

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

**(DS491)**

**RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS  
FOLLOWING THE SECOND PANEL MEETING**

**April 21, 2017**

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<b>Exhibit</b>	<b>Citation</b>
Exhibit US-104	APP's Post-Hearing Brief to the USITC (Public Version)
Exhibit US-105	APP's Final Comments to the USITC (Public Version)
Exhibit US-106	APP's Pre-Hearing Brief to the USITC (Public Version)
Exhibit US-107	Previously-Redacted Discussion of the Unisource Affidavit (Exhibit US-2) in the Commission's Determination (Exhibit US-1) and APP's Final Comments (Exhibit US-105)
Exhibit US-108	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia</i> , Inv. Nos. 701-TA-470-471 and 731-TA-1169-1170 (Preliminary), Conference Transcript, selected pages
Exhibit US-109	19 U.S.C. § 1677f
Exhibit US-110	19 U.S.C. § 208
Exhibit US-111	19 U.S.C. § 3512
Exhibit US-112	19 C.F.R. § 201.6
Exhibit US-113	19 C.F.R. § 207.7
Exhibit US-114	19 C.F.R. Part 201, Subpart E
Exhibit US-115	H.R. Rep. 103-826(I)
Exhibit US-116	Statement of Administrative Action for the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I (1994)

Exhibit US-117	CFS New Subsidy Allegation Memorandum (Exhibit V -14 to Application (Exhibit US-80))
Exhibit US-118	Section 771(5A) of the Tariff Act of 1930

## TABLE OF REPORTS

SHORT FORM	FULL CITATION
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Anti-Dumping and Countervailing Duties (China) (AB)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011
<i>US – Carbon Steel (India) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Carbon Steel (India) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/R, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R
<i>US – Countervailing Measures (China) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, 2001, adopted 23 August 2001
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, 2004, adopted 17 February 2004
<i>US – Softwood Lumber VI (Panel)</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004

<i>US – Washing Machines (Panel)</i>	Panel Report, <i>United States – Anti-dumping and Countervailing Measures on large residential washers from Korea</i> , WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
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**1 GENERAL :** Please submit, as exhibits to the Panel:

- a. **(United States) Confidential version of the USITC's Final Determination (non-confidential version provided to the Panel as Exhibit US-1);**
- b. **(Indonesia) Complete confidential version of the GOI's Initial Questionnaire Response in the CVD investigation (excerpts of the public version were submitted to the Panel as Exhibits IDN-11, US-32, and US-89), and any exhibit thereof of relevance to Indonesia's factual allegations, in particular Exhibit 32 to the Questionnaire Response;**
- c. **(Indonesia) Exhibits 23 and 33 to the GOI's First Supplemental Questionnaire Response, Part 2, in the CVD investigation (Exhibit IDN-14/US-34) and any other exhibit to the Questionnaire Response of relevance to Indonesia's factual allegations concerning the debt buy-back subsidy not already submitted as exhibits to the Panel;**
- d. **(Indonesia) Exhibits 5S-1, 5S-2 and 5S-3 to the GOI's Fifth Supplemental Questionnaire Response in the CVD investigation (Exhibit IDN-16);**
- e. **(United States) Exhibit 20 (CFS new subsidy allegation Memorandum) to Petitioners' Factual Information Submission (Exhibit US-40);**
- f. **(United States) Complete version of Exhibit 52 to APP/SMG's Supplemental Questionnaire Response, dated 22 February 2010 (Memorandum to the File from Dana S. Mermelstein, Program Manager: Countervailing Duty Investigation of Coated free Sheet Paper from Indonesia: Meeting with an Independent Expert, dated August 24, 2007), an excerpt of which was submitted to the Panel as Exhibit US-81 (see United States' response to Panel question No. 2, fn. 11, stating that Exhibit US-81 contains excerpts of the document);**
- g. **(Indonesia) Complete confidential version of APP's Pre-Hearing Brief to the USITC (excerpts of the public version were provided to the Panel as Exhibits IDN-36/US-95/US-13);**
- h. **(United States) Complete confidential version of APP's Post-Hearing Brief to the USITC (excerpts of the public version were provided to the Panel as Exhibit US-14);**
- i. **(United States) Complete confidential version of APP's Final Comments to the USITC (excerpts of the public version were provided to the Panel as Exhibits US-15 and US-103);**

- j. (Indonesia) The documents referred to in footnotes 185, 189, 207, 208, 210 and 221 of Indonesia's first written submission; footnotes 69 and 70 of Indonesia's response to Panel question No. 58; and footnote 13 of Indonesia's opening statement at the second meeting, as well as any other document referred to in Indonesia's submissions that Indonesia wishes the Panel to take into consideration.**

**ANSWER:**

1. The United States has submitted the exhibits requested in subparts (e) and (g). The exhibit numbers corresponding to each of these exhibits can be found in the table of exhibits.
2. The United States is unable to provide the Panel with the confidential versions of the exhibits requested in subparts (a), (h), and (i) of question 68: namely, the Commission’s opinion, APP’s posthearing brief, and final comments. As discussed below, the laws and regulations of the United States, as well as the Panel’s working procedures and ADA Article 6.5 and SCMA Article 12.4, prohibit the United States from disclosing business proprietary information (“BPI”) without the consent of the party that submitted the information.
3. The Commission is prohibited by U.S. law and regulation from disclosing the confidential versions of its opinion and APP’s briefs without first securing the consent of each and every party that submitted BPI contained therein. (To be clear, APP’s submission to the ITC contain both its own BPI information, as well as information submitted by many other persons in the ITC investigation.) Under U.S. law, “information submitted to . . . the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information.”<sup>1</sup> Similarly, the Commission’s regulations provide that “[a]ny business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law.”<sup>2</sup> Otherwise, with limited exceptions,<sup>3</sup> the prohibition on disclosure covers disclosure to any entity outside of the Commission – even disclosure to other components of the U.S. Government. Breaches of confidentiality can lead to potentially severe sanctions for violations.<sup>4</sup>

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<sup>1</sup> 19 U.S.C. § 1677f(b)(1)(A) (Exhibit US-109).

<sup>2</sup> 19 C.F.R. § 201.6(g).

<sup>3</sup> See 19 U.S.C. §§ 1677f(a)(4)(A), (c), (f) (Exhibit US-109); 19 U.S.C. §§ 1516a(b)(2)(B) (Exhibit US-5). Of particular note, the Commission may disclose business proprietary information to interested parties who are parties to the proceeding under a protective order, and may disclose information aggregated in a way that avoids revealing information about any one firm. 19 U.S.C. §§ 1677f(a)(4)(A), (c).

<sup>4</sup> See 19 C.F.R. § 207.7(d) (Exhibit US-113). Penalties for violations include “disbarment from practice in any capacity before the Commission” and “referral to the United States Attorney.” *Id.* at §§ 207.7(d)(1) & (2).

4. The requirements of U.S. law accord with the corresponding requirements of ADA Article 6.5 and SCMA Article 12.4, which both provide that:

Any information which is by nature confidential ... or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

5. Likewise, the Panel’s Additional Working Procedures Concerning Business Confidential Information (BCI Procedures) provide that a party submitting business confidential information (BCI) shall “obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party.”<sup>5</sup> Thus, as under U.S. law, the AD Agreement, and the SCM Agreement, under the Panel’s working procedures the United States may not disclose the requested confidential documents to the Panel without first obtaining consent from all parties that submitted the BPI contained in those documents. The United States notes that Indonesia did not object to this aspect of the Panel’s working procedures. Indeed, the consent requirement was contained in the draft BCI Procedures that the United States and Indonesia jointly proposed to the Panel. The United States also notes that similar consent procedures are routinely contained in BPI procedures adopted by other panels in WTO trade remedy disputes.

6. The United States also notes that the public version of the Commission’s opinion (Exhibit US-1) discloses aggregations of almost all of the BPI information that the Commission used in its injury and threat analyses, and accordingly the public version contains very few redactions. Furthermore, most of the redacted information in the public version of the opinion is not relevant to Indonesia’s claims. This is perhaps best demonstrated by the detailed discussions of the threat of injury issues in the parties’ submissions and in response to the panel’s questions. Indeed, to the extent information originally treated as BPI in the Commission’s determination appears to be relevant to the issues here, the unredacted information has been provided to the panel because that information has already been made public. In this regard, redactions in the impact section of the Commission’s determination include RISI’s projections for apparent U.S. consumption during the 2010-12 period, which were made public by petitioners during the investigations and thus provided to the Panel.<sup>6</sup> The only other redacted portions of the opinion relevant to the Panel’s deliberations are the Commission’s discussions of the Unisource affidavit, and, due to the fact the submitter made the affidavit public, we disclose those discussions in Exhibit US-107.<sup>7</sup>

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<sup>5</sup> Additional Working Procedures, para. 2.

<sup>6</sup> USITC Pub. 4192 (Exhibit US-1) at 36 & n.237, 37 n.246, 38. The United States disclosed RISI’s projected trends in apparent U.S. consumption during the 2010-12 period in its first written submission, based on petitioners’ disclosure of these data in the public version of the posthearing brief. United States First Written Submission, para. 229 (citing Petitioners’ posthearing brief, responses to question 3, exhibit 1 (Exhibit US-4)).

<sup>7</sup> See USITC Pub. 4192 (Exhibit US-1) at 29 & n.186, 34, 38 n.252.

7. Disclosing the BPI in the ITC opinion, as well as the BPI contained in the confidential versions of APP’s prehearing brief and final comments, would entail securing the consent of a great many parties. By our count, the BPI contained in the confidential version of the Commission’s opinion was submitted by 19 domestic producers of coated paper or other products, nine U.S. importers, nine U.S. purchasers, ten Chinese producers, and three Indonesia producers.<sup>8</sup> APP’s prehearing brief was filled with BPI, on 52 of its 164 pages. Much of this BPI, on 28 of the 52 pages, was submitted by parties other than APP, including 18 U.S. producers, nine purchasers, 11 U.S. importers, and six foreign producers unrelated to APP.<sup>9</sup> The BPI contained in APP’s final comments, on five pages, was submitted by nine U.S. producers and one U.S. purchaser.<sup>10</sup> Most of the bracketed BPI contained in these briefs is of a highly sensitive nature, including U.S. producers’ sales prices on specific products in specific quarters, but of no apparent relevance to Indonesia’s claims. Indonesia’s claims are entirely based on the public version of the Commission’s opinion, which contains few redactions.

8. Given the large number of parties that submitted the BPI included in these requested documents, and the passage of time, it would not be practicable for the Commission to secure permission from each of the parties for disclosure of their BPI. Nor is disclosure of this BPI necessary for the resolution of Indonesia’s claims, since (as noted) the claims themselves and the United States’ responses to them are based entirely on the public versions of the Commission’s opinion and staff report. Indeed, the only confidential information relevant to Indonesia’s claims was the Unisource affidavit, which the Commission was able to disclose after the submitter decided to make it public.

9. Because the Unisource affidavit (Exhibit US-2) is no longer confidential, the United States has provided, in Exhibit US-107, the bracketed discussions of the affidavit contained in the confidential versions of the Commission’s determination and APP’s final comments. The United States is also submitting complete copies of the public version of APP’s prehearing brief (Exhibit US-106), posthearing brief (Exhibit US-104), and final comments (Exhibit US-105). Because APP’s posthearing brief contained no BPI, the public version is identical to the confidential version.

10. With respect to sub-question (e), Exhibit 20 to Petitioners’ General Factual Information Submission (June 21, 2010) (Ex. US-40) does not correspond to the “CFS new subsidy allegation Memorandum.” As evidenced by the table of contents in Exhibit US-40, internal Exhibit 20 to that submission contains a new subsidy allegation memorandum from an earlier countervailing

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<sup>8</sup> See USITC Pub. 4192 (Exhibit US-1) at 9-10, 13, 15-16, 23 & nn. 139, 144-45, 24 & n.149, 25, 28 & n.180, 29 & n.186, 30 & n.194, 31 & n.201, 32 n.215, 33 n.222., 34 & n.227, 36 & n.237, 37 n.246, 38 & n.252.

<sup>9</sup> The confidential version of APP’s prehearing brief contained bracketed BPI submitted by U.S. producers on pages 21, 32, 51-53, 55-59, 61-64, 82, 87-88, 99, and 107; by U.S. purchasers on pages 61, 69, 70, and 104-6; by U.S. importers on pages 103-4; and by foreign producers unrelated to APP on pages 114 and 127-28.

<sup>10</sup> The confidential version of APP’s final comments contained bracketed BPI submitted by U.S. producers on pages 2-3, 13-14, and 18-19; and by a U.S. purchaser on page 17.

duty investigation concerning certain lined paper products from Indonesia.<sup>11</sup> The new subsidy allegation memorandum pertaining to the CFS investigation is the document contained at internal Exhibit V-14 to the petitioners' application in the CCP investigation. For the Panel's understanding, the United States is providing this complete memorandum as Exhibit US-117.

11. With respect to sub-question (f), the United States inadvertently stated in its response to Panel question 2, at footnote 11, that Exhibit US-81 only contains "excerpts of this memorandum."<sup>12</sup> Exhibit US-81 in fact is the full, public version of the summary of USDOC's meeting with an independent expert during the CFS investigation that was on the record of the CCP investigation.

