case. Turkey is participating in this case because of its systemic interest in correct and consistent interpretation and implementation of the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as "SCM Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining its interest, Turkey will share its views on issues addressed by the United States of America (hereinafter referred to as US) and the Republic of Indonesia (hereinafter referred to as Indonesia) in their first written submissions pertaining to Article 14 (d) of the SCM Agreement.

II. LEGAL INTERPRETATION OF ARTICLE 14(D) OF THE SCM AGREEMENT

3. In its first written submission Indonesia claims that the US Department of Commerce (hereinafter referred to as USDOC) improperly concluded per se that the predominant market share of standing timber from public forests caused a price distortion and failed to determine the adequacy of remuneration based on prevailing market conditions in Indonesia. Thus, according to Indonesia, the use of out-of-country benchmarks, which is the benchmark value for Malaysian exports of acacia pulpwood and mixed tropical hardwood, breached Article 14(d) of the SCM Agreement.[1] Indonesia, specifically underlines that this per se determination tainted the conclusion of the USDOC since it is not legally permissible to reach, without further inquiries, an outcome that the market of the investigated good is distorted for the sole reason that the government acts as the predominant provider.[2]

4. The US, replies in its first written submission that even though there is no threshold to determine whether the market power of the government amounts to a per se price distortion, it is reasonable to conclude that the more predominant a government's role is in the market, the more it is possible to observe distorted prices.[3] Nevertheless, an investigating authority must consider the particular facts of the investigation and analyze factors other than the impact of government market share to determine whether the price distortion is caused by the influence of the government.[4] The US stresses that in-country prices for the good in question is a starting point for the investigating authority and that the authority is not bound to use these prices if they are not determined by market forces due to government intervention. According to the US, the government intervention can be at such a level that it may distort in-country private prices by artificially lowering the prices which the private-providers are compelled to follow.[5]

5. Article 14 (d) provides as follows:

> "The provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

6. Turkey understands that the government may act as a purchaser or provider of goods or services as long as this transaction is not made less (or more in the event of purchase) than the adequate remuneration. Despite this provision, the government has still discretion to sell the

[1] Indonesia's First Written Submission, para. 29.
[2] Ibid, para. 33.
[3] United States' First Written Submission, para. 50.
[4] Ibid, para.51.
[5] US First Written Submission, para. 49.

good/services in question less than the adequate remuneration by taking into consideration that such an option will lead to a "benefit" within the legal framework of the SCM Agreement. Since a separate analysis of benefit and remuneration are not required under Article 14(d), "benefit" will become evident at the point that the investigating authority determines that the provision is made less (or more) than the adequate remuneration.[6]

7. Turkey opines that assessing the influence of the government in the market under investigation is the first step to determine whether the in-country prices are useable to make an "adequate remuneration" analysis. Turkey shares the view that neither the SCM Agreement nor the case law provides a numerical value to be used to judge whether the economic weight of the government providers is at such a level that the prices charged by the government drives the prices of even private-providers out of ambit of unconstrained forces of supply and demand. The case law directs that, in the context of the Article 14 (d), a market need not to be "pure" or "absent of any government intervention".[7] Thus, in a marketplace where government itself is a market actor, the evaluation on whether the influence of the government enables it to set, directly or indirectly, all prices of the relevant good in the market should be made on a case-by-case basis considering, *inter alia*, the peculiarities of the market.[8] As a final point, Turkey understands that the burden to explain adequately how the government's substantial involvement eventually leads to the significant distortion of the market is cardinal to ensure due process requirements.

8. Even though Turkey underscores that the circumstances considered in the investigation is central to the assessment on the economic weight of the government provider and its ability to influence the price level of the good in questions in the market; Turkey equally considers that the "likelihood" of the government provider to set prices, which all market actors will be compelled to follow, may increment proportionally with its market power.[9] The question whether these prices lead to distortion in market, however, shall be the subject of a separate analysis.

9. Turkey observes that there is a chain of same-toned Appellate Body decisions concerning the legal margin of using in-country-benchmarks to determine whether the provision is less than adequate remuneration. The case law indicates that, prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision is the "primary benchmark" and a "starting point" [10] to be considered. As matter of interpretation, it is possible to use "secondary benchmarks" if it is established that the "primary benchmark" is not serving the legal objectives of Article 14(d) of the SCM Agreement provided that the investigating authority abides by the guidelines in this Article and the methodology selected in line with the chapeau of Article 14 relates or refers to or is connected with the prevailing conditions in the country of provision or purchase[11]. Moreover, Turkey once again would like to emphasize that necessity for using the secondary benchmarks needs to be established on a case-by-case basis according to the facts underlying each CVD investigation.

