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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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**LIST OF ANNEXES****ANNEX A**

## WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	A-7

**ANNEX B**

## ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	First integrated executive summary of Indonesia	B-2
Annex B-2	First integrated executive summary of the United States	B-17
Annex B-3	Second integrated executive summary of Indonesia	B-33
Annex B-4	Second integrated executive summary of the United States	B-48

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of Brazil	C-2
Annex C-2	Integrated executive summary of Canada	C-5
Annex C-3	Integrated executive summary of the European Union	C-8
Annex C-4	Integrated executive summary of Turkey	C-12

**ANNEX D**

## PROCEDURAL RULINGS OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex D-1	Decision of the Panel concerning Canada's request for enhanced third-party rights	D-2
Annex D-2	Decision of the Panel concerning the European Union's request regarding BCI	D-5

**ANNEX E**

## INTERIM REVIEW

<b>Contents</b>		<b>Page</b>
Annex E-1	Interim Review	E-2

**ANNEX A**

WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	A-7

## **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.

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**ANNEX B**

ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	First integrated executive summary of Indonesia	B-2
Annex B-2	First integrated executive summary of the United States	B-17
Annex B-3	Second integrated executive summary of Indonesia	B-33
Annex B-4	Second integrated executive summary of the United States	B-48

**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*.<sup>1</sup> 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.<sup>2</sup> But as we informed the Panel, Indonesia may rely on any appropriate authority and that does not change the claims into something different.<sup>3</sup> 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.<sup>4</sup> According to the United States, these claims should have been made under Article 22.3 of the SCM Agreement.<sup>5</sup> 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.<sup>6</sup>

**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.

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<sup>1</sup> See Indonesia's 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).

<sup>2</sup> See US FWS, p. 11.

<sup>3</sup> See Indonesia's Response to the US Request for a Preliminary Ruling, p. 1.

<sup>4</sup> See US FWS, pp. 11-12.

<sup>5</sup> See US FWS, p. 12.

<sup>6</sup> 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.<sup>7</sup>

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."<sup>8</sup>

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."<sup>9</sup>

**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

<sup>7</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.515.

<sup>8</sup> *Ibid.*, para. 4.154.

<sup>9</sup> 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.<sup>10</sup> This finding was confirmed by the panel on *China – GOES*,<sup>11</sup> as well as the panel on *US – Countervailing Measures (China)*.<sup>12</sup>

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 ...

<sup>10</sup> *US – Export Restraints*, para. 8.75.

<sup>11</sup> *China – GOES*, para. 7.90.

<sup>12</sup> 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<sup>13</sup> 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. . . ."<sup>14</sup> 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

<sup>13</sup> 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.

<sup>14</sup> *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 additional 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".<sup>15</sup> 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.

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<sup>15</sup> *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*<sup>16</sup> and *US – Carbon Steel (India)*<sup>17</sup> 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."<sup>18</sup> The Appellate Body stated that, under the standard of review, the Panel was to examine whether USDOC's determination was "reasoned and adequate."<sup>19</sup> 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. . . ."<sup>20</sup>

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."<sup>21</sup>

38. The second sentence of Article 2.1(c) provides a list of particular factors regarding the use of the subsidy.<sup>22</sup> 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.<sup>23</sup>

39. As the Appellate Body noted<sup>24</sup>, 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.<sup>25</sup> 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.<sup>26</sup> Because there is no written plan that confers a benefit, USDOC needed to look at whether a systematic series of actions conferred a benefit.

<sup>16</sup> Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*.

<sup>17</sup> Appellate Body Report, *US – Carbon Steel (India)*.

<sup>18</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 (footnotes omitted) (emphasis added).

<sup>19</sup> *Ibid.*, para. 4.187.

<sup>20</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.

<sup>21</sup> 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.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, para. 4.143 (emphasis original).

<sup>24</sup> *Ibid.*

<sup>25</sup> See Indonesia FWS, para. 77.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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."<sup>29</sup> In *US – Countervailing Measures (China)*, the Appellate Body stated that an essential part of the specificity analysis is identifying the relevant jurisdiction.<sup>30</sup>

##### **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.

<sup>27</sup> See Indonesia FWS, para. 13.

<sup>28</sup> See Indonesia FWS, para. 83.

<sup>29</sup> Article 2.1, SCM Agreement.

<sup>30</sup> 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."<sup>31</sup> 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.