## **2 AS APPLIED" CLAIMS WITH RESPECT TO THE USDOC'S DETERMINATION**

### **2.1 Claims under Article 14(d) of the SCM Agreement**

**Question 70: (to the United States) The Panel notes that, contrary to the Preliminary Determination (Exhibit IDN-05/US-48, p. 10769), the USDOC's Final Determination (Exhibit IDN-06/US-47) and the Issues and Decision Memorandum accompanying it (Exhibit IDN-10/US-31) do not explicitly address the selection of the benchmark for the log export ban and why the USDOC decided not to use private log prices in Indonesia as the benchmark. The Panel also notes that in response to a question from the Panel on the first day of the second Panel meeting, the United States indicated that the relevant discussion of this issue is contained in pages 13 and 27 of the Issues and Decision Memorandum. However, on page 13 of the Memorandum, the USDOC only indicated that it would use world market prices for logs to calculate the benefit conferred by the log export ban, but did not explain why it would not use private log prices. Page 27 of the Memorandum only contains a discussion as to why, in the USDOC's view, it would not be appropriate to use import prices as the benchmark, in the context of addressing an argument that the USDOC had assumed the existence of distortive effects due to the export ban. Page 27 contains no discussion as to why it was not possible to use private log prices in Indonesia as the benchmark. The Panel further notes that the analysis of various potential benchmarks in the section of the Memorandum concerning the stumpage programme (Exhibit IDN-10/US-31, pp. 7-10) is limited to the benchmark to be used for that subsidy, and does not discuss the selection of the benchmark for the log export ban. In light of the above, the Panel asks itself whether the Final Determination contains any distortion analysis with respect to the log export ban subsidy or any discussion as to why it was appropriate to use world market prices as benchmark.**

- a. Please explain the basis for the USDOC's decision, in the Final Determination, not to resort to private log prices in Indonesia as the benchmark to calculate the benefit conferred by the log export ban.**

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<sup>11</sup> Petitioners' General Factual Information Submission (June 21, 2010), at Table of Exhibits (Ex. US-40).

<sup>12</sup> US First Panel Question Responses, para. 4 & n.11.

**ANSWER:**

12. The Final Determination explains the USDOC's approach to establishing the benchmark in the investigation. The Final Determination explains that USDOC's first preference was market prices from actual transactions in the country of investigation, and its second preference was world market prices that would be available to purchasers in the country under investigation.<sup>13</sup> The USDOC further explained that "the preferred benchmark in the hierarchy is an observed market price for the good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import)."<sup>14</sup>

13. As the Panel has indicated, pages 12-14 of the Issues and Decision Memorandum do not address whether there is a viable first tier benchmark. Rather, this portion of the record explains that USDOC utilized a world market price as a second tier benchmark.<sup>15</sup> The basis for using this second tier benchmark, rather than a first-tier (in-country) benchmark is contained in a different portion of the administrative record. As the United States explained at the second substantive meeting with the Panel, part of the explanation is contained in the Preliminary Determination. This is not unusual, and makes perfect sense in that certain threshold issues (such as the use of in-country versus out-of-country benchmarks) are generally made at an early stage of the investigation.

14. The Preliminary Determination states that, "[i]n the instant case, there are no meaningful or usable private domestic prices for logs or actual import prices to evaluate for purposes of identifying a 'first tier' benchmark (*i.e.*, market prices from actual transactions within the country under investigation)" and that "all logs, including logs harvested from private land, are subject to the export ban."<sup>16</sup> This indicated that no private prices for logs were available as a possible benchmark, because all such prices were impacted by the GOI's financial contribution. No party disputed this following the USDOC's issuance of its Preliminary Determination, nor did any party propose a private price for logs as a possible benchmark for measuring the benefit conferred by the imposition of the log export ban.<sup>17</sup> Indeed, the USDOC asked APP/SMG whether its unaffiliated log suppliers were subject to Indonesian log export restrictions, and APP/SMG confirmed that, "All Indonesian forestry companies and parties involved in the sale and distribution of logs are subject to the export ban."<sup>18</sup> The Final Determination is consistent with the statement in the Preliminary Determination that all log sales are subject to the export

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<sup>13</sup> IDM at 7 (Ex. US-31).

<sup>14</sup> IDM at 8 (Ex. US-31). The USDOC also explained this methodology in introducing its distortion analysis for the log export ban in particular in the Preliminary Determination. *See* CCP Preliminary Determination, 75 Fed. Reg. at 10,769 (Ex. US-48).

<sup>15</sup> IDM at 13 (Ex. US-31).

<sup>16</sup> CCP Preliminary Determination, 75 Fed. Reg. at 10,769 (Ex. US-48).

<sup>17</sup> *See, e.g.*, GOI and APP/SMG Case Brief at 11-42 (Ex. US-45).

<sup>18</sup> APP/SMG Initial Questionnaire Response (Dec. 29, 2009) at 46 (Ex. US-91).

ban, and there was no reason for the USDOC to reconsider its determination that no private log sales should be considered as a benchmark because they were all part of the GOI’s financial contribution. As such, this statement in the Preliminary Determination is important in understanding the USDOC’s final distortion analysis.

15. Indeed, in the Final Determination, the USDOC linked private prices for logs with the financial contribution under investigation. Specifically, the USDOC determined, consistent with its prior finding in *CFS from Indonesia*, that through the log export ban “the GOI entrusts and directs domestic log suppliers to sell logs at suppressed prices to domestic consumers.”<sup>19</sup> The USDOC explained that although the GOI had begun the process of legalizing exports of certain forest products, “the GOI confirmed that a ban on the exportation of logs was still in effect.”<sup>20</sup> Given the sweeping nature of the measure – a comprehensive ban on the export of logs – there were no domestic log sales that were independent of the financial contribution.

16. Additional reasoning on the use of the second-tier, out-of-country benchmark is contained in the Final Determination, in response to comments presented by interested parties on the Preliminary Determination. In particular, USDOC addressed an argument by the GOI and APP/SMG that the log export ban could not have distorted the market because the existence of log imports to Indonesia indicated that the ban has no effect on prices.<sup>21</sup> USDOC explained that under the log export ban, “domestic consumers face no price competition from foreign buyers, and the price settles to a value low enough to clear the domestic market.”<sup>22</sup> USDOC further explained that this fact was demonstrated empirically by the price data on the record, which reflected that, “Indonesian domestic prices are in fact distorted, and that trading takes place at prices significantly lower than those found in the surrounding region for the identical timber.”<sup>23</sup>

17. Finally, the United States emphasizes that where government intervention has distorted the prices in a domestic market, the distortion will affect any private sales, that is, both private sales of domestically-produced logs and imported logs. This is plainly indicated by the text of Article 14(d).<sup>24</sup> The log import prices that the GOI and APP/SMG proposed as a benchmark to measure the adequacy of remuneration APP/SMG paid to its unaffiliated Indonesian log suppliers were not prices that reflected “prevailing market conditions” because the log export ban and government control of most Indonesian timber had distorted the market price. In this regard, In this regard the USDOC explained that the GOI had a predominant role in the Indonesian timber market, as evidenced by the undisputed facts that “[o]ver 93 percent of the

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<sup>19</sup> IDM at 13 (Ex. US-31).

<sup>20</sup> IDM at 13 (Ex. US-31).

<sup>21</sup> IDM at 26-27 (Ex. US-31); *see also* GOI and APP/SMG Case Brief at 46-47 (Ex. US-45).

<sup>22</sup> IDM at 27 (Ex. US-31).

<sup>23</sup> IDM at 27 (Ex. US-31).

<sup>24</sup> SCM Agreement, art. 14(d) (“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)*”) (emphasis added).

harvest volume during the [period of investigation] was from government-owned land, and imports were less than one percent of the timber produced domestically.”<sup>25</sup> As such, exporters to Indonesia had such minimal market power that it “remains to be explained how that foreign shipper would be able to have any sales in Indonesia at all if it did not match the artificially low prices of the government distorted domestic market.”<sup>26</sup>

18. In sum, USDOC’s market distortion analysis is supported by the reasoning in the record of this dispute, which is contained both in the Preliminary Determination and Final Determination. In addition, the United States recalls that there is no magic language USDOC was required to recite; rather, under the appropriate standard of review, USDOC’s determinations simply had to be supported by record evidence (which they were) and the explanations thereof had to be reasoned and adequate (which they were).

- b. Please indicate where, in the Final Determination, the USDOC discussed which benchmark it would use to calculate the benefit conferred by the log export ban and why it would not use private log prices in Indonesia as the benchmark.**

**ANSWER:**

19. As noted in response to part (a), the decision to use a second tier, out-of-country benchmark was made at the time of the Preliminary Determination, and the initial explanation is contained in the administrative record. With regard to the choice of which second-tier (out of country) benchmark to employ, USDOC discussed this on pages 13-14 and 28-43 of the Issues and Decision Memorandum for the Final Determination. The discussion of benchmarks on pages 28-43 applies equally to the log export ban and provision of standing timber subsidy programs, because the various datasets of log prices were considered as benchmarks for both programs.<sup>27</sup>

20. In addition, as discussed in the United States’ response to subpart (a) of this question, pages 13, 26-27, and 31 of the Final Determination further address the USDOC’s decision not to use private log prices in Indonesia as the benchmark for measuring adequacy of remuneration under the log export ban.

- c. To what extent did the USDOC, in the Final Determination, rely on the corresponding analysis from the Issues and Decision Memorandum in the CFS investigation?**

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<sup>25</sup> IDM at 31 (Ex. US-31).

<sup>26</sup> IDM at 31 (Ex. US-31).

<sup>27</sup> See U.S. Resp. to Panel’s Questions (1st Panel Meeting), paras. 54-58, 74-76.



**ANSWER:**

21. In the Final Determination, the USDOC, citing to the *CFS* Issues and Decision Memorandum,<sup>28</sup> stated that no information had been placed on the record of the instant CCP investigation that caused it to reconsider its prior finding in *CFS* that the GOI “entrusts and directs domestic log suppliers to sell logs at suppressed prices to domestic consumers, providing a good to pulp and paper producers for less than adequate remuneration.”<sup>29</sup> The USDOC also specifically cited the finding in *CFS* that one purpose of the log export ban was to develop downstream industries.<sup>30</sup>

- d. To what extent did the USDOC, in the Final Determination, rely on its analysis of this issue in the Preliminary Determination? During the Q&A session on the first day of the second meeting, the United States asserted that there is a discussion in the Final Determination on this issue that is independent from the one in the Preliminary Determination. As noted above, the United States also indicated that the USDOC's discussion of this issue is to be found on pages 13 and 27 of the Issues and Decision Memorandum. However, on the second day of the second meeting, the United States stated that the discussion of this issue in the Preliminary Determination formed part of the USDOC's decision in the Final Determination concerning the selection of the benchmark. Specifically, the United States stated that the Final Determination only addressed issues that were changed ex officio or in response to comments from the parties and that there were no comments on this issue. Please reconcile these two answers and indicate whether the basis for the USDOC's decision concerning the selection of the benchmark, including any determination that it was not appropriate to use private log prices in Indonesia as the benchmark is: (i) exclusively contained in the Final Determination and the Issues and Decision Memorandum accompanying it; or (ii) contained in both the Preliminary and the Final Determination.**

**ANSWER:**

22. The United States refers the Panel to its response to subpart (a) of this Question. In short, the basis for the decision to use out-of-country benchmarks is contained in both the Preliminary and Final determinations. To summarize, the initial decision to use a second tier (out-of-country benchmark) was made at the Preliminary Determination stage, and is explained in the decision memorandum for that phase. Both determinations identify private log sales as those being provided for less than adequate remuneration. Additional discussion, including responses to parties’ comments on the Preliminary Determination, was contained in the Final Determination and the corresponding decision memorandum for that phase.

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<sup>28</sup> IDM at 13 (Ex. US-31) (citing CFS IDM at 27 (Ex. US-43)).

<sup>29</sup> IDM at 13 (Ex. US-31).

<sup>30</sup> IDM at 13 (Ex. US-31) (citing CFS IDM at 27 (Ex. US-43)).

23. Regarding whether the additional reasoning in the Final Determination is “independent,” it addresses different aspects of the benchmark determination. In particular, the Final Determination addressed the respondents’ comment that in-country prices were not distorted because there was insufficient demand in the Indonesian market to consume the entire domestic log supply. Nonetheless, the reasoning all goes to the same basic issue – which benchmark is appropriate for determining the “adequacy of remuneration” under Article 14(d) of the SCM Agreement.

- e. **Page 27 of the Issues and Decision Memorandum contains a discussion of the price effects of the log export ban. Is it not self-contradictory for the United States to say that the price effects of the log export ban is an issue that is relevant to the USDOC's conclusion that private prices for logs were not a suitable benchmark for the calculation of the benefit, given its position that the issue of the price effects of the ban has to do with the financial contribution question?**

**ANSWER:**

24. It is not contradictory. The United States understands the Panel’s question as referring to the issue of whether the log export ban can constitute a financial contribution. To recall, this issue arose in the context of Indonesia’s inapposite and out-of-scope arguments (or putative Article 1.1(a) claims) that pertained only to financial contribution – namely, whether export restraints can constitute a financial contribution.<sup>31</sup> As the United States has explained, the log export ban results in *both* a financial contribution and in distortions in the domestic market that require the use of an out-of-country benchmark. The first issue (financial contribution) is not within the scope of this dispute, while the second issue goes to the question of the appropriate benchmark. Accordingly, the United States certainly never stated that the *price effects* of the ban are not relevant to a distortion analysis.

**Question 71: (to the United States) In the Preliminary Determination, the USDOC found that the GOI played a predominant role in the market for logs because it owned 99% of the harvestable forest land and because over 93% of logs in Indonesia were harvested from government forest land (USDOC Preliminary Determination, Exhibit IDN-05/US-48, p. 10769). Thus, the USDOC appears to have equated government supply of *standing timber* and ownership of public *forests* with the government being an actor – the predominant actor - in the market for logs.**

- a. **Is there any explanation in the determination as to why the USDOC considered that the GOI's predominant role in the stumpage market would inform the question of price distortion in the log market?**

**ANSWER:**

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<sup>31</sup> United States First Written Submission, paras. 37, 71-78.