III. CONCLUSION

10. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

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[6] *US – Carbon Steel (India)*.4.125-4.126.
[7] *US – Softwood Lumber IV*, para. 87; *Canada – Renewable Energy/Feed In Tariffs*, para. 7.274.
[8] *US – Softwood Lumber IV*, para. 102.
[9] *US – Carbon Steel (India)*, paras. 4.152-4.158.
[10] Ibid, paras. 4.152-4.158.
[11] *US – Softwood Lumber IV*, para. 96; *US – Carbon Steel (India)*, paras. 4.197-4.199.

ANNEX D

PRELIMINARY RULINGS OF THE PANEL

ANNEX D-1

DECISION OF THE PANEL CONCERNING CANADA'S REQUEST FOR ENHANCED THIRD-PARTY RIGHTS

3 November 2016

The Panel refers to Canada's communication of 8 July 2016, in which Canada requests that the Panel grant it certain additional "passive" third-party rights in these proceedings, namely: (i) the right to receive an electronic copy of all submissions and statements of the parties, including responses to Panel questions, up to the issuance of the interim report; and (ii) the right to be present for the entirety of all meetings of the Panel with the parties.[1]

In its request, Canada submits that, in addition to having a legal and systemic interest in these proceedings, it has significant economic interests in the present dispute. Canada submits, in particular, that: (i) the forest products industry is of great importance to Canada's economy and the United States is the most important market for its exports of forest products; (ii) Canada maintains measures similar to those at issue in this dispute because, like in Indonesia, a significant portion of Canada's forests are publicly-owned and managed; Canadian provincial and territorial governments maintain regimes to regulate the harvest of standing timber and to set the price of stumpage and other fees; and Canada controls the export of logs through export permitting processes; and (iii) Canada's stumpage and other forest management measures have been the subject of several trade remedy actions by the United States in the past and could be the subject of further investigations in the near future in light of the expiry of the standstill period under the Canada – United States Softwood Lumber Agreement of 2006.

For the foregoing reasons, Canada submits, its legal rights and economic interests are very much at issue in this dispute. Canada adds that, to ensure that its interests are fully taken into account, it needs to be aware of the arguments and evidence presented in the later stages of these proceedings so that it can be fully informed of the arguments and issues that are before the Panel, that will be relied on by the Panel to reach its conclusions, and that may be subject to appeal. According to Canada, the nature of the additional rights it seeks would not prejudice either of the parties or impose an undue burden on them, the Secretariat or the Panel as its request concerns only "passive" additional third-party rights. Nor would granting its request raise confidentiality concerns or result in delays. Finally, Canada submits that a panel has discretion to grant enhanced third-party rights even in the absence of consent from the parties.[2]

At the organizational meeting, the Panel invited the parties to comment on Canada's request. Indonesia indicated that it supports Canada's request[3] whereas the United States opposes it.[4]

The Panel has carefully considered the reasons advanced by Canada to support its request, in light of the provisions of the DSU and relevant prior panel and Appellate Body decisions. In this respect, the Panel notes that Articles 10.2 and 10.3, and paragraph 6 of Appendix 3, of the DSU specify the rights of third parties: to receive the parties' submissions up to the first meeting of the panel, to make submissions to the panel, to present their views during a session of the first substantive meeting of the panel set aside for that purpose, and to be present during the entirety of such a session. However, it is well established that panels have discretion to depart from these standard rights and grant so-called "enhanced" third-party rights, subject to the requirements of due process and the need to guard against an inappropriate blurring of the distinction drawn in the DSU between the rights of parties and those of third parties.[5] Prior panels have granted requests