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<sup>31</sup> 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."<sup>32</sup>

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.<sup>33</sup> The Appellate Body reached a similar holding in *Mexico – Anti-Dumping Duties on Rice*.<sup>34</sup>

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 . . . ."

<sup>32</sup> 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.

<sup>33</sup> 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.

<sup>34</sup> 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*".<sup>35</sup> "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".<sup>36</sup> 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

<sup>35</sup> Oxford English Dictionary, online at <http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid>.

<sup>36</sup> Oxford English Dictionary, online at <http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid>.

analysis<sup>37</sup> 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; "decidará 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",<sup>38</sup> "attention accompanied by protectiveness and responsibility,"<sup>39</sup>; "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"<sup>40</sup>; "responsibility," in turn, is defined as "[a] moral obligation to behave correctly towards or in respect of a person or thing"<sup>41</sup> and synonymous with "reasonableness."<sup>42</sup> 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.

<sup>37</sup> US FWS, para. 313.

<sup>38</sup> Oxford English Dictionary, <<http://www.oed.com/view/Entry/27899?rskey=617Lh0&result=1#eid>>.

<sup>39</sup> Merriam Webster's Collegiate Dictionary (11<sup>th</sup> ed. 2003), available at <<http://www.merriam-webster.com/thesaurus/care>>.

<sup>40</sup> Oxford English Dictionary, <<http://www.oed.com/view/Entry/153138?redirectedFrom=protective#eid>>.

<sup>41</sup> Oxford English Dictionary, <<http://www.oed.com/view/Entry/163862?redirectedFrom=responsibility#eid>>.

<sup>42</sup> Shorter Oxford English Dictionary (6<sup>th</sup> 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."<sup>43</sup> 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".<sup>44</sup>

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."<sup>45</sup> "Impartial" is defined as "favoring no one side or party more than another; without prejudice or bias; fair; just."<sup>46</sup>

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."<sup>47</sup> 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

<sup>43</sup> (Emphasis added).

<sup>44</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

<sup>45</sup> (Emphasis added).

<sup>46</sup> *Webster's New World Dictionary*, p. 703, available at

<<http://www.yourdictionary.com/impartial#websters>.

<sup>47</sup> 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."<sup>48</sup> 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.<sup>49</sup>

90. US law mandates that a tie vote in the material injury context is an affirmative determination.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup>

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"<sup>54</sup> and aids in interpreting the covered agreements.<sup>55</sup> Domestic laws

<sup>48</sup> (Emphasis added).

<sup>49</sup> Panel Report, *US – Softwood Lumber VI*, para. 7.33.

<sup>50</sup> See 19 U.S.C. § 1677(11)(A).

<sup>51</sup> (Emphasis added).

<sup>52</sup> Article 31(1) VCLT.

<sup>53</sup> Panel Report, *US – Softwood Lumber VI*, para. 7.33 (emphasis added).

<sup>54</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

97. The same approach is embodied in the Statute of the International Court of Justice:<sup>60</sup> 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.

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<sup>55</sup> 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.

<sup>56</sup> Canadian International Trade Tribunal Act (R.S.C., 1985, c. 47 (4<sup>th</sup> Supp.) § 3(1)).

<sup>57</sup> International Trade Administration Act (No. 71) 2002 § 12(6), Government Gazette Vol. 451, No. 24287.

<sup>58</sup> Regulation on the Prevention of Unfair Competition in Imports (1999), Government Gazette, No. 23861, Article 44.

<sup>59</sup> Presidential Decree No. 766/94, 12 May 1994, Article 11.

<sup>60</sup> 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 country 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 2011 would 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, un rebutted 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."<sup>1</sup>

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<sup>1</sup> 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."<sup>2</sup> According to the United States, this means Indonesia should have brought certain claims under Article 22 of the SCM Agreement.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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)*.<sup>6</sup> 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.<sup>7</sup>

14. Indeed, the United States continues to demonstrate and convey an inaccurate depiction of the GOI's role.<sup>8</sup> 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 . . . ."<sup>9</sup> But the GOI does not sell standing timber.<sup>10</sup> Rather, the GOI grants concessions to companies to use the land that is the subject of the concession.<sup>11</sup> Moreover, the GOI only grants concessions on land that is heavily degraded, a fact USDOC has been aware of since its 2006/2007 investigation.<sup>12</sup>

<sup>2</sup> See US Response to First Panel Questions, para. 28.

<sup>3</sup> See US Response to First Panel Questions, para. 29.