25. Logs may only be obtained from standing timber. The process of doing so may be as simple as felling, delimiting, and transporting the standing timber.<sup>32</sup> Thus, the goods are highly similar and their economic value propositions are closely linked (which was additionally important here in considering benchmarks because only logs, not timber, are traded across borders). Accordingly, the portion of the Preliminary Determination cited by the Panel is consistent with the Final Determination, in which the USDOC relied upon the overwhelming share of the harvest volume during the period of investigation that was derived from government land (over 93 percent), and the negligible import volume of logs as the two principal undisputed facts that demonstrated the GOI's predominant role in the "Indonesian timber market."<sup>33</sup> The USDOC explained that the GOI's ownership of virtually all harvestable forest land indicates that it "has almost complete control over access to the timber supply."<sup>34</sup>

- b. What is the relevance, for this issue, of the fact that logs were harvested by private producers? Did the USDOC perform any pass-through analysis or did the USDOC assume that private logging companies passed all the benefit received from the government provision of stumpage to their customers? If so, why was that an appropriate assumption?**

**ANSWER:**

26. A pass-through analysis was neither called for nor appropriate. Rather, in this investigation, the government distorted the market *both* through its control over standing timber, and through the log export ban. The USDOC appropriately sought a viable, market-based benchmark for the immediate input to paper production (that is, logs). Accordingly, in selecting that benchmark, the USDOC appropriately first looked to whether any in-country benchmark was available. Even if, as the question suggests, the subsidized stumpage was not fully passed on to the price of logs, the market for logs was still massively distorted by the provision of the key input to logs (that is, standing timber), as well as by the log export ban. Accordingly, the USDOC properly used an out-of-country benchmark based on actual, market-based prices for logs.<sup>35</sup>

- c. As part of the same discussion in its Preliminary Determination, the USDOC stated that: "We also note that all logs, including logs harvested from private land, are subject to the export ban." (Exhibit IDN-05/US-48, p. 10769). What was the importance or significance of this language to the USDOC's conclusion that it was**

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<sup>32</sup> For instance, the harvesting cost study that the USDOC utilized, which was carried out by a GOI agency and which the GOI submitted to USDOC, identified four categories of harvesting costs, three of which relate to moving the log: falling, skidding, loading/unloading, and hauling. See GOI Verification Report (Aug. 3, 2010) at 12 (Ex. US-38).

<sup>33</sup> IDM at 31 (Ex. US-31).

<sup>34</sup> IDM at 9 (Ex. US-31).

<sup>35</sup> See *US – Softwood Lumber IV (AB)*, para. 103 ("We find, instead, that an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods").

**not possible to determine a private domestic log benchmark price for the log export ban?**

**ANSWER:**

27. The USDOC made this statement that all logs are subject to the GOI’s log export ban when explaining why no “first tier” benchmark was available to measure the adequacy of remuneration APP/SMG paid to its unaffiliated, domestic log suppliers. This language demonstrates why a pass-through analysis, or any other further discussion of the suitability of a private domestic log price benchmark, was unnecessary and unworkable. The USDOC was investigating whether all such private log sales provided a benefit to paper producers, and using a private price as the benchmark would serve to compare the financial contribution to itself.

**Question 72: (to the United States) During the Q&A session at the second meeting, the United States indicated that private prices would not have provided a suitable benchmark because that would imply a comparison of a distorted price with itself (see also United States' second written submission, fn. 41). Where in the USDOC Final Determination can the Panel see this reasoning or conclusion as part of the USDOC's discussion concerning the selection of the benchmark for the log export ban?**

**ANSWER:**

28. The United States again refers to its response to Question 70(a). This reasoning appears in the Preliminary Determination and remained unchallenged for the Final Determination. In the Preliminary Determination, the USDOC concluded that there were no useable in-country prices for consideration as log benchmarks because “all logs, including logs harvested from private land, are subject to the ban.”<sup>36</sup> Furthermore, the reasoning is found in the USDOC’s identification, in both the preliminary and final determinations, of private sales of logs as those entrusted or directed to be provided at suppressed prices.

**Question 73: (to both parties)**

- a. Could it not be said that an export ban by definition impacts all sales of the good concerned on the domestic market of the Member imposing the ban? Does this not imply that all domestic private sales are affected by the financial contribution?**

**ANSWER:**

29. Yes. The ban by definition impacts all private sales of the good in the Member’s domestic market. An export ban prohibits exports of the good or input in question. The effect is to reallocate resources through directing producers not to export, thereby increasing the domestic supply of the good or input, which in turn suppresses the domestic price of that good or input.

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<sup>36</sup> CCP Preliminary Determination, 75 Fed. Reg. at 10,769 (Ex. US-48).

- b. In such a context, what would be the purpose of a price distortion analysis (in other words, an enquiry into whether there are domestic prices that are unaffected by the government's actions)? How does such a situation differ from one in which the government is the sole supplier or one in which the government administratively sets prices for the good in the country?**

**ANSWER:**

30. Here, the question was whether private sales in Indonesia could serve as an in-country benchmark, and USDOC's market distortion findings went to that question. The log export ban, as the above question indicates, was a strong indicator that no in-country benchmark could serve as an appropriate market-based benchmark. Government control of standing timber also was a strong indicator that no in-country, market-based benchmark was available. The choice of benchmark generally entails a fact-based evaluation, involving a review of all relevant material on the record of the investigation. In the investigation at issue, USDOC conducted this analysis and appropriately decided to use a market-based, out-of-country benchmark.

31. In the case where the government administratively set prices (which in fact occurred in this dispute for the vast majority of standing timber), this would also indicate that no in-country benchmark was appropriate.

32. As stated, *market* conditions must be present with respect to the good in question. Appellate Body reports have expressly recognized this limitation in successive disputes.<sup>37</sup> Where, as here, there is a complete ban that insulates domestic buyers from competing with foreign buyers so that prices remain artificially low, there are no market conditions. Indonesia's log export ban imposes conditions analogous to the two scenarios cited in the Panel's question and recognized in *US – Countervailing Measures*, *US – Anti-Dumping and Countervailing Duties*, and *US – Softwood Lumber*: where the government is the sole (or predominant) supplier and where the government administratively sets prices.<sup>38</sup> The conditions are analogous because all three scenarios involve government action that effects all prices for the good in the domestic market. If the government's financial contribution affects all domestic prices, any domestic price benchmark to measure the adequacy of remuneration would result in a circular comparison.

- c. Could import prices nonetheless be used as the benchmark in such a situation?**

**ANSWER:**

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<sup>37</sup> See *US – Countervailing Measures (China) (AB)*, para. 4.101; *US – Carbon Steel (AB)*, para. 4.155; *US – Anti-Dumping and Countervailing Duties*, para. 444; *US – Softwood Lumber IV (AB)*, para. 90.

<sup>38</sup> E.g., *US – Countervailing Measures (China) (AB)*, para. 4.76 (discussing *US – Softwood Lumber IV (AB)*, para. 98).

33. As noted above, the choice of benchmark generally involves a close review of the factual record. In the investigation at issue, the USDOC did analyze import prices on the record for potential use as a benchmark. The USDOC properly concluded that in this investigation, import prices could not serve as a market-based benchmark. USDOC explained that it was unclear how a “foreign shipper would be able to have any sales in Indonesia at all if it did not match the artificially low prices of the government distorted domestic market.”<sup>39</sup>

**Question 75. (to both parties)**

- a. At the second meeting with the Panel, the parties took opposite views with respect to the ownership of trees planted by private companies on GOI land. What was the information on the record with respect to who had ownership of (i) standing timber, and (ii) logs? When did transfer of ownership occur in both cases?**

**ANSWER:**

34. The United States first makes the point that this question is a purely factual issue. Furthermore, the arguments Indonesia raised during the second Panel meeting regarding when title passes were not raised in the underlying investigation and is not supported by record evidence. Once again, Indonesia seeks *de novo* review and that is not the role of the Panel in this dispute – all the more so because this is not a mixed question of law and fact but a purely factual issue.

35. Having stated the above, the record evidence does not support Indonesia’s claims here. The GOI grants HPH licenses to harvest timber from its natural forest land and HTI licenses to establish and harvest plantation timber on government land.<sup>40</sup> An HTI license holder initially must pay a concession fee. This initial fee does not convey the right to harvest particular trees. Rather, payment of the concession fee is a prerequisite to submitting specific plans to harvest a specific area of land during a specific time period.<sup>41</sup> Next, the GOI assesses species-specific stumpage fees based on the precise volume of harvested wood.<sup>42</sup> This second fee must be paid “before the harvested wood is allowed to leave the collecting area.”<sup>43</sup> As memorialized in the USDOC’s verification report, GOI officials stated that “[o]nce the necessary fees have been paid, the logs *officially become property of the logging company* and can be transported out of the area.”<sup>44</sup> Pursuant to this statement, the logs (as well as standing timber from which they derived)

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<sup>39</sup> IDM at 31 (Ex. US-31); *see also* Second Written Submission of the United States of America at 6-7 (Jan. 17, 2017).

<sup>40</sup> IDM at 6 (Ex. US-31).

<sup>41</sup> GOI Initial Questionnaire Response (Dec. 29, 2009), at 9-13 (Ex. US-32); GOI Verification Report at 6-7 (Ex. US-38).

<sup>42</sup> GOI Initial Questionnaire Response (Dec. 29, 2009), at 12 (Ex. US-32); GOI Verification Report at 7 (Ex. US-38).

<sup>43</sup> GOI Initial Questionnaire Response (Dec. 29, 2009), at 12 (Ex. US-32).

<sup>44</sup> GOI Verification Report at 6-7 (Ex. US-38).

were not officially the property of the logging company prior to the payment of the stumpage fee – an act which only occurs after the logs are harvested.

36. Thus, this record evidence demonstrates that the GOI owned the standing timber at all times, and owned the logs until the concessionaire paid the requisite stumpage fees.

- b. Article 14(d) of the SCM Agreement refers to the provision of goods by a government. Is it necessary for the GOI to be the owner of the good in this respect, or is it enough to look at the financial transactions involved?**

**ANSWER:**

37. No, there is nothing in Article 1.1(a)(iii) or Article 14(d) that could support the proposition that the formal title or description of a good under a Member's domestic law is determinative as to whether a financial contribution exists with respect to the provision of a good. Before turning to this issue, however, the United States again notes that Indonesia did not raise financial contribution claims under Article 1.1., and accordingly, the USDOC's financial contribution determination is not within the scope of this dispute. Turning to the text of the SCM Agreement, it provides that a contribution exists where a "government provides goods." The language does not include any explicit or implicit limitation to goods for which the government holds formal title under its domestic law. Rather, in examining an issue of contribution, all facts must be considered, and the economic reality of whether or not the goods have been provided is the governing question. If this were not the case, a government could avoid WTO subsidy disciplines simply by modifying its domestic law such that the government never holds title to goods provided at less than adequate remuneration.

38. In the investigation at issue, USDOC appropriately examined the financial transactions involved in the provision of standing timber. Regardless of when title passes, logging companies used government land under HTI licenses to grow, cut, and sell timber for nominal stumpage fees. These fees are not market based. They are based on an arbitrarily set percentage of the domestic price for the species of log.

- c. Are the findings of the panels and the Appellate Body in *US – Softwood Lumber IV* and *US – Carbon Steel (India)* relevant to the Panel's consideration of Indonesia's argument that the GOI does not provide standing timber? (See *Panel Report, US – Softwood Lumber IV*, paras. 7.13-7.18; *Appellate Body Report, US – Softwood Lumber IV*, paras. 68-76; *Panel Report, US – Carbon Steel (India)*, paras. 7.233-7.241; and *Appellate Body Report, US – Carbon Steel (India)*, paras. 4.66-4.75)**

**ANSWER:**

39. Yes. The panel and Appellate Body reports for both *US – Softwood Lumber IV* and *US – Carbon Steel* are on point. *US – Softwood Lumber IV* involved Canada's provincial stumpage programs, the description of which – in all relevant respects – is similar to Indonesia's

description of its stumpage program. Importantly, given Indonesia’s arguments, the panel in that case reviewed the nature of the contracts and whether a timber tenure or license is different than a contract for identified trees. The panel found, “there is no meaningful distinction between the provision of a right to harvest timber and the provision of standing timber itself,”<sup>45</sup> explaining that “the exact legal nature of the stumpage contracts is not what is important.”<sup>46</sup> The panel further stated that while “governments may ... at the same time be pursuing certain other social, economic or environmental policies by imposing certain forest management obligations as conditions of sale,”<sup>47</sup> this recognition did not alter the panel’s conclusion. The Appellate Body agreed with the panel’s finding in examining the meaning of “provides.”

40. Similarly, in *US – Carbon Steel*, the panel and Appellate Body examined *US – Softwood Lumber IV*’s discussion of “provides.” Both the panel and Appellate Body found that mining rights, like the right to use land to harvest timber, is not a passive governmental act, but rather, is proximately linked to the extraction of ore – the situs of which is not uncertain, but known.<sup>48</sup> The Appellate Body, quoting its previous finding in *US – Softwood Lumber IV*, drew a parallel between the extractions of ore and felled timber (or logs): “felled trees ‘crystallize as a natural and inevitable consequence of the harvesters’ exercise of their harvesting rights.”<sup>49</sup>

41. Like both the standing timber in *US – Softwood Lumber IV* and the ore extractions in *US – Carbon Steel*, the standing timber that is the subject of this dispute is government-provided. As explained during the second Panel meeting, Indonesia’s arguments are nearly identical to those Canada raised in *US – Softwood Lumber IV* and the Appellate Body rejected. Indonesia’s distinction between providing land and providing timber is a distinction without a difference – regardless of when title passes. Indonesian logging companies have a proprietary interest that culminates in the cutting and selling of logs. In addition, like Indonesia, Canada also argued that other goals, such as conservation, drove the stumpage program. The panel found that to be irrelevant and the Appellate Body did not disturb that finding. *US – Carbon Steel* further downplayed the relevance of proximity in time (*i.e.*, whether an extraction or a tree has matured) versus causal proximity. Like the ore extractions in *US – Carbon Steel* that flowed from mining rights, there is no question that timber and logs flow from the government grant of rights to harvest and cut trees.

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<sup>45</sup> *US – Softwood Lumber IV (Panel)*, para. 7.18.

<sup>46</sup> *US – Softwood Lumber IV (Panel)*, para. 7.15.

<sup>47</sup> *US – Softwood Lumber IV (Panel)*, para. 7.16.

<sup>48</sup> *US – Carbon Steel (India) (Panel)*, paras. 7.238-7.240.

<sup>49</sup> *US – Carbon Steel (AB)*, para. 4.74.