[1] Canada's request for enhanced third-party rights, p. 1.
[2] Canada's request for enhanced third-party rights, p. 3 (referring to Panel Report, *EC – Tariff Preferences*, p. A-2).
[3] Indonesia's statement at the organizational meeting.
[4] United States' statement at the organizational meeting, and written comments of 20 July 2016.
[5] Appellate Body Reports, *EC – Hormones*, para. 154; and *US – 1916 Act*, para. 150; Panel Reports, *China – Rare Earths*, para. 7.7; *EC and certain member States – Large Civil Aircraft*, paras. 7.166-7.167; *US – Large*

for enhanced third-party rights in situations in which third parties demonstrated an interest in the dispute going beyond the "substantial interest" that all third parties may be presumed to have in the matter before a panel.[6] Specifically, prior panels have granted enhanced third-party rights on the basis of one or several of the following factors: the significant economic effect of the measures at issue for certain third parties[7], the importance of trade in the product at issue to certain third parties[8], the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue[9], claims that the measures at issue derived from an international treaty to which certain third parties were parties[10], third parties having previously been granted enhanced rights in related panel proceedings[11], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[12]

In the majority of instances in which enhanced third-party rights were granted in past disputes, the panel based its decision on the fact that third parties' rights or interests would be directly affected by the outcome of dispute. The measures at issue in the present dispute are not Indonesia's forestry management programmes, but the anti-dumping and countervailing measures imposed by the United States on imports of coated paper from Indonesia. Thus, the rights and interests alleged by Canada do not directly relate to the matter at issue before the Panel or to the outcome of the present dispute.[13] Moreover, the Panel notes that Canada's alleged rights and interests in these proceedings depend on the occurrence of a number of events − that the US authorities will initiate countervailing duty investigations on Canadian forestry products, that those investigations will target programmes similar to Indonesian programmes that were the subject of the investigation underlying this dispute, and that the United States will apply measures on the basis of findings and interpretations regarding those programmes similar to the USDOC's findings and interpretations in the investigation underlying this dispute. Not only does this conditionality undermine the significance of Canada's alleged interests, the Panel is also of the view that, should these assumptions materialize, Canada will be able to defend its rights and interests by bringing its own dispute and pursuing its own claims, which would then be assessed on their own merits.[14]

The Panel also notes that the United States opposes Canada's request. In the absence of a demonstration of a specific interest in the dispute, the Panel does not consider that the consent of one of the parties to the dispute provides a sufficient basis for the granting of enhanced third-party rights.[15]

Finally, the Panel notes that Canada does not seek the right to be granted additional active participatory rights, but only seeks to be apprised of the arguments and evidence put forward by the parties over the entire course of the proceedings. Canada has not explained why or how granting the additional "passive" third-party rights it seeks would ensure that its interests are "fully taken into account" in a way that the third-party rights provided for in the DSU and the Panel's Working Procedures would not; at the end of the dispute, like all other third parties and WTO Members, Canada will be apprised of the relevant arguments and evidence relied on by the Panel in its Report and annexes attaching the executive summaries of the parties' arguments. Therefore, the Panel considers that its existing Working Procedures provide Canada and other third parties adequate opportunities to be made aware of the arguments and issues that will be addressed by the Panel.

Civil Aircraft (2nd complaint), paras. 7.16-7.17; *EC – Export Subsidies on Sugar*, para. 2.7; *EC – Tariff Preferences*, Annex A, para. 7; and *EC – Bananas III*, para. 7.9.

[6] See Article 10.2 of the DSU.

[7] Panel Reports, *EC – Bananas III*, para. 7.8; and *EC – Tariff Preferences*, Annex A, para. 7. See also Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.

[8] Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.

[9] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

[10] Panel Report, *EC – Bananas III*, para. 7.8.

[11] Panel Report, *EC – Bananas III*, para. 7.8.

[12] Panel Report, *EC – Hormones (Canada)*, para. 8.17.

[13] In addition, the Panel is not convinced that the fact that a third party maintains measures similar to the measures being challenged is, in itself, sufficient to justify the granting of enhanced rights to that third party. The panel in *EC – Tariff Preferences* invoked this as one of several reasons in its decision to grant enhanced third-party rights in that dispute. However, the principal reason for the panel's decision in that case appears to have been that some of the third parties were direct beneficiaries of the challenged programme.

[14] See Panel Report, *US – Washing Machines*, para. 1.12.

[15] The Panel is not aware of any prior panel having granted enhanced third-party rights solely on the basis that one, or even both, of the parties agreed to the request.

In sum, Canada has not demonstrated a specific interest in the dispute sufficient to justify granting that third party additional participatory rights beyond those provided to all third parties under the DSU and the Working Procedures adopted by the Panel. In light of the foregoing, the Panel denies Canada's request for enhanced third-party rights.