<sup>4</sup> See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.15.

<sup>5</sup> 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).

<sup>6</sup> See Appellate Body Report, *United States – Countervailing Duty Measures (China)*, para. 4.15.

<sup>7</sup> See Indonesia's Response to First Panel Questions, para. 8.

<sup>8</sup> See US Response to First Panel Questions, para. 31.

<sup>9</sup> See US Response to First Panel Questions, para. 31.

<sup>10</sup> See Opening Statement by the Government of the Republic of Indonesia at the First Meeting of the Panel (Indonesia Opening Statement), paras. 19-23.

<sup>11</sup> See Indonesia Opening Statement, para. 21.

<sup>12</sup> 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."<sup>13</sup> 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<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The United States repeatedly, and without justification, faults Indonesia for not providing information on in-country pricing data.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> In rejecting this data, USDOC stated merely that shipments to Indonesia were not a suitable benchmark.<sup>26</sup> 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

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the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (Oct. 17, 2007), Exhibit IDN-26, p. 60.

<sup>13</sup> See United States Second Written Submission (US SWS), para. 25.

<sup>14</sup> See Final CVD Decision Memorandum, Exhibit IDN-10, p. 8.

<sup>15</sup> See US FWS, para. 43.

<sup>16</sup> See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

<sup>17</sup> See US SWS, para. 30.

<sup>18</sup> See US Response to First Panel Questions, paras. 35 & 39.

<sup>19</sup> See Canada Response to First Panel Questions, para. 5; China Response to First Panel Questions, para. 3.

<sup>20</sup> See US FWS, para. 43; see also US Response to First Panel Questions, para. 50.

<sup>21</sup> See Indonesia's Response to First Panel Questions, paras. 24-29.

<sup>22</sup> See US FWS, para. 61; see also US Response to First Panel Questions, para. 50.

<sup>23</sup> See US FWS, para. 67; see also US Response to First Panel Questions, para. 50.

<sup>24</sup> See US FWS, para. 62.

<sup>25</sup> See US FWS, Exhibit US-44, p. 12.

<sup>26</sup> 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.<sup>27</sup>

**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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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

<sup>27</sup> See Brazil Response to First Panel Questions, para. 3.

<sup>28</sup> See US FWS, Exhibit US-40 (internal exhibit no. 33, p.2).

<sup>29</sup> See Exhibit US-81, p. 3.

<sup>30</sup> The United States appears to argue for such unfettered discretion. See US Response to First Panel Questions, para. 86.

<sup>31</sup> 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.<sup>32</sup> As described above, Orleans'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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> Canada agrees that nothing prohibits an investigating authority from accepting new information during the on-site verification.<sup>40</sup> Finally, the EU explained that it routinely accepts new information at verification and whether it will rely on it depends on the circumstances.<sup>41</sup>

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<sup>32</sup> See US Response to First Panel Questions, para. 114.

<sup>33</sup> See US Response to First Panel Questions, para. 115.

<sup>34</sup> See para. 51 below.

<sup>35</sup> See US SWS, paras. 62-66.

<sup>36</sup> See Exhibit IDN-15, p. 5.

<sup>37</sup> See Exhibit IDN-15, p. 5.

<sup>38</sup> See US SWS, para. 78.

<sup>39</sup> See Brazil Response to First Panel Questions, para. 5.

<sup>40</sup> See Canada Response to First Panel Questions, paras. 7-11.

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> The United States is mistaken when it states that the ban applied to wood chips.<sup>48</sup> As Indonesia has explained, the log export ban never applied to wood chips, which fall under HS 4401.<sup>49</sup> The United States agrees that wood chips fall under HS 4401 but claims they also fall under HS 4404.<sup>50</sup> 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.<sup>51</sup> 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,<sup>52</sup> 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.<sup>53</sup> 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

<sup>42</sup> See US FWS, paras. 174 (standing timber), 183 (log export ban), and 193 (debt forgiveness).

<sup>43</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

<sup>44</sup> See Indonesia FWS, para. 77.

<sup>45</sup> See Indonesia FWS, paras. 76-77.

<sup>46</sup> See Indonesia FWS, para. 13.

<sup>47</sup> See US Response to First Panel Questions, para. 67.

<sup>48</sup> See US Response to First Panel Questions, para. 65.

<sup>49</sup> See Indonesia Response to First Panel Questions, para. 25.

<sup>50</sup> See US Response to First Panel Questions, para. 69.