**Question 79: (to the United States) The USDOC stated, with respect to import prices being a potential benchmark, that "[e]ven if it is reasonable to conclude that the foreign shipper believes that the Indonesian price is adequate, it is just as reasonable to conclude that the foreign shipper may have obtained an even better price elsewhere." (USDOC Issues and Decision Memorandum, Exhibit US-31, p. 31) Is there any additional explanation, in the determination, of the rationale for this statement by the USDOC? Please explain why the foreign shipper would not sell elsewhere if it could have obtained a better price elsewhere?**

**ANSWER:**

42. It is important to place this quotation in context; it was not part of the affirmative rationale for using an out of country benchmark, but rather was contained in a response to an argument presented by an interested party. The USDOC stated:

Over 93 percent of the harvest volume during the POI was from government-owned land, and imports were less than one percent of the timber produced domestically. We note, in this regard, Respondents make no effort to indicate how private sector or import prices could not be affected by this government predominance over the domestic market beyond the argument that the import transactions are between private parties and that the exporter shipping into Indonesia would not do so if the price received was inadequate. It remains to be explained how that foreign shipper would be able to have any sales in Indonesia at all if it did not match the artificially low prices of the government distorted domestic market. Even if it is reasonable to conclude that the foreign shipper believes that the Indonesian price is adequate, it is just as reasonable to conclude that the foreign shipper may have obtained an even better price elsewhere.

While Petitioners offer some suggestions regarding why a foreign shipper might accept a “second best” price, and the [USDOC] could think of a few additional reasons, it is not even necessary to engage in this speculation. The fact remains that the foreign shipper will have to match the prices of the overwhelming majority of transactions distorted through government action, a conclusion borne out by the data on the record, demonstrating a significant price difference between Malaysian exports of acacia to Indonesia and Malaysian exports of acacia to other countries in the surrounding region.<sup>50</sup>

43. The USDOC's determination not to further analyze this miniscule volume of sales was reasonable and its explanation for not doing so is adequate. Indeed, the Appellate Body found no

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<sup>50</sup> IDM at 31-32 (Exhibit US-31) On page 31, USDOC provided additional detail on industry's arguments: “In relevant part, the petitioning U.S. industry stated that ‘Indonesian imports of tropical timber were less than one-tenth of one percent of the total domestic harvest’, and that ‘companies may sell small amounts into Indonesia for any number of reasons, including maintaining/improving commercial relationships, offloading difficult to sell inventory, or because a more lucrative sale fell through.’”

error where a panel upheld USDOC’s determination that three percent import penetration, where the government held ninety-six percent of the market for the relevant input provided at less than adequate remuneration, was insufficient to provide a reliable market-determined benchmark.<sup>51</sup>

## 2.2 Claims under Articles 2.1 and 2.1(c) of the SCM Agreement

**Question 81: (to the United States) With respect to the log export ban, did the USDOC explain why it changed its determination from a finding of *de jure* specificity in the CFS investigation to a finding of *de facto* specificity in the coated paper investigation, in light of the fact that the programme at issue was unchanged? If so, what were those explanations and where are they contained?**

### **ANSWER:**

44. As an initial matter, the United States notes that Indonesia has not challenged the evidentiary basis for USDOC’s finding that the log export ban was *de facto* specific in the CCP investigation.<sup>52</sup> Indonesia’s only challenge is to whether the log export ban constituted a “subsidy programme” in the CCP investigation, as a precursor to USDOC’s *de facto* specificity analysis under Article 2.1(c) of the SCM Agreement.<sup>53</sup>

45. Nonetheless, to aid the Panel’s understanding of USDOC’s specificity analysis, the United States offers the following. Depending on the specific facts on the record in an investigation, a subsidy may be *de jure* or *de facto* specific, or it may fall under both classifications. The key point is that an investigating authority must provide a reasoned and adequate explanation as to its finding of specificity; the SCM Agreement contains no requirement that a determination properly finding a subsidy to be *de facto* specific must also include an analysis of *de jure* specificity. Rather, the investigating authority needs only one basis upon which to make its determination.<sup>54</sup>

46. The United States has previously explained how and why USDOC found the log export ban to be *de facto* specific in the challenged CCP investigation and the record evidence supporting that determination.<sup>55</sup> In the CFS investigation, USDOC found the log export ban *de*

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<sup>51</sup> See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 453-58.

<sup>52</sup> See US First Written Submission, para. 189.

<sup>53</sup> Indonesia had initially challenged USDOC’s determination of the relevant jurisdiction of the granting authority pursuant to the chapeau of Article 2.1 of the SCM Agreement as well. However, Indonesia abandoned its Article 2.1 chapeau claim with regard to the log export ban at the first meeting of the Panel. Indonesia Opening Statement (1st Panel Meeting), para. 56.

<sup>54</sup> See Article 2.1 of the SCM Agreement.

<sup>55</sup> See US First Written Submission, para. 189; see also CCP Final Determination IDM, at 13 (Ex. US-31) (“the log export ban is *de facto* specific . . . because the industries receiving subsidies from the operation of the ban are limited in number”); CCP Preliminary Determination, 75 Fed. Reg. at 10,769 (Ex. US-48) (same).

*jure* specific.<sup>56</sup> The finding of *de jure* specificity in the CFS investigation was not explored in the CCP preliminary or final determinations because USDOC’s specificity finding in the CCP investigation stands on its own. In finding specificity in the CCP investigation, USDOC considered the administrative record developed in that proceeding.

**Question 82 (to the United States) Please explain the USDOC's finding of specificity with respect to the debt buy-back subsidy, in particular:**

- a. **What was the legal basis for the USDOC's finding of specificity with respect to the debt buy-back? In answering, please explain the provisions of US law that the USDOC relied upon.**

**ANSWER:**

47. In the CCP investigation, USDOC explained that “[b]ecause the debt was sold to an APP/SMG affiliate . . . the sale was company-specific under section 771(5A)(D)(iii)(I)” of the Tariff Act of 1930, as amended (the Act).<sup>57</sup> Thus, section 771(5A)(D)(iii)(I) of the Act formed the “legal basis” for USDOC’s finding that the debt buyback was *de facto* specific. Section 771(5A)(D)(iii) implements Article 2.1(c) of the SCM Agreement into U.S. municipal law.<sup>58</sup> This provision states, in relevant part:

(5A) SPECIFICITY.—

. . . .

(D) DOMESTIC SUBSIDY.—In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:

. . . .

(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

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<sup>56</sup> CFS Final Determination IDM, at 32-33 (Ex. US-43) (“the GOI’s decree banning the export of a small subsection of products in seven industries, and its specific decree banning the exports of logs and chipwood in particular, are *de jure* specific . . . since it is restricted by law to only a limited group of industries and because it covers only a small, discrete number of products within each of these seven industries”).

<sup>57</sup> CCP IDM at 20 (Ex. US-31); *see also* CCP Preliminary Determination, 75 Fed. Reg. at 10,773 (Ex. US-48) (same).

<sup>58</sup> *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, at 931 (1994) (Ex. US-116) (“Section 771(5A)(D)(iii) lists the factors to be examined with respect to *de facto* specificity. These factors . . . [are] found in Article 2.1(c) of the Subsidies Agreement . . .”).

- (I) *The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.*
- (II) An enterprise or industry is a predominant user of the subsidy.
- (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
- (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.<sup>59</sup>

48. As under Article 2.1(c) of the SCM Agreement, and as indicated in the emphasized text from the United States’ municipal law in the quotation above, the basis for USDOC’s finding of *de facto* specificity under U.S. law with regard to the debt buyback is section 771(5A)(D)(iii)(I) of the Act, which provides that “the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.”

**b. Did the USDOC find that the financial contribution consisted in the PPAS programme, or did it find that it consisted in the violation of the PPAS programme's prohibition on companies buying back their own debt?**

**ANSWER:**

49. The evidence supporting the financial contribution consisted collectively of the PPAS program, the terms of reference and bid protocol for the APP/SMG debt sale, and the associated bidding documents for that sale, *and* USDOC’s finding – as facts available under Article 12.7 of the SCM Agreement – that debtor APP/SMG and successful bidder Orleans were affiliated parties. These documents on the record, coupled with the Article 12.7 facts available finding on affiliation, worked in concert to inform USDOC’s financial contribution analysis. Based on this evidence, USDOC “determine[d] that the GOI’s sale of APP/SMG’s debt to Orleans constituted a financial contribution, in the form of debt forgiveness.”<sup>60</sup>

**c. Similarly, was the USDOC's finding of benefit linked to the PPAS programme, or was it linked to the violation of the PPAS programme's prohibition on companies buying back their own debt?**

**ANSWER:**

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<sup>59</sup> See § 771(5A)(D)(iii)(I) of the Tariff Act of 1930, *amended* by Pub. L. 114-27 (2015) (Ex. US-118) (emphasis added).

<sup>60</sup> CCP IDM at 20 (Ex. US-31).

50. The evidence supporting that APP/SMG received a benefit from the debt buyback was the PPAS program’s existence, the associated APP/SMG debt sale documents – and USDOC’s finding, based on facts available under Article 12.7 of the SCM Agreement, that APP/SMG and Orleans were affiliated.<sup>61</sup> The latter finding was especially critical in determining that a benefit was conferred.<sup>62</sup> USDOC explained as part of its facts available finding that: “[w]hat is missing is information regarding whether APP/SMG did, in fact, receive a benefit. . . . [W]hether APP/SMG received a benefit hinges on whether it bought back its own debt through the guise of Orleans.”<sup>63</sup> Consequently, USDOC’s finding of benefit was linked to *both* the PPAS program and its facts available determination.

**d. How could the subsidy programme be a written programme if the subsidy consisted, in part, in the violation of the law? How does the United States justify the approach the USDOC took and where is the relevant explanation?**

**ANSWER:**

51. The debt buyback constituted a written “subsidy programme” under Article 2.1(c) of the SCM Agreement because it was a written GOI plan or scheme that resulted in a financial contribution and a benefit to APP/SMG.<sup>64</sup> The documents evincing the written plan or scheme included Article 1 of IBRA Regulation SK-7/BPPN/0101, which “prohibit[ed] the resale of the debt either back to the original debtor or to affiliated parties.”<sup>65</sup> With regard to the APP/SMG debt sale, the IBRA issued “terms of reference” in “early December 2003,” which “sets out the process for bidder registration, due diligence, and submission of bids.”<sup>66</sup> 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.”<sup>67</sup> Those protocols prohibited debt purchases from affiliated companies.<sup>68</sup>

52. The fact that some of the evidence relied upon was based on unwritten acts – the violation of the bid protocol, terms of reference, and the law – in no way alters the nature of the debt buyback as a written program. Although the facts available USDOC relied upon in finding affiliation were not in the form of official GOI documents, the Appellate Body has explained that “[e]vidence regarding the nature and scope of a subsidy programme may be found in a *wide*

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<sup>61</sup> See CCP IDM at 20, 57 (Ex. US-31).

<sup>62</sup> CCP IDM at 20, 57 (Ex. US-31).

<sup>63</sup> CCP IDM at 57 (Ex. US-31).

<sup>64</sup> See US First Written Submission, paras. 195-196.

<sup>65</sup> GOI Third Supplemental Questionnaire Response (May 27, 2010), at 2 & Ex. 3S-1 (Ex. IDN-15 (BCI)).

<sup>66</sup> GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 29-30, 36 & Ex. 24 (Ex. US-34 (BCI)).

<sup>67</sup> GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 36 & Ex. 35 (Ex. US-34 (BCI)).

<sup>68</sup> US First Written Submission, para. 195.

variety of forms.”<sup>69</sup> One such “instance” could be “in the form of a law, regulation, or other official document or act setting out criteria or conditions governing eligibility for the subsidy.”<sup>70</sup> Indeed, most of the evidence supporting USDOC’s “subsidy programme” finding consisted of these types of documents.

53. The evidence on USDOC’s record, coupled with the facts available regarding affiliation, supported USDOC’s conclusion that the debt buyback constituted an Article 2.1(c) “subsidy programme” in the form of a written plan or scheme. The relevant explanation is subsumed within USDOC’s final determination.<sup>71</sup>

**Question 83: (to the United States) If the debt buy-back subsidy was company-specific, how does the United States justify that it fell under Article 2.1(c) of the SCM Agreement? Where is this explained in the USDOC's Final Determination?**

**ANSWER:**

54. There is nothing inconsistent in finding that a subsidy provided only to a single company is *de facto* specific under Article 2.1(c). To the contrary, the limited number of users supports *de facto* specificity.

55. As the United States explained during the second Panel meeting and in its prior submissions, a company-specific subsidy can be *de facto* specific within the meaning of Article 2.1(c) if it meets one of the four criteria in that provision. In this case, it is used by a limited number of certain enterprises (the first factor). One company is “a limited number of certain enterprises.”<sup>72</sup> Recall that Indonesia does not challenge in its panel request that the debt buyback is *de facto* specific because its use is limited to one company. As the Panel’s question anticipates, Indonesia’s challenge is, rather, based on an imputed requirement that a “systematic series of actions” as well as a “plan or scheme” must be present for the debt buyback to constitute not just a subsidy, but a subsidy *program*, within the meaning of Article 2.1(c). As the United States has argued at length,<sup>73</sup> there is no such requirement imposed by the SCM Agreement. Moreover, *US – Countervailing Measures*, upon which Indonesia relies heavily, does not support this interpretation. The Appellate Body’s report from this dispute examined a series of unwritten measures and determined that in such a case it would be necessary to show a systematic series of actions.<sup>74</sup> The debt buyback was a written measure – the bid protocol and terms of reference for the transaction were reduced to writing. Moreover, the Appellate Body never stated that even where measures are unwritten, a showing of a “systematic series of

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<sup>69</sup> *US – Countervailing Measures (China) (AB)*, para. 4.141 (emphasis added).

<sup>70</sup> *US – Countervailing Measures (China) (AB)*, para. 4.141.

<sup>71</sup> See CCP IDM at 17-20, 52-55, 57-58 (Ex. US-31).

<sup>72</sup> Article 2.1(c) of the SCM Agreement; see also US Second Written Submission, para. 101.

<sup>73</sup> See USUS First Written Submission, para. 193; USUS Second Written Submission, paras. 95-101.

<sup>74</sup> *US – Countervailing Measures (China) (AB)*, paras. 4.149-4.150.

actions” is always necessary.<sup>75</sup> Indeed, to read such a requirement into a scenario such as this, where only one enterprise is using a subsidy, would render Article 2.1(c) not merely inutile but also nonsensical. No subsidy can be more *de facto* specific in terms of being to “a limited number of certain enterprises.”