ANNEX D-2

DECISION OF THE PANEL CONCERNING THE EUROPEAN UNION'S REQUEST REGARDING BCI

4 November 2016

In its third-party submission, the European Union requested that third parties be given access to the exhibits containing BCI submitted by the parties, in addition to objecting to the fact that the Additional BCI Procedures adopted by the Panel do not provide for third party access to BCI submitted by the parties. The European Union argued, *inter alia*, that failure to provide such access to third parties is inconsistent with the DSU.[1]

The Panel consulted with the parties regarding the European Union's request. The parties provided written comments on 2 November 2016. Indonesia opposed the request, stating that, in its view, limiting access to BCI to the parties is not inconsistent with the DSU. The United States was also of the view that limiting access to BCI to the parties is not inconsistent with the DSU, but did not object to granting the third parties access to the BCI submitted by the parties in the present dispute.

The Panel adopted its Additional BCI Procedures after consulting with the parties, who jointly proposed that the Panel limit access to BCI to the parties. The Panel considers that its Additional BCI Procedures as adopted are not inconsistent with the DSU and that it is therefore not required to modify them. Particularly as one of the parties to the dispute opposes third party access to BCI, the Panel also considers it neither appropriate nor necessary to grant the European Union's request. In this context, the Panel notes that the parties submitted non-confidential versions of each exhibit containing BCI that they submitted to the Panel. Moreover, third parties were provided the same data concerning projections for US demand in 2010-2012 – the only instance of BCI allegedly not provided to the third parties that the European Union specifically identified[2] – as the Panel and the parties.[3] Finally, the Panel notes that, of the 18 exhibits to which the European Union specifically requested access, as subsequently clarified by the United States, 11 of those exhibits do not exist.[4]

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[1] European Union's third-party submission, para. 5. The European Union also took issue with the requirement in paragraph 2 of the Additional BCI Procedures that the party submitting BCI provide an authorizing letter from the entity that submitted that information to the investigating authority in the underlying investigation, but made no concrete request in this regard. (Ibid. para. 4)

[2] European Union's third-party submission, para. 65.

[3] The Panel and the other party received the same version of Exhibits IDN-18 and US-1 as the third parties. In addition, as indicated in footnote 491 of the United States' first written submission (corrected version), the US demand projections data, while redacted from Exhibit US-1 , p. II-12, was provided to the Panel, Indonesia and the third parties in Exhibit US-4 (pp. 1 and 21), and was discussed in paras. 229 and 243 of the United States' first written submission (corrected version).

[4] As indicated in the list of exhibits submitted by the United States, these were "intentionally omitted", i.e. there is no content associated with those exhibit numbers.

ANNEX E

INTERIM REVIEW

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the comments and arguments made at the interim review stage by the parties. As explained below, we have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate. In addition, we have made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the United States.

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. In the discussion below, we use the numbering in the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Paragraph 1.3

2.1. The United States suggests that the Panel modify its characterization of the panel request submitted by Indonesia on 20 August 2015 after the filing of a prior panel request on 9 July 2015. The United States submits that, because Indonesia's panel request procedurally, was made *ab initio*, the Panel should refer to it as a "new" panel request rather than as a "revised" panel request in the second sentence of paragraph 1.3. Indonesia does not comment on the United States' request.

2.2. We have modified paragraph 1.3 in accordance with the suggestion of the United States.

2.2 Footnote 51 to paragraph 7.18

2.3. The United States requests that the Panel make two changes to the first sentence of footnote 51 to paragraph 7.18. Specifically, the United States suggests clarifying that in its request for ruling described in the footnote, the United States asked the Panel to find that Indonesia's Article 14(d) and Article 2.1(c) claims with respect to the log export ban are in fact financial contribution claims "not before the Panel", and that the United States made this request in the alternative. Indonesia does not comment on this request.

2.4. To better reflect the ruling sought by the United States, we have amended the first sentence of footnote 51.

2.3 Paragraph 7.68

2.5. The United States suggests adding a new footnote at the end of paragraph 7.68 following the Panel's statement that the USDOC established that a benefit was conferred by comparing the price paid by APP/SMG to a benchmark price, citing page 13 of the USDOC Issues and Decision Memorandum. Indonesia does not comment on this request.