<sup>51</sup> See Indonesia Response to First Panel Questions FSM, para. 26.

<sup>52</sup> See US Response to First Panel Questions, paras. 70-71.

<sup>53</sup> See Indonesia FWS, para. 83.

Indonesia knowingly and deliberately violated Indonesian law. The United States argues that the jurisdiction was discernible from the determination.<sup>54</sup> 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),<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> Finally, it is worth noting that the World Bank report is dated November 4, 2003,<sup>58</sup> more than a month before the December 8, 2003 announcement of the sale of the APP Group assets.<sup>59</sup> 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.<sup>60</sup>

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."<sup>61</sup> 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.<sup>62</sup> 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

<sup>54</sup> See US FWS, para. 221.

<sup>55</sup> See para. 51 below.

<sup>56</sup> See US Response to First Panel Questions, para. 83.

<sup>57</sup> See Indonesia Response to First Panel Questions, para. 49.

<sup>58</sup> See Exhibit US-40, p. 38 of pdf.

<sup>59</sup> See Exhibit US-33, p. 110 of pdf; see also US Response to First Panel Questions, n. 109.

<sup>60</sup> See Indonesia FWS, para. 99.

<sup>61</sup> See US FWS, para. 246.

<sup>62</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

industry's declining performance.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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.*"<sup>67</sup> 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.<sup>68</sup> 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."<sup>69</sup> The subsidy's expiration, along with declining demand, made the domestic industry vulnerable to injury.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> The USITC's present injury findings contain a pricing analysis based on four pricing products.<sup>73</sup> Finally, the USITC's present injury findings contain an impact analysis that is based on several trade and financial performance indicators.<sup>74</sup> 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.<sup>75</sup> But by applying less precise, amorphous standards phrased in general terms like "increasing volumes of low-priced imports,"<sup>76</sup> "will take sales from current suppliers such as the domestic industry,"<sup>77</sup> and "will gain additional U.S. market

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<sup>63</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>64</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>65</sup> See US Response to First Panel Questions, para. 129.

<sup>66</sup> See USITC Opinion, Exhibit IDN-18, p. 33.

<sup>67</sup> See US FWS, para. 244. (Emphasis added)

<sup>68</sup> See US Response to First Panel Questions, para. 134.

<sup>69</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>70</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>71</sup> See US FWS, para. 304.

<sup>72</sup> See USITC Opinion, Exhibit IDN-18, pp. 26-27.

<sup>73</sup> See USITC Opinion, Exhibit IDN-18, pp. 31-33.

<sup>74</sup> See USITC Opinion, Exhibit IDN-18, pp. 35-38.

<sup>75</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>76</sup> See USITC Opinion, Exhibit IDN-18, pp. 38.

<sup>77</sup> See USITC Opinion, Exhibit IDN-18, pp. 38.

share in the imminent future,"<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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."<sup>81</sup>

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."<sup>82</sup> 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> 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

<sup>78</sup> See USITC Opinion, Exhibit IDN-18, pp. 38.

<sup>79</sup> See US FWS, n. 630.

<sup>80</sup> 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.

<sup>81</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>82</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>83</sup> See USITC Opinion, Exhibit IDN-18, p. 38.

<sup>84</sup> See Indonesia FWS, para. 124.

<sup>85</sup> See US FWS, para. 263; US Response to First Panel Questions, para. 137.

market share.<sup>86</sup> In addition, a decline in shipments (as opposed to market share) could be caused by declining demand. Indeed, domestic shipments declined less than demand.<sup>87</sup>

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.<sup>88</sup> In reality, Eagle Ridge was established in response to APP's loss of business with Unisource.<sup>89</sup> Unisource was a major paper distributor.<sup>90</sup> APP had hoped to expand its business with Unisource but lost the account instead.<sup>91</sup> 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.<sup>92</sup> This contradicts the USITC's conclusion about the likelihood of lower priced subject imports gaining market share.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> The USITC also found that consumption in the rest of Asia was likely to exceed capacity growth by 160,000 tons from 2009-2011.<sup>99</sup> 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.<sup>100</sup> 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,<sup>101</sup> shows that the Chinese industry projected very little excess capacity in

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<sup>86</sup> See USITC Opinion, Exhibit IDN-18, pp. 37-38.

<sup>87</sup> 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).

<sup>88</sup> See US FWS, para. 282.

<sup>89</sup> See USITC Opinion, Exhibit IDN-18, p. 24.