56. With respect to where this explanation appears in the determination, the final determination discusses the *de facto* specificity of the debt buyback.<sup>76</sup> As we explained in response to question 82(a), the CCP final determination references the provision in U.S. law that implements Article 2.1(c), and this provision employs nearly identical language to that in Article 2.1(c).<sup>77</sup>

**Question 84: (to both parties) Indonesia argues that the debt buy-back subsidy could not have been company-specific given that APP/SMG was composed of multiple companies. Please explain how the debt sold to Orleans was structured - as a single debt or as a debt package?**

**ANSWER:**

57. As the United States previously explained, Indonesia’s contention that the debt buyback was not company-specific because APP/SMG consisted of multiple companies is erroneous.<sup>78</sup> The record evinces that APP/SMG’s debt sale consisted of a single asset. The IBRA’s terms of reference explain that “[t]he current Strategic Asset Portfolio of BPPN is made up of 1 (one) asset, namely the APP Group launched on 8 December 2003, which comprises” five companies and their subsidiaries.<sup>79</sup> The terms of reference also state that “[t]he condition in the sale of APP Group credit asset is on ‘as is’ basis,” which supports that the sale was comprised of the aggregated debt of the “APP Group” (*i.e.*, APP/SMG).<sup>80</sup> The GOI also explained to USDOC that “[t]he sale of debt a company’s debt [sic] under the PPAS was a one time event,”<sup>81</sup> which further supports USDOC’s understanding that the APP/SMG debt sale consisted of a single asset representing APP/SMG’s aggregated debt.

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<sup>75</sup> *US – Countervailing Measures (China) (AB)*, paras. 4.145-4.146.

<sup>76</sup> CCP IDM at 20 (Ex. US-31).

<sup>77</sup> CCP IDM at 20 (Ex. US-31) (citing to section 771(5A)(D)(iii)(I) of the Act).

<sup>78</sup> US Second Written Submission, para. 102.

<sup>79</sup> GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Ex. 24 (pp. 4-5) (Ex. US-34 (BCI)).

<sup>80</sup> GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Ex. 24 (p. 5) (Ex. US-34 (BCI)).

<sup>81</sup> *See* GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Ex. 21 (p. 7) (Ex. US-34 (BCI)).

**Question 86: (to both parties) Indonesia raises several arguments that pertain to the USDOC's determination that the sale of APP/SMG's debt to Orleans was company-specific, in the context of its claims under both Article 2.1(c) and Article 2.1. The Panel notes that Indonesia's panel request sets forth a claim under Article 2.1 with respect to the debt forgiveness stating that the:**

**USDOC did not identify whether the entity allegedly providing the purported subsidy was the national, regional or local government, and therefore, failed to properly examine whether the purported subsidy was "specific to an enterprise ... within the jurisdiction of the granting authority". (WT/DS491/3, para. 1(c)(i)).**

**It also sets forth a claim under Article 2.1(c) stating that the:**

**USDOC improperly failed to demonstrate that Indonesia's alleged debt forgiveness constituted a subsidy program specific to an enterprise or industry or group of enterprises or industries. USDOC did not cite to evidence establishing the existence of a plan or scheme sufficient to constitute a "subsidy programme". (WT/DS491/3, para. 1(c) (ii)).**

**Is Indonesia's panel request broad enough to allow Indonesia to challenge the USDOC's determination that the debt buy-back subsidy was company-specific, as opposed to challenging the USDOC's alleged failure to identify the jurisdiction of the granting authority or the existence of the subsidy programme?**

**ANSWER:**

58. Indonesia's panel request is not broad enough to cover Indonesia's challenge to USDOC's finding that the debt buyback program was *de facto* company-specific. Indonesia's panel request focused on USDOC's *identification* of the granting authority and the subsidy program in its determinations, not to any other aspects of the specificity analysis. Consequently, any of Indonesia's arguments purporting to now challenge USDOC's analysis or evidentiary basis for finding the debt buyback *de facto* company-specific are outside the Panel's terms of reference.

59. Indonesia's arguments, thus, are also out-of-scope. For example, the existence of multiple news sources that note the plausibility of one or more IBRA debt sales involving affiliated parties or the question of APP/SMG's debt being aggregated do not go to, in the words of Indonesia's panel request, whether "USDOC did not identify whether the entity allegedly providing the purported subsidy was the national, regional or local government, and therefore, failed to properly examine whether the purported subsidy was 'specific to an enterprise . . . within the jurisdiction of the granting authority.'"<sup>82</sup> These arguments also do not go to whether "USDOC improperly failed to demonstrate that Indonesia's alleged debt forgiveness constituted

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<sup>82</sup> Indonesia's panel request.



a subsidy program specific to an enterprise or industry or group of enterprises or industries” based on Indonesia’s claim that “USDOC did not cite to evidence establishing the existence of a plan or scheme sufficient to constitute a ‘subsidy programme.’”<sup>83</sup>

### 2.3 Claims under Article 12.7 of the SCM Agreement

**Question 87: (to both parties) Paragraph 7 of Annex II of the Anti-Dumping Agreement, which the Appellate Body has indicated is relevant in interpreting and applying Article 12.7 of the SCM Agreement, uses the phrase "does not cooperate". Does the phrase "does not cooperate" refer to conditions that differ from those set forth in Article 12.7 of the SCM Agreement for resorting to facts available?**

**ANSWER:**

60. Annex II(7) of the AD Agreement does not refer to conditions that substantially differ from those set forth in Article 12.7 of the SCM Agreement. In *US – Carbon Steel (India)*, the Appellate Body referred to Annex II(7) of the AD Agreement as “relevant,” “[a]dditional context” for interpreting Article 12.7 of the SCM Agreement, even though Annex II “does not form part of the SCM Agreement.”<sup>84</sup> Paragraph 7 reads in pertinent part: “if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.” The Appellate Body has not interpreted “does not cooperate” in Annex II to mean something substantially different from Article 12.7’s “refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.”<sup>85</sup> The selection of “facts available” that leads to “a less favourable result” is permissible under both the AD Agreement and the SCM Agreement, and the interested party’s or Member’s “knowledge ... of the consequences of failing to provide information” is relevant in employing facts available that may lead to a less favorable result.<sup>86</sup>

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<sup>83</sup> Indonesia’s panel request.

<sup>84</sup> *US – Carbon Steel (India) (AB)*, paras. 4.423, 4.425; see also *id.* at para. 4.432 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291).

<sup>85</sup> See *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 293-95.

<sup>86</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

**Question 88: (to the United States) The Panel notes that the USDOC requested several documents from the GOI in addition to those related to the sale at issue, and that the GOI challenged the relevance of these documents as it considered them unrelated to the APP/SMG debt sale. Other than in its letter of 11 June 2010 (Exhibit US-42), did the USDOC explain to the GOI that *this information* in particular was essential to its determination on affiliation? When? Please reference the relevant documents and submit them as exhibits if they are not already on the Panel record.**

**ANSWER:**

61. The United States recalls that in evaluating the USDOC’s use of facts available, it is essential to take account of the fact that there was an investigatory process. It was during the course of this investigation, and in particular the lack of ownership information in the Orleans bidding documents, that led USDOC to request the bidding documents for the other PPAS sales. As the United States has previously explained, the GOI initially provided the Orleans bidding documents for the APP/SMG debt sale, which contained no ownership information for Orleans.<sup>87</sup> USDOC’s subsequent questioning to the GOI was intended to gather other available facts to better understand the IBRA’s due diligence procedures, and whether Orleans and APP/SMG were afforded preferential treatment in the PPAS debt sale at issue.<sup>88</sup>

62. In the third supplemental questionnaire to the GOI, USDOC first sought the bidding documents for the other PPAS debt sales. There, USDOC requested, in relevant part, that:

For each sale under the PPAS, please provide the:

- winning bidder’s articles of association;
- winning bidder’s certificate of incorporation;
- winning bidder’s Statement Letter confirming it would comply with the rules of the bid/sale process;
- the Asset Sale and Purchase Agreement that includes a representation that the bidder is not affiliated with the company whose debt it plans on buying;

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<sup>87</sup> GOI First Supplemental Questionnaire Response, Part II (Feb. 22, 2010), at 34 (Ex. US-34 (BCI)) (“we note that the Articles of Incorporation do not identify the shareholders of Orleans”).

<sup>88</sup> See CCP IDM, at 19 (Ex. US-31) (“In order to evaluate how exactly the process through which APP/SMG’s debt was bought by Orleans should have been conducted and what types of documents should have been collected, we sought after the Preliminary Determination to gather more information concerning IBRA’s operations in general, specifically what types of guidelines and policies officials administering its programs were instructed to follow, focusing on the standards maintained for the PPAS program”).

- the letter from outside counsel that confirmed the purchaser's compliance with the conditions of the debt purchase.<sup>89</sup>

63. The SCM Agreement, of course, does not provide that an investigating authority must explain why any particular question is posed. Nonetheless, given that this was the third supplemental questionnaire, and that the relationship between the parties to the debt buyback was a key issue in the investigation, Indonesia knew precisely why this information was requested. These questions, combined with other questions in the same supplemental questionnaire, evince that one of the overarching purposes of this questionnaire was to better understand the IBRA's due diligence procedures under the PPAS. The United States highlights some examples from this questionnaire that illustrate this intent:

- Question 5: "Were there different due diligence requirements for other debt sales under the PPAS? If so, please provide translated copies of these due diligence requirements."
- Question 6: "Please provide the internal due diligence guidelines that IBRA established for its own employees (as well as any companies which provided services to IBRA regarding the debt sales) for analyzing the documentation and other information that potential bidders had to submit for debt sales under the PPAS. If the guidelines differ between the different debt sales, be sure to include the guidelines used for each sale."
- Question 12: "Please provide the relevant bid protocols for each company's debt sale under the PPAS, in a manner similar to the APP/SMG bid protocols submitted as Exhibit 35 to the February 22, 2010 response."
- Question 18: "If the PPAS's Terms of Reference (TOR) differed with respect to bidder registration, due diligence, and submission of bids and documentation required for other debt sales under the PPAS, please provide the TORs for all other debt sales under the PPAS."
- Question 21: "Please clarify whether or not other debt sales conducted by IBRA required the submission of a 'Letter of Compliance' similar to the one submitted as Exhibit 28 of the GOI's February 22, 2010 questionnaire response."<sup>90</sup>

64. Furthermore, USDOC advised the GOI that if it had any questions about the third supplemental questionnaire, it could contact the USDOC officials in charge.<sup>91</sup> In other words, if the GOI had any questions or concerns about how the other PPAS bidding documents were

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<sup>89</sup> Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at 3 (Ex. US-41) (question 22(c)).

<sup>90</sup> Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at 1-3 (Ex. US-41).

<sup>91</sup> Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at cover letter (Ex. US-41).

relevant to USDOC’s investigation, it could have inquired directly with USDOC before it filed its response. The GOI did not do so.

65. Finally, in the fifth supplemental questionnaire, USDOC explained that:

While you may consider this line of inquiry to be irrelevant and to involve information that is possibly archived or otherwise not readily available, and while you may believe that your response constitutes an earnest attempt to provide all relevant information, you must submit the documents requested in these questions by June 18, 2010, the same due date as for your response to the attached questionnaire.<sup>92</sup>

66. Thus, USDOC sought the information that the GOI failed to provide in its third supplemental response a second time, through the fifth supplemental questionnaire.<sup>93</sup> Similar to the third supplemental questionnaire, other questions in the fifth supplemental questionnaire demonstrate that USDOC’s intention in requesting these bidding documents was to better understand the IBRA’s due diligence procedures regarding affiliation.<sup>94</sup> The GOI failed – twice – to provide this information within a reasonable period of time.

**Question 89: (to the United States)**

- a. Was the information on the record of the coated paper investigation that suggested that Orleans was affiliated with APP/SMG the same as was on the record of the CFS investigation?**

**ANSWER:**

67. The information that USDOC relied upon as facts available in finding APP/SMG and Orleans affiliated between the CFS and CCP investigations was similar, but not identical. In the CFS final determination, USDOC relied on certain articles, as well as a summary of USDOC’s meeting with an independent expert during its on-the-spot verification of the GOI, as the facts available for affiliation.<sup>95</sup> USDOC specifically cited to Exhibits 11 and 16 of petitioners’ new subsidy allegation filed in that investigation, as the facts available.<sup>96</sup> USDOC also cited to “news

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<sup>92</sup> Fifth Supplemental Questionnaire to the GOI (May 27, 2010), at cover letter (Ex. US-42).

<sup>93</sup> Fifth Supplemental Questionnaire to the GOI (May 27, 2010), at 1 (Ex. US-42) (question 8).

<sup>94</sup> See, e.g., Fifth Supplemental Questionnaire to the GOI (May 27, 2010), at 1 (Ex. US-42) (questions 3, 4, 5).

<sup>95</sup> See CFS IDM, at 44-45 (Ex. US-43).

<sup>96</sup> CFS IDM, at 44 (Ex. US-43) (citing *New Subsidy Allegation* at Exs.11 & 16, “Other information on the record further supports a finding that Orleans is either affiliated with, or acted on the behalf of, SMG/APP or the Widjaja family, owners of SMG/APP. Petitioner placed on the record court documents that stated that there was speculation that the Widjaja family had been buying up its own debt through third parties ... [and] a World Bank report indicated that IBRA allowed some parties to buy back their own debt through third parties”).

articles suggesting that SMG/APP was ‘surreptitiously buying back its own debt through third parties.’”<sup>97</sup>

68. Internal Exhibit 11 to the CFS new subsidy allegation was not on the CCP investigation record, so, although USDOC relied on this document as facts available in the CFS investigation, it did not do so in the CCP investigation.<sup>98</sup> By contrast, Exhibit 16 to the CFS new subsidy allegation was also on the CCP investigation record as part of Petitioners’ General Factual Information Submission at internal Exhibit 24. That document was the World Bank report, and it was relied upon as facts available in both investigations. The independent expert summary from USDOC’s on-the-spot verification of the GOI during the CFS investigation was also on the record of both cases, and was discussed as the basis for facts available in both investigations.<sup>99</sup>

69. With regard to the “news articles suggesting that SMG/APP was ‘surreptitiously buying back its own debt through third parties’” that were mentioned in the CFS final determination, USDOC referenced internal Exhibit 11 to the CFS new subsidy allegation.<sup>100</sup> Even though this reference to Exhibit 11 appears to have been inadvertent, it corresponds to Exhibit 33 of the Petitioners’ General Factual Information Submission in the CCP investigation, which is a news article from the Financial Times.<sup>101</sup> Thus, this same news article was relied upon as facts available in both investigations, because USDOC also cited to internal Exhibit 33 in the CCP final determination.<sup>102</sup>

70. Finally, in the CCP final determination, USDOC also cited to internal Exhibits 10-12, 16, 18, 22, and 36 of Petitioners’ General Factual Information Submission filed in the CCP investigation, in addition to internal Exhibits 24 and 33 discussed above, as its basis for facts available on affiliation.<sup>103</sup> Internal Exhibits 10-12 of that submission correspond to internal Exhibits 1-3 of the CFS new subsidy allegation, respectively. Similarly, internal Exhibits 16, 18, and 22 of Petitioners’ General Factual Information Submission in the CCP investigation correspond to internal Exhibits 8, 10, and 14 of the new subsidy allegation filed in the CFS investigation, respectively. Exhibit 36 of Petitioners’ General Factual Information Submission in the CCP investigation was not contained in the new subsidy allegation filed in the CFS investigation.