2.6. We have added the reference suggested by the United States, but to paragraph 7.66 rather than paragraph 7.68.

2.4 Paragraph 7.234

2.7. The United States requests that the Panel modify the second and third sentences of paragraph 7.234. In this respect, the United States submits that the USITC did not affirmatively find that subject imports caused no material injury during the POI but rather, the USITC "[did] not find a sufficient causal nexus necessary to make a determination that the subject imports [were]

having a significant adverse impact on the domestic industry".[1] Accordingly, the United States requests that the Panel amend the language of the second sentence of paragraph 7.234 to indicate that the USITC "declined to make a finding of present material injury". In the same vein, the United States requests that the Panel change the language of the third sentence of paragraph 7.234 to state that the USITC determined that the deterioration in the domestic industry's condition coincided with an economic downturn and a sharp decline in demand in the course of "determining not to find present material injury". Indonesia does not comment on the United States' request.

2.8. We have, in light of the United States' request, modified the second sentence of paragraph 7.234 to better reflect the USITC's conclusion concerning present material injury, albeit not in the specific terms requested by the United States.

2.5 Paragraph 7.286

2.9. The United States suggests adding a footnote at the end of the final sentence of paragraph 7.286, referring to page 38 of the USITC's final determination. Indonesia does not comment on this request.

2.10. We have added the reference suggested by the United States, as well as a cross-reference to a paragraph of the Report quoting the relevant language from the USITC's final determination.

2.6 Paragraph 7.299

2.11. The United States suggests that, to underscore the significance of APP's intentions, the Panel insert a footnote at the end of the second sentence of paragraph 7.299 to mention the USITC's finding, on page 24 of its final determination, that APP accounted for the large majority of subject merchandise produced and exported in 2009. Indonesia objects to the United States' request. In Indonesia's view, the United States is asking the Panel to make an additional finding of fact, not to correct a factual error. Indonesia submits that the United States' request is not appropriate at this phase of the proceeding.

2.12. We have, in light of the United States' suggestion, provided a more complete quotation of the USITC's final determination in paragraph 7.299. We also consider it appropriate to add a reference in the Report to the indication by the USITC that APP accounted for the large majority of the production and export of subject merchandise in 2009. As the USITC made this statement in describing the conditions of supply in the market for coated paper, we have added this reference to the footnote attached to paragraph 7.197, in the introduction to the claims pertaining to the USITC's final determination.

2.7 Footnote 555 to paragraph 7.310 and paragraph 7.314

2.13. The United States requests that the Panel correct certain errors in the description of the USITC's price trends analysis in footnote 555 to paragraph 7.310. Indonesia does not comment on this request.

2.14. In addition, the United States requests that the Panel include, in the same footnote and in the second sentence of paragraph 7.314, a discussion of other evidence that the USITC relied on in concluding that subject imports depressed domestic prices "at least to some extent" for part of the POI. Specifically, the United States suggests that the Panel add language to reflect the fact that, in its conclusion in this respect, the USITC also relied on "domestic producer testimony that domestic producers reduced prices to compete with subject imports during the POI, and on confirmation from numerous purchasers that domestic producers had lowered prices to meet subject import prices", and the corresponding reference to the USITC's final determination. Indonesia objects to this request. In Indonesia's view, the United States is asking the Panel to make an additional finding of fact, not to correct a factual error, and such a request is not appropriate at this phase of the proceeding.

[1] The United States refers to USITC Final Determination, (Exhibit US-1), p. 38.

2.15. We have, in light of the United States' request, modified the description of the USITC's price trends analysis in footnote 555, including a more complete description of the USITC's findings regarding price depression and the evidence relied upon. In light of this change, we do not consider it necessary to amend paragraph 7.314 as suggested by the United States.

2.8 Paragraph 7.341

2.16. The United States suggests certain edits to the penultimate sentence of paragraph 7.341 to more accurately reflect the United States' argument concerning Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement. Indonesia does not comment on this request.

2.17. We have made the changes suggested by the United States.

2.9 Paragraph 7.344

2.18. The United States requests that the Panel clarify that the words "the two" in the penultimate sentence of paragraph 7.344 refer to ''subject imports and injury to the domestic industry'', to reflect that an investigating authority must consider whether subject imports cause or threaten injury to a domestic industry. Indonesia does not comment on this request.

2.19. We have amended paragraph 7.344 in light of the United States' request, albeit not in the specific terms requested by the United States.