<sup>90</sup> See USITC Opinion, Exhibit IDN-18, p. 29.

<sup>91</sup> See US FWS, n. 612.

<sup>92</sup> See USITC Opinion, Exhibit IDN-18, p. 29.

<sup>93</sup> See USITC Opinion, Exhibit IDN-18, p. 35.

<sup>94</sup> See USITC Opinion, Exhibit IDN-18, Table C-1.

<sup>95</sup> See US FWS, para. 301.

<sup>96</sup> See USITC Opinion, Exhibit IDN-18, p. 27.

<sup>97</sup> See US FWS, para. 282.

<sup>98</sup> See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.

<sup>99</sup> See USITC Opinion, Exhibit IDN-18, p. 28 & n. 181.

<sup>100</sup> See US Response to First Panel Questions, para. 154.

<sup>101</sup> See US Response to First Panel Questions, para. 154.

2011.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> Indeed, the USITC found declining consumption and the economic downturn were responsible for the decline in the domestic industry's shipments.<sup>107</sup>

56. The United States also relies on the increase in production capacity in China,<sup>108</sup> 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.<sup>109</sup> 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,<sup>110</sup> 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.<sup>111</sup> But Eagle Ridge was not even started to be established until the second half of 2009.<sup>112</sup> 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.<sup>113</sup> The USITC even appears to have had the data to perform this analysis but, for whatever reason, chose not to do so.<sup>114</sup>

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*

<sup>102</sup> See USITC Opinion, Exhibit US-1, Table VII-2.

<sup>103</sup> See USITC Opinion, Exhibit US-1, Table VII-2.

<sup>104</sup> Indonesia FWS, paras. 125-126.

<sup>105</sup> See US FWS, para. 279.

<sup>106</sup> See USITC Opinion, Exhibit IDN-18, Table C-3.

<sup>107</sup> 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.").

<sup>108</sup> See US FWS, para. 264.

<sup>109</sup> See US FWS, para. 265.

<sup>110</sup> See US FWS, para. 265.

<sup>111</sup> See USITC Opinion, Exhibit IDN-18, p. 26.

<sup>112</sup> See USITC Opinion, Exhibit IDN-18, p. 24.

<sup>113</sup> See USITC Opinion, Exhibit IDN-18, p. 30, n. 193.

<sup>114</sup> See USITC Opinion, Exhibit IDN-18, p. 30, n. 193 (referencing a document containing monthly import statistics for the period of investigation).

*investigations.*"<sup>115</sup> 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."<sup>116</sup>

58. The United States also relies on the increase in production capacity in China and the establishment of Eagle Ridge.<sup>117</sup> 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."<sup>118</sup> 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.<sup>119</sup> 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."<sup>120</sup> 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.<sup>121</sup> 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."<sup>122</sup>

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.<sup>123</sup> Indonesia has argued that the cumulative effect of the deficiencies also amount to violations.<sup>124</sup> The United States argues that the claims must go beyond those made under other provisions of the Anti-Dumping and SCM Agreement.<sup>125</sup> 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.

<sup>115</sup> See US FWS, para. 244. (Emphasis added).

<sup>116</sup> 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.

<sup>117</sup> See US FWS, para. 271.

<sup>118</sup> See US FWS, para. 272.

<sup>119</sup> See US SWS, para. 147.

<sup>120</sup> 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.

<sup>121</sup> See US SWS, para. 148.

<sup>122</sup> See *US – Softwood Lumber VI*, para. 7.33.

<sup>123</sup> See Indonesia FWS, para. 131.

<sup>124</sup> See Indonesia FWS, para. 132.

<sup>125</sup> 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.<sup>126</sup> 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*".<sup>127</sup> "Decide", in turn, is defined as "*To come or bring to a resolution or conclusion*".<sup>128</sup> 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"<sup>129</sup> 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<sup>130</sup>, 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".<sup>131</sup> 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

<sup>126</sup> See Indonesia FWS, paras. 133-165. The relevant provision of United States law has been codified at 19 U.S.C. § 1677(11)(B).

<sup>127</sup> Oxford English Dictionary, online at <http://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid>.

<sup>128</sup> Oxford English Dictionary, online at <http://www.oed.com/view/Entry/48173?rskey=cRJZ2R&result=1#eid>.

<sup>129</sup> US FWS, para. 313.

<sup>130</sup> Canada, Third Party Submission, paras. 39-44.

<sup>131</sup> 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".<sup>132</sup>

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.