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<sup>97</sup> CFS IDM, at 44 (Ex. US-43). In the CFS final determination, USDOC alluded that this specific quote was in Exhibit 11 to the CFS New Subsidy Allegation. This statement appears to have been inadvertent because there is no news article in the CFS New Subsidy Allegation that contains this language.

<sup>98</sup> See CFS New Subsidy Allegation (Dec. 15, 2006), at Ex.11 (corresponding to “Deutsche Bank and BNP Paribas’ Petition with the Singapore High Court, June 23, 2002”).

<sup>99</sup> Compare CFS IDM, at 44-45 (Ex. US-43), with CCP Preliminary Determination, 75 Fed. Reg. at 10,772 (Ex. US-48).

<sup>100</sup> CFS IDM, at 44 (Ex. US-43).

<sup>101</sup> See Petitioners’ General Factual Information Submission (June 21, 2010), at Ex. 33 (Ex. US-40).

<sup>102</sup> CCP IDM, at 6 & n.6 (Ex. US-31).

<sup>103</sup> CCP IDM, at 6 & n.6 (Ex. US-31).

71. In sum, although most of the documents were the same between the two investigations, USDOC cited to certain additional documents in the CCP investigation as facts available. Many of these documents were also on the record of the CFS investigation, but were not explicitly cited to in the CFS final determination.

**b. To what extent did the USDOC rely on each of the respective pieces of information in reaching its finding of affiliation in the coated paper investigation? To what extent does the USDOC's determination in the CFS investigation with respect to this other evidence form part of the USDOC's reasoning in the coated paper investigation? Where is this explained by the USDOC?**

**ANSWER:**

72. In the CCP final determination, USDOC cited to internal exhibits 10-12, 16, 18, 22, 24, 33, and 36 of Panel Exhibit US-40, which were the facts available that USDOC applied in finding APP/SMG and Orleans affiliated.<sup>104</sup> In the CCP preliminary determination, USDOC also cited to a summary of its meeting with an independent expert “knowledgeable about the debt and banking crisis in Indonesia,” which was on the record of this case.<sup>105</sup> USDOC relied upon all of this information that was on the CCP investigation record collectively for what it demonstrated, for example:

- APP/SMG had past dealings with companies in the British Virgin Islands;<sup>106</sup>
- APP/SMG has been a part of debt-to-equity swaps in other markets;<sup>107</sup>
- A director of Orleans was also the representative of a company called Warner Mansion Fund “which was being investigated as a front for APP in a scheme that had APP employees buying APP shares in debt-for-equity swap in Taiwan;”<sup>108</sup>
- The IBRA was allegedly allowing debtors to buy back their debt through third parties;<sup>109</sup> and
- With specific regard to the APP/SMG debt sale, “[o]ther creditors and bidders yesterday also raised questions about who might be behind the Orleans bid. That was in part because of the mysterious nature of the bidder and the long-running

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<sup>104</sup> CCP IDM, at 6 n.6 (Ex. US-31).

<sup>105</sup> CCP Preliminary Determination, 75 Fed. Reg. at 10,772 & n.10 (Ex. US-48); Meeting with an Independent Expert (Aug. 24, 2007) (Ex. US-81).

<sup>106</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex. 11 (Ex. US-40).

<sup>107</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex. 18 (Ex. US-40).

<sup>108</sup> Compare Petitioners’ General Factual Information Submission (June 21, 2010), at Ex. 22 (Ex. US-40), with Meeting with an Independent Expert (Aug. 24, 2007) (Ex. US-81).

<sup>109</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex. 24 (Ex. US-40).

creditor suspicions that APP has been surreptitiously been buying back its debt.”<sup>110</sup>

73. Other exhibits cited in the CCP final determination provided general background regarding what was transpiring around the time the APP/SMG debt sale took place, such as the facts that APP/SMG defaulted on its debt,<sup>111</sup> that the company’s debts were being restructured,<sup>112</sup> that Orleans had won the bid for APP/SMG’s debt through the IBRA,<sup>113</sup> and that “so far nobody knows who was behind Orleans.”<sup>114</sup>

74. With respect to the CFS investigation, the findings USDOC made there informed the lines of questioning it posed to the GOI in the CCP investigation.<sup>115</sup> However, the determination to resort to facts available for affiliation was based upon the record that was specifically developed in the CCP investigation.<sup>116</sup>

**Question 90: (to the United States) The Panel understands that the information on the record with respect to the question of Orleans' affiliation with APP/SMG was as follows:**

- **On the one hand, the GOI had provided evidence that tended to demonstrate that Orleans was not affiliated with APP/SMG: (i) the provisions of Indonesian law (IBRA regulations) prohibiting sales of debt to an affiliate of a debtor; (ii) statements of non-affiliation in the bidding documents; (iii) contractual representation of non-affiliation by the buyer in the Asset Sale and Purchase Agreement; (iii) statement by a lawyer attesting to the fact that Orleans was not affiliated with APP/SMG;**
- **On the other hand, the USDOC had information - a number of newspaper articles, the World Bank Report, and discussions with an independent expert**

<sup>110</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex.33 (Ex. US-40).

<sup>111</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex.10 (Ex. US-40) (“BII had not been able to diversify its portfolio to reduce the risk of a default by the group, and when one unit, Asia Pulp & Paper, defaulted on its \$13.4 billion debt in March 2001, the largest default in emerging-markets history, the die was cast”).

<sup>112</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex.12 (Ex. US-40) (“The Indonesian Bank Restructuring Agency (IBRA) clarifies the debt restructuring of the Sinar Mas group of companies (Sinar Mas), which includes Asia Pulp & Paper and its subsidiaries (APP)”).

<sup>113</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex.16 (Ex. US-40) (“Orleans Investment last week was declared preliminary winner in the bidding for part of Asia Pulp & Paper Co.’s debt held by the Indonesian Bank Restructuring Agency (IBRA)”).

<sup>114</sup> Petitioners’ General Factual Information Submission (June 21, 2010), at Ex.36 (Ex. US-40).

<sup>115</sup> See, e.g., CCP IDM, at 17-18 (Ex. US-31) (providing background on the CFS investigation, and explaining that USDOC asked in its initial questionnaire in the CCP investigation “if there was any new information or evidence of changed circumstances with respect to the GOI’s administration of this program that would warrant a reconsideration of the Department’s prior countervailability finding”); see also CCP Preliminary Determination, 75 Fed. Reg. at 10,772 (Ex. US-48) (similar).

<sup>116</sup> See CCP IDM, at 17-20 (Ex. US-31) (explaining the types of questions USDOC posed to the GOI in the CCP investigation, as well as why USDOC resorted to facts available in the CCP investigation).

**in the CFS investigation - that raised doubts as to the veracity of the statements and certification that Orleans was not affiliated with APP/SMG.**

- a. According to which criteria did the USDOC decide that the information and documents casting doubt on the veracity of the statements and certification that Orleans was not affiliated with APP/SMG were more reliable than the evidence to the effect that Orleans was not affiliated with APP/SMG?**
- b. It appears to the Panel that there was no direct evidence regarding ownership in either set of information. What prompted the USDOC to give more weight to one set of information than to the other?**
- c. What weight did the USDOC attach to the Government of Indonesia's legal framework surrounding IBRA and PPAS sales, including procedures and penalties in case the purchaser was found to be affiliated with the debtor?**
- d. What weight did the USDOC attach to the GOI's purported failure to cooperate in reaching its finding of affiliation?**

**ANSWER:**

75. The United States responds to sub-questions (a)-(d) together.

76. The criteria that USDOC relied on in considering the record evidence highlighted in sub-question (a) above are consistent with Article 12.7 of the SCM Agreement. As USDOC explained, “[t]he identification of Orleans’ shareholders is pivotal to the Department’s ability to analyze the alleged affiliation between APP/SMG and Orleans.”<sup>117</sup> In making a determination regarding who owned Orleans, USDOC considered all of the information on the record, including the information in the first bullet point in the above question.<sup>118</sup> None of these documents addressed who owned Orleans, because none of the GOI’s proffered documents provided Orleans’ ownership information.<sup>119</sup> We once again draw a distinction between positive evidence of ownership and evidence that is silent on the question. The GOI provided documents that did not definitively answer who owned Orleans, and thus did not enable an assessment of whether those owner(s) are affiliated with APP/SMG. This factor is all the more relevant because the self-certifications referred to in sub-question (a) were submitted *pro forma* to meet the bidding requirements.

77. Receipt of all these documents led USDOC to “gather more information concerning IBRA’s operations in general, specifically what types of guidelines and policies officials administering its programs were instructed to follow, focusing on the standards maintained for

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<sup>117</sup> CCP IDM at 19 (Ex. US-31).

<sup>118</sup> See CCP IDM at 18 (Ex. US-31) (identifying each of the “[r]equirements for bidding”).

<sup>119</sup> See CCP IDM at 19 (Ex. US-31).



the PPAS program.”<sup>120</sup> In other words, Article 12.7 was triggered upon receiving these documents because none of them addressed who owned Orleans. USDOC also accorded some weight to the “legal framework” surrounding IBRA and PPAs sales, in the sense that this information also influenced USDOC’s subsequent questioning regarding the IBRA’s due diligence procedures. After all, Article 3 of the IBRA regulation contained “a provision for IBRA to conduct due diligence ‘on the status of its affiliation with the Original Owner.’”<sup>121</sup>

78. In requesting additional information regarding the IBRA’s due diligence procedures – including the bidding documents for the other PPAS sales – USDOC provided the GOI with an additional opportunity to supplement the record with information pertaining to how the IBRA approached potential affiliation between bidders and debtors.<sup>122</sup> The GOI failed – twice – to provide the bidding documents for the other PPAS sales – *i.e.*, “necessary information” under Article 12.7 – within a reasonable period of time. Given that this necessary information, which could have been probative to whether the IBRA approached due diligence differently for the APP/SMG debt sale, was missing from the record, USDOC considered other information on the record. The Panel rightly highlights in its question above that other record information “raised doubts as to the veracity of the statements and certification that Orleans was not affiliated with APP/SMG.” With regard to what that information provides, the United States refers to its response to Panel Question 89(b) above.

79. In determining which record facts available it should rely on for affiliation, USDOC also weighted the GOI’s non-cooperation as a significant factor,<sup>123</sup> and relied on the news articles, World Bank report, and independent expert summary as the facts available. Placing weight upon an interested Member’s failure to cooperate with the investigating authority’s information requests, as USDOC did here, is fully consistent with Article 12.7.<sup>124</sup>

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<sup>120</sup> CCP IDM at 19 (Ex. US-31).

<sup>121</sup> See CCP IDM at 18 (Ex. US-31) (citation omitted).

<sup>122</sup> US First Panel Question Responses, para. 116.

<sup>123</sup> See CCP IDM, at 5-6, 17-20, 52-55 (Ex. US-31) (“it was reasonable to expect the GOI to be more forthcoming with this information”).

<sup>124</sup> See *US – Carbon Steel (India) (AB)*, para. 4.468 (“as part of the process of reasoning and evaluating which ‘facts available’ constitute reasonable replacements, the procedural circumstances in which information is missing, including the non-cooperation of an interested party, may be taken into account”); *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.61 (“If we were to refuse an authority to such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile”).

**Question 91: (to the United States) With respect to the USDOC's discussion with the independent expert (Exhibit US-81), during the Q&A session at the second meeting of the Panel, Indonesia asserted that neither the Indonesian interested parties nor their counsel in the USDOC proceedings were informed of the expert's credentials. Please react, and, assuming that Indonesia is correct, explain who was informed of the expert's credentials, and why interested parties were not.**

**ANSWER:**

80. The United States confirms that the credentials of the independent expert that USDOC consulted in the CFS investigation were not on the record in the CCP investigation and, thus, were not available to interested parties to the CCP investigation or to USDOC in that investigation. However, to the extent Indonesia implies that the CCP investigation thus was somehow inconsistent with WTO rules, Indonesia has no basis for any such argument. Indeed, neither Indonesia nor any other interested party expressed any concerns about the expert's credentials in their case or rebuttal briefs to USDOC. To the contrary, APP/SMG and the GOI challenged the alleged speculative nature of the independent expert's remarks in their case and rebuttal briefs before USDOC, but did not raise specific concerns with the fact that the expert's credentials were not on the record as an issue for USDOC's CCP final determination.<sup>125</sup>

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<sup>125</sup> In their case brief before USDOC, APP/SMG and the GOI simply stated that “[i]n the prior investigation, it appears that the Department formed its opinion on an affiliation between APP/SMG and Orleans based on 1) the admitted speculation of an unnamed expert; 2) and a few newspaper articles speculating that Orleans was related to APP/SMG,” and that “[s]peculation, based on allegation, supported by rumor, does not constitute substantial evidence.” See APP/SMG and GOI Case Brief (Aug. 17, 2010), at 53 (Ex. US-44). APP/SMG and the GOI made similar arguments in their rebuttal brief before USDOC.

### **3. "AS APPLIED" CLAIMS WITH RESPECT TO THE USITC'S THREAT OF INJURY DETERMINATION**

#### **3.1 Claims under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement**

#### **3.2 Claims under Article 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement**

**Question 93: (to both parties) The USITC's Final Determination indicates that APP lost the Unisource account "in 2009" and that in the "second half of 2009", APP established Eagle Ridge (USITC Final Determination, Exhibit IDN-18/US-1, pp. 24 and 29). Please indicate precisely when APP lost the Unisource account and when it established Eagle Ridge.**

**ANSWER:**

81. APP lost the Unisource account to New Page in May 2009, according to a New Page press release dated May 11, 2009.<sup>126</sup> APP opened the first two Eagle Ridge Paper locations in the United States in October 2009, and an additional eight locations during the following three months through January 2010.<sup>127</sup>

**Question 95: (to the United States) Please react to Indonesia's assertion that APP never expressed its intention to double its exports to the United States (Indonesia's opening statement at the second meeting, para. 39).**

**ANSWER:**

82. The United States has serious systemic concerns with Indonesia's assertion. First, the United States recalls that 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 U.S. market for coated paper. Second, we recall that Indonesia, and not APP, is a party to this dispute. Indonesia would not know every statement ever made by a representative of APP with respect to APP's intentions for the U.S. market. But even if Indonesia could have such knowledge, its assertion would be improper. Indonesia's statement appears to be an attempt to present oral testimony.

83. Turning to the application of the proper standard of review for a WTO proceeding, the Commission relied on positive evidence indicating that APP had expressed its intention to double exports to the United States from the levels prevailing in 2008. As the United States has

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<sup>126</sup> APP's Prehearing Brief at 60, Exhibit 11 (Exhibit US-106).

<sup>127</sup> APP's Prehearing Brief at 116 (Exhibit US-106).

explained in its written submissions and at the panel meetings,<sup>128</sup> an official from Unisource Worldwide, Inc., a leading U.S. distributor of CCP, submitted an affidavit to the Commission concerning his interactions with APP.<sup>129</sup> Importantly, the Unisource official included the following declaration at the end of his affidavit: “Pursuant to 28 U.S.C. § 1746(1), I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.” Under U.S. law, anyone who makes a declaration “under section 1746 of title 28, U.S. Code” and “willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both.”<sup>130</sup> Due in part to the criminal penalties – including possible imprisonment – for filing a false affidavit under 28 U.S.C. § 1746(1), the Commission normally considers statements contained in such affidavits to be reliable.

84. In the affidavit, the Unisource official stated that APP and Unisource had a series of communications beginning in November 2008 regarding APP’s desire to double its coated paper exports to the United States from 30,000 metric tons to 60,000 metric tons per month. As part of an effort to double its monthly sales to Unisource from 8,000-10,000 metric tons to 16,000-20,000 metric tons, APP offered to cut its prices by 2 to 5 percent, notwithstanding that its prices were already 15 percent below those of domestically produced CCP, and that U.S. consumption of CCP was anticipated to decline in 2009.<sup>131</sup> Unisource declined the offer because it believed that APP’s increased volume and reduced pricing “would significantly disrupt the market as a whole because prices would have simply collapsed.”<sup>132</sup> Soon after losing the Unisource account, APP established its own distribution network in the United States, Eagle Ridge, as a means of retaining and growing its U.S. market presence.<sup>133</sup> Both the Unisource affidavit and APP’s establishment of Eagle Ridge supported the Commission’s conclusion that subject producers not only had the ability to increase exports to the United States but also a strong interest in doing so.<sup>134</sup>

85. The Commission reasonably relied on the Unisource affidavit as “positive evidence” of APP’s intentions, within the meaning of ADA Article 3.1. The Appellate Body has interpreted “positive evidence” to mean that “the evidence must be of an affirmative, objective and

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<sup>128</sup> See U.S. First Written Submission, para. 265; U.S. Responses to Panel Questions, para. 152; U.S. Second Written Submission, paras. 132-34.

<sup>129</sup> See Petitioner’s Posthearing Brief, Exhibit 1 (Unisource Affidavit) (Exhibit US-2), cited in USITC Pub. 4192 (Exhibit US-1) at 29, 30, 34, 38.

<sup>130</sup> 18 U.S.C. § 1621(2).

<sup>131</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2).

<sup>132</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2).

<sup>133</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>134</sup> USITC Pub. 4192 (Exhibit US-1) at 28.

verifiable character, and that it must be credible.”<sup>135</sup> Under these criteria, the Unisource affidavit clearly qualified as positive evidence.

86. The Unisource affidavit was inherently credible, reliable, and trustworthy because it was made under penalty of perjury and the affiant, Unisource’s Vice President of Strategic Development and Sourcing, would have possessed knowledge of the events described in the affidavit. Furthermore, the statements in the affidavit are consistent with testimony presented at the Commission’s hearing. Indeed, the same Unisource official testified under oath at the public hearing held during the preliminary phase of the investigations that he had firsthand knowledge of APP’s efforts to increase its market share through aggressive pricing: “I have seen firsthand how Chinese producers are using aggressive pricing tactics to gain market share. . . . They seem to want to be the biggest players in our market, and they will price product aggressively to achieve that position.”<sup>136</sup> Additional support for the veracity of the affiant is found in the testimony of APP’s own witness. Before responding to a question concerning APP’s loss of the Unisource account at the same hearing, the sole industry witness for APP, an external advisor to the two largest importers of subject merchandise, indicated that the same Unisource official had been directly involved in the relevant discussions between APP and Unisource.<sup>137</sup> That the Unisource official’s sworn testimony closely mirrored the statements in his affidavit, and that APP’s own witness alluded to the Unisource official’s participation in discussions between APP and Unisource, confirmed the credibility and reliability of the affidavit. Given these corroborative statements, and the affiant’s declaration subjecting himself to criminal penalties for perjury, the Commission had ample grounds to rely on the Unisource affidavit as positive evidence of APP’s intentions in the U.S. market.

87. Indonesia’s criticisms of the Unisource affidavit in its opening statement at the second panel meeting are neither timely nor convincing.<sup>138</sup> Indonesia complains that the affidavit did not name the APP officials with whom the discussions referenced in the affidavit were held, and that the domestic industry did not accompany the affidavit with e-mails or other written evidence of the discussions.<sup>139</sup> Yet, the appropriate time for Indonesia to have raised such concerns was during the investigations, in APP’s final comments filed after submission of the Unisource affidavit, not six years later before this Panel. In APP’s final comments, counsel to APP raised

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<sup>135</sup> *US – Hot-Rolled Steel (AB)*, para. 192.

<sup>136</sup> Conference Tr. at 47 (Hederick) (Exhibit US-108). Hearings held during the preliminary phase of an investigation are conducted by Commission staff and therefore known as staff conferences.

<sup>137</sup> Conference Tr. at 180 (Hunley) (Exhibit US-108). Specifically, during an exchange with APP’s industry witness, Commission staff asked him to include in APP’s posthearing brief “any information regarding the loss of the Unisource business,” due to his expectation that “you don’t want to talk about it right now.” *Id.* at 179 (Cassise). In response, the APP witness indicated that he was willing to discuss the loss of the Unisource business at the public hearing because the Unisource official in the room, the very official who submitted the affidavit, was already familiar with the details: “Jeff Hederick is sitting in the room here. He and I know each other well. So, and it’s really not that confidential of information.” *Id.* at 180 (Hunley).

<sup>138</sup> Indonesia’s Opening Statement, para. 39.

<sup>139</sup> Indonesia’s Opening Statement, para. 39.

no such objections to the Unisource affidavit, even though they could easily have done so without disclosing confidential information to their clients.<sup>140</sup> Far from impugning the credibility of the affidavit in its final comments, APP relied on the affidavit to argue that APP lost the Unisource account for reasons other than price:

Petitioners try to rely on statements by large national distributors, but these statements - and more importantly, the actions by these distributors - contradict Petitioners' theory. Petitioners cite [a] statement by Unisource, but leave out the important detail that Unisource was describing 2007-2008, not 2009, and was describing small shifts in volume. In early 2009, Unisource switched from APP to NewPage. Subject imports cannot explain low NewPage pricing to Unisource, when APP had been eliminated as a supplier for non-price reasons.<sup>141</sup>

88. Indonesia's untimely criticism of the Unisource affidavit is belied by APP's implicit endorsement of the affidavit in its final comments. Indonesia's specific criticisms are also contradicted by the sworn conference testimony discussed above, indicating that the Unisource official who submitted the affidavit was personally involved in the relevant discussions between APP and Unisource.<sup>142</sup> The Commission had every reason to rely on the affidavit as positive evidence of APP's intentions.

**Question 97: (to the United States) The USITC's Final Determination states that "significant volumes of dumped and subsidized imports will gain additional US market share in the imminent future and material injury by reason of subject imports will occur" (USITC Final Determination, Exhibit IDN-18/US-1, p. 38).**

- a. Was the USITC concluding that increased volume of subject imports would take market share from the domestic industry in the imminent future?**

**ANSWER:**

89. Yes, the Commission recognized that the likely increase in subject import volume would take sales both from the domestic industry (as discussed immediately below), and from nonsubject imports (as discussed below in response to part (c) of this question). In the sentence excerpted by the Panel, the Commission concluded its analysis of the likely impact of subject imports on the domestic industry by finding that the significant increase in subject import volume and market share that was likely in the imminent future would materially injure the domestic industry. In drawing this conclusion, the Commission necessarily relied upon all of its preceding findings concerning the likely adverse impact of subject import volume and prices on

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<sup>140</sup> See APP's Final Comments, 16-17 (Exhibit US-105).

<sup>141</sup> APP's Final Comments, 16-17 (Exhibit US-105). We have restored the information redacted in the public version of APP's final comments because the information concerns the Unisource affidavit, which is no longer confidential. See Exhibit US-107.

<sup>142</sup> Conference Tr. at 47 (Hederick), 180 (Hunley) (Exhibit US-108).

the industry. With respect to the likely increase in subject import volume, the Commission explained that the increase would necessarily take sales from current suppliers, including domestic producers, because there would be no increase in demand that could accommodate the large volumes of subject imports that were likely in the imminent future; rather, RISI projected, apparent U.S. consumption would decline somewhat, by 3.3 percent in 2011 and another 2.5 percent in 2012.<sup>143</sup> By definition, the likely significant increase in subject import volume coupled with the likely decline in apparent U.S. consumption would result in a significant increase in subject import market share, as the Commission found.<sup>144</sup>

90. The Commission cited ample factual support for its conclusion that the significant increase in subject import volume would come in significant part at the expense of domestic producers, most notably the sheer magnitude of the increase that was likely. As the Commission explained, the massive excess capacity that subject producers were likely to possess in the imminent future, 740,000 metric tons (815,709 short tons), gave them both the ability and the incentive to increase exports to the U.S. market significantly.<sup>145</sup> Indeed, the subject producer responsible for most exports to the United States, APP, had expressed the intention to double such exports from 30,000 to 60,000 metric tons per month, and established its own distribution network, Eagle Ridge, as a means of retaining and growing its U.S. presence.<sup>146</sup> As the United States pointed out in its responses to Panel questions after the first meeting, APP's realization of its goal would have meant an increase in subject import volume of 396,831 short tons, nearly doubling the already significant volume of subject imports in 2009.<sup>147</sup> Given that nonsubject import volume that year was 363,472 short tons,<sup>148</sup> it was eminently reasonable for the Commission to conclude that the likely increase in subject import volume would take sales from domestic producers, and not just displace nonsubject imports. Other facts supported that conclusion as well. Specifically, the Commission found a moderately high degree of interchangeability between subject imports and the domestic like product, and that increased subject import volume had adversely impacted the domestic industry's U.S. shipments during the period of investigation.<sup>149</sup> Based on all of these record facts, the Commission reasonably concluded that the likely significant increase in subject import volume and market share would adversely impact the domestic industry.<sup>150</sup>

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<sup>143</sup> USITC Pub. 4192 (Exhibit US-1) at 38; Petitioner's Posthearing Brief, Question 3 to Commissioner Pinkert, Exhibit 1 (Exhibit US-4).

<sup>144</sup> USITC Pub. 4192 (Exhibit US-1) at 31.

<sup>145</sup> USITC Pub. 4192 (Exhibit US-1) at 28-29 & n.181.

<sup>146</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner's Posthearing Brief, Exhibit 1 (Exhibit US-2).

<sup>147</sup> See U.S. Responses to Panel Questions, para. 144; USITC Pub. 4192 (Exhibit US-1) at Table C-3. 30,000 metric tons equals 33,069.3 short tons. Assuming that APP sustained that intended increase for all twelve months of the year, it would have shipped an additional 396,831.6 short tons in 2009.

<sup>148</sup> USITC Pub. 492 (Exhibit US-1), at Table C-3.

<sup>149</sup> USITC Pub. 4192 (Exhibit US-1) at 26-27.

<sup>150</sup> USITC Pub. 4192 (Exhibit US-1) at 39.

91. The Commission’s conclusion that “material injury by reason of subject imports will occur” was also supported by the Commission’s analysis of the likely adverse impact of subject import prices on the domestic industry. In particular, the Commission found that significant subject import underselling was likely to continue in the imminent future, thereby increasing demand for subject imports and depressing domestic like product prices to a significant degree, based upon the pervasive subject import underselling during the period of investigation that contributed to the depression of domestic like product prices between 2008 and 2009; the likelihood that subject producers would use underselling as a means of filling their massive excess capacity and recouping market share lost during the interim period; and the attractiveness of the U.S. market to subject producers.<sup>151</sup> Given the prevalence of spot sales and the propensity for purchasers to switch suppliers quickly, the Commission explained, “subject imports will put pressure on domestic producers to lower their prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share.”<sup>152</sup>

92. Thus, the sentence excerpted by the Panel is properly understood as the conclusion of the Commission’s preceding analysis of the likely adverse impact of subject import volume and prices on the domestic industry in the imminent future.

**b. If so, what was the basis for this conclusion in light of evidence that the domestic industry's market share "increased steadily" throughout the entirety of the POI (USITC Final Determination, Exhibit IDN-18/US-1, p. 22)?**

**ANSWER:**

93. Crucially, the domestic industry’s market share gain during the period of investigation was *not* the result of increasing industry sales volume. To the contrary, the domestic industry’s sales volume *decreased*. The domestic industry’s U.S. shipments simply declined by less than the decline in apparent U.S. consumption.<sup>153</sup>

94. As explained above, the Commission had ample factual support for its finding that the likely significant increase in subject import volume, combined with the moderate decline in demand that was projected, would likely take sales from the domestic industry in the imminent future.<sup>154</sup> The Commission identified two clearly foreseen and imminent changes in circumstances making it likely that subject import competition would intensify significantly in the imminent future. First, the Commission found that the massive excess capacity that Chinese producers were likely to possess in 2011 net of increased shipments to home market and Asian

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<sup>151</sup> See USITC Pub. 4192 (Exhibit US-1) at 34-35, 38; see also United States’ FWS, paras. 242-44, 247.

<sup>152</sup> USITC Pub. 4192 (Exhibit US-1) at 34-35; see also *id.* at 29 (“Given the importance of price in purchasing decisions, aggressively prices subject imports would be able to quickly gain market share, or, alternatively, force domestic producers to lower their prices substantially in order to retain volume.”).

<sup>153</sup> USITC Pub. 4192 (Exhibit US-1) at 35-36.

<sup>154</sup> See also Responses of the United States to the Panel’s Questions Following the First Panel Meeting, paras. 137-42.



customers, equivalent to 815,709 short tons, would give them the ability and the incentive to increase their exports to the United States significantly.<sup>155</sup> 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 its own distribution network, Eagle Ridge, to retain and expand its sales in the U.S. market. These factors, combined with the significant increase in subject imports over the period of investigation and the attractiveness of the U.S. market to subject producers, supported the Commission's conclusion that subject imports were likely to increase significantly in the imminent future, beyond the levels attained during the period of investigation, at the expense of the domestic industry.

- c. Did the USITC assume that the entire market share gain by subject imports in the imminent future would be at the expense of the domestic industry's market share, as opposed to the market share of nonsubject imports? Please explain.**

**ANSWER:**

95. No. The Commission found that the likely significant increase in subject import volume would “take sales from current suppliers such as the domestic industry.”<sup>156</sup> By referencing “current suppliers,” the Commission recognized that subject imports were likely to take sales not only from the domestic industry but also from nonsubject imports, since “current suppliers” included both domestic producers and nonsubject producers. Nor was it necessary for the Commission to find that the entire increase in subject import market share would come at the domestic industry's expense for the Commission to conclude that “material injury by reason of subject imports will occur.”<sup>157</sup>

96. As explained above, the Commission based its conclusion that material injury by reason of subject imports will occur on the entirety of its analysis of the adverse impact of subject import volume and prices on the domestic industry. Through its written submissions and participation in the panel meetings, the United States has demonstrated that the Commission's threat analysis was supported by facts and clearly foreseen and imminent changes in circumstances, consistent with ADA Article 3.7 and SCMA Article 15.7.

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<sup>155</sup> USITC Pub. 4192 (Exhibit US-1) at 28 n.181. As noted in the U.S. First Written Submission, respondents own capacity projections were not significantly different from the RISI figures relied on by the Commission. The Commission took note of respondents' admission that Chinese coated paper production capacity would increase between 2009 and 2011 by an amount equivalent to approximately 75 percent of total apparent U.S. consumption of CCP in 2009, or 1.5 million short tons. USITC Pub. 4192 (Exhibit US-1) at 28. In any event, respondents themselves submitted the RISI data as exhibit 28 to their prehearing brief. USITC Pub. 4192 (Exhibit US-1) at 28 n.181.

<sup>156</sup> USITC Pub. 4192 (Exhibit US-1).

<sup>157</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

**Question 98: (to the United States) In the context of the present injury analysis, the USITC found that "failure of domestic prices to rebound significantly in interim 2010 even after subject imports largely ceased in March 2010 indicate[d] the important role that factors other than subject imports played in the market". (USITC final determination, Exhibit IDN-18/US-1, p. 33). Did the USITC take this finding into account when it concluded, in its threat of injury analysis, that subject imports would likely depress domestic prices in the imminent future?**

**ANSWER:**

97. Yes. In conducting its threat analysis, the Commission took into account all of its findings from the present material injury context, concerning the effects of subject imports on the domestic industry during the period of investigation. The influence of the Commission’s present material injury analysis over its threat analysis is reflected by the organization of the Commission’s opinion, with the volume, price, and impact sections subdivided into injury and threat subsections.<sup>158</sup> With respect to volume, price, and impact, the Commission considered the question of present material injury before addressing threat, and drew extensively from its present material injury analysis in conducting its threat analysis. For example, the Commission found that subject import underselling was likely to be significant in the imminent future in part “[b]ecause subject imports undersold domestically produced certain coated paper to a significant degree throughout the period, and particularly in 2009 when demand was depressed.”<sup>159</sup> This organization of the Commission’s opinion reflects the requirement, under ADA Article 3.7 and SCMA Article 15.7, that investigating authorities consider subject import volumes and prices during the period of investigation in projecting the likely effects of subject import volumes and prices in the imminent future. Accordingly, the Commission took into account all of its findings concerning the present price effects of subject imports, including the finding highlighted by the Panel, in its subsequent analysis of the likely future price effects of subject imports.

98. That the Commission factored the specific finding highlighted by the Panel into its conclusion that subject imports were likely to depress domestic like product prices is also clear from a careful reading of the opinion. In its analysis of subject import price effects for purposes of material injury, the Commission found that “subject imports depressed domestic prices at least to some extent” between 2008 and 2009, based on the significance of subject import underselling; evidence that low and declining subject import prices for products one and four caused domestic like product prices for the same products to decline; and purchaser reports that domestic producers lowered their prices to meet subject import prices.<sup>160</sup> Because declining demand between 2008 and 2009 and the black liquor tax credit in 2009 also “contributed importantly to lower prices,” however, the Commission was “unable to gauge whether there are

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<sup>158</sup> See USITC Pub. 4192 (Exhibit US-1) at 26-39.

<sup>159</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>160</sup> USITC Pub. 4192 (Exhibit US-1) at 32-33. The Commission also found evidence that subject imports depressed domestic prices for products 2 and 5. *Id.* at 32 n.214.

significant effects attributable to subject imports.”<sup>161</sup> It was in this context that the Commission found that “the failure of domestic prices to rebound significantly in interim 2010 even after subject imports largely ceased in March 2010 indicates the important role that factors other than subject imports played in the market.”<sup>162</sup>

99. In considering whether subject imports were likely to depress or suppress domestic prices in the imminent future, the Commission began by noting the price and demand trends at the end of the period of investigation, between interim 2009 and interim 2010.<sup>163</sup> Specifically, the Commission noted that in interim 2010, domestic prices “were relatively flat” while apparent U.S. consumption was higher than in interim 2009 but “relatively depressed compared to its earlier levels.”<sup>164</sup> Thus, as the baseline of its analysis of likely price depression or suppression, the Commission essentially reiterated its finding from the material injury context, highlighted by the Panel, that domestic prices had failed “to rebound significantly in interim 2010” (*i.e.*, “were relatively flat”) due to “factors other than subject imports” (*i.e.*, apparent U.S. consumption that remained “relatively depressed”).<sup>165</sup>

100. The Commission recognized that “sluggish demand will likely restrain price recovery to some degree” in the imminent future.<sup>166</sup> Indeed, the Commission prefaced its analysis of likely price effects by noting that “relatively depressed” consumption in interim 2010 was accompanied by “relatively flat” domestic prices, even after expiration of the black liquor tax credit in 2009 and the virtual absence of subject imports after March 2010.<sup>167</sup> Given this finding, as well as the parallel finding highlighted by the Panel, one could logically conclude that the continuation of sluggish demand into the imminent future would likely result in relatively flat domestic prices, all else being equal.<sup>168</sup>

101. As the Commission further explained, the significant increase in low priced subject imports that was likely absent antidumping and countervailing duty orders would mean that all else would not be equal, and that the increase in low priced subject imports likely would have significant adverse effects on domestic producers’ prices. Having found that significant subject import underselling was likely to continue, the Commission explained that subject producers

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<sup>161</sup> See USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>162</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>163</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>164</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>165</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>166</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>167</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>168</sup> The record indicated that a more moderate decline in apparent U.S. consumption than occurred between 2008 and 2009 need not place downward pressure on domestic prices. Specifically, between 2007 and 2008, the 7.7 percent decline in apparent U.S. consumption was accompanied by increasing domestic prices. See USITC Pub. 4192 (Exhibit US-1) at 32 & n.214 (finding that sales prices for domestically produced products 1, 2, 4, and 5 rose irregularly in 2007 through most of 2008), Table C-3.

were likely to use aggressive prices to increase their exports to the United States significantly, 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.<sup>169</sup> Noting the prevalence of spot sales and the propensity of purchasers to quickly switch suppliers, the Commission concluded that “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 and accelerated erosion of their market share,” thereby having “a significant depressing effect on domestic prices.”<sup>170</sup>

102. The Commission thus factored the finding highlighted by the Panel into its analysis of likely price depression by essentially reiterating the finding to establish the baseline for its analysis of likely price depression or suppression,<sup>171</sup> and by drawing on the finding in explaining that “sluggish demand will likely restrain price recovery to some degree” in the imminent future, as it had in interim 2010.<sup>172</sup> Having done so, however, the Commission recognized that going forward, the adverse effects of subject imports on domestic prices would likely be of a much greater magnitude than the effects of flat prices resulting from sluggish demand alone, and thus would be significant.<sup>173</sup> The Commission further explained why the likely price effects of subject imports going forward would be much more significant than they were during the POI – including massive excess capacity subject producers were likely to possess, the attractiveness of the U.S. market, and APP’s establishment of Eagle Ridge after expressing its intention to double exports to the United States by cutting prices.<sup>174</sup> Accordingly, the Commission reasonably did not conclude from the absence of an increase in domestic prices after subject imports left the market that subject imports would not have significant price effects going forward in the absence of orders. Instead, the Commission explained why changes in circumstances would cause the price effects of subject imports to be greater going forward than they were during the period of investigation.<sup>175</sup>

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<sup>169</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>170</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>171</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>172</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>173</sup> USITC Pub. 4192 (Exhibit US-1) at 34-35, 38-39.

<sup>174</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>175</sup> USITC Pub. 4192 (Exhibit US-1) at 34-35, 38-39.

### 3.3 Claims under Article 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement

**Question 99: (to the United States) Please react to the arguments that Indonesia made in paras. 51-53 of its opening statement at the second meeting in support of its "as applied" claims under Articles 3.8 and 15.8.**

**ANSWER:**

103. Indonesia added nothing new to its “as applied” claims under ADA Article 3.8 and SCMA Article 15.8 in its opening statement at the second panel meeting, asserting that “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.”<sup>176</sup> This assertion underscores that 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.<sup>177</sup> 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 under ADA Article 3.8 and SCMA Article 15.8.

104. Indonesia also reprises its argument that, regardless of how the Panel rules on its claims of “specific violations,” the Panel should nevertheless find that the Commission violated the special care requirement “by resolving all key issues against respondents.”<sup>178</sup> This argument makes no sense. As the United States pointed out in its second written submission, 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 antidumping or countervailing duty investigation in favor of respondents instead of resolving each based on analysis of the facts and application of the applicable legal standards.<sup>179</sup> Given this, the only way that the Commission’s “resolution of all key issues against respondents” could breach the special care requirement under Articles 3.8 and 15.8 would be if the Commission’s resolution of those issues were inconsistent with ADA Articles 3.5 and 3.7 and SCMA Articles 15.5 and 15.7.

105. In its opening statement for the second panel meeting, Indonesia supported its “special care” claim by arguing that the Commission lacked factual support for its analysis of vulnerability, the black liquor tax credit, nonsubject imports as an “other known factor,” Eagle Ridge, excess capacity in China, the likelihood of subject producers seeking to use aggressive pricing to regain market share lost in interim 2010, and demand as an “other known factor.”<sup>180</sup> These are not

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<sup>176</sup> Indonesia’s Opening Statement, Second Panel Meeting, para. 51.

<sup>177</sup> See Indonesia’s Opening Statement, First Panel Meeting, para. 75.

<sup>178</sup> Indonesia’s Opening Statement, Second Panel Meeting, para. 52.

<sup>179</sup> United States’ SWS, para. 148.

<sup>180</sup> Indonesia’s Opening Statement, Second Panel Meeting, para. 52.

“additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations.”<sup>181</sup>

106. As the United States explained at the second meeting of the Panel with the parties, to the extent that Indonesia is attempting at this point to assert any independent argument with respect to the Commission’s analysis of any of the subjects discussed above, the moment for doing so in this proceeding has long passed. The basis for allegations of breach of a WTO discipline must be articulated in the complaining Member’s first written submission – allowing for meaningful written response and discussion at the Panel meetings.<sup>182</sup> The basis should not be articulated in the complaining Member’s oral statement at the second panel meeting. But in any event, as the United States demonstrated in its response to the claims under ADA Articles 3.5 and 3.7 and SCMA Articles 15.5 and 15.7, the Commission cited ample factual support for its analysis of each of these issues.<sup>183</sup>

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<sup>181</sup> *US – Softwood Lumber VI (Panel)*, para. 7.34.

<sup>182</sup> *See Dispute Settlement Understanding*, Appendix 3, para. 4 (“Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.”); Working Procedures of the Panel, para. 6 (noting that “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” and that the second written submission constitutes a “rebuttal”); *US – Washing Machines (Panel)*, para. 7.82.

<sup>183</sup> With respect to the argument, raised for the first time in Indonesia’s opening statement at the first panel meeting, that the Commission somehow “ignored the questionnaire data it gathered from Chinese producers” (*see* Indonesia’s Opening Statement at the Second Panel Meeting, para. 41; Indonesia’s Closing Statement at the Second Panel Meeting, para. 52) the United States notes that this claim is likewise without merit. Contrary to Indonesia’s argument, the Commission took note of the Chinese producers’ own projections that their new capacity would be 1.5 million short tons, only slightly less than the 1.8 million short tons predicted by RISI, and equivalent to 75 percent of total U.S. consumption in 2009, and explained that this amount would be “substantial.” USITC