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<sup>132</sup> 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.

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**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.

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**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 provided 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.

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**ANNEX C**

ARGUMENTS OF THE THIRD PARTIES

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of Brazil	C-2
Annex C-2	Integrated executive summary of Canada	C-5
Annex C-3	Integrated executive summary of the European Union	C-8
Annex C-4	Integrated executive summary of Turkey	C-12

**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"<sup>1</sup>, 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

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<sup>1</sup> 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<sup>2</sup>.

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"<sup>3</sup>. 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".<sup>4</sup> 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".<sup>5</sup> 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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<sup>2</sup> AB Report. *United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.419.

<sup>3</sup> US FWS p. 109.

<sup>4</sup> AB Report *US – United States – Countervailing Measures on Certain Carbon Steel Flat Products from India*. p. 4.416.

<sup>5</sup> 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<sup>6</sup> 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"<sup>7</sup>. 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.

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<sup>6</sup> U.S. FWS, Exhibit US-1, table C-3.

<sup>7</sup> *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.<sup>1</sup>

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)*

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<sup>1</sup> 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 *China – 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.<sup>2</sup>

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<sup>2</sup> 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

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<sup>1</sup> Indonesia's First Written Submission, para. 29.

<sup>2</sup> Ibid, para. 33.

<sup>3</sup> United States' First Written Submission, para. 50.

<sup>4</sup> Ibid, para.51.

<sup>5</sup> 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.<sup>6</sup>

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".<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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"<sup>10</sup> 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<sup>11</sup>. 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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<sup>6</sup> *US – Carbon Steel (India)*, 4.125-4.126.

<sup>7</sup> *US – Softwood Lumber IV*, para. 87; *Canada – Renewable Energy/Feed In Tariffs*, para. 7.274.

<sup>8</sup> *US – Softwood Lumber IV*, para. 102.

<sup>9</sup> *US – Carbon Steel (India)*, paras. 4.152-4.158.

<sup>10</sup> *Ibid*, paras. 4.152-4.158.

<sup>11</sup> *US – Softwood Lumber IV*, para. 96; *US – Carbon Steel (India)*, paras. 4.197-4.199.



**ANNEX D**

PRELIMINARY RULINGS OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex D-1	Decision of the Panel concerning Canada's request for enhanced third-party rights	D-2
Annex D-2	Decision of the Panel concerning the European Union's request regarding BCI	D-5

**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.<sup>1</sup>

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.<sup>2</sup>

At the organizational meeting, the Panel invited the parties to comment on Canada's request. Indonesia indicated that it supports Canada's request<sup>3</sup> whereas the United States opposes it.<sup>4</sup>

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.<sup>5</sup> Prior panels have granted requests

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<sup>1</sup> Canada's request for enhanced third-party rights, p. 1.

<sup>2</sup> Canada's request for enhanced third-party rights, p. 3 (referring to Panel Report, *EC – Tariff Preferences*, p. A-2).

<sup>3</sup> Indonesia's statement at the organizational meeting.

<sup>4</sup> United States' statement at the organizational meeting, and written comments of 20 July 2016.

<sup>5</sup> 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.<sup>6</sup> 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<sup>7</sup>, the importance of trade in the product at issue to certain third parties<sup>8</sup>, the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue<sup>9</sup>, claims that the measures at issue derived from an international treaty to which certain third parties were parties<sup>10</sup>, third parties having previously been granted enhanced rights in related panel proceedings<sup>11</sup>, and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.

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*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.

<sup>6</sup> See Article 10.2 of the DSU.

<sup>7</sup> 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.

<sup>8</sup> Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5.

<sup>9</sup> Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

<sup>10</sup> Panel Report, *EC – Bananas III*, para. 7.8.

<sup>11</sup> Panel Report, *EC – Bananas III*, para. 7.8.

<sup>12</sup> Panel Report, *EC – Hormones (Canada)*, para. 8.17.

<sup>13</sup> 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.

<sup>14</sup> See Panel Report, *US – Washing Machines*, para. 1.12.

<sup>15</sup> 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.<sup>1</sup>

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<sup>2</sup> – as the Panel and the parties.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> 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)

<sup>2</sup> European Union's third-party submission, para. 65.

<sup>3</sup> 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).

<sup>4</sup> 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

<b>Contents</b>		<b>Page</b>
Annex E-1	Interim Review	E-2

**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".<sup>1</sup> 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.

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<sup>1</sup> 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.

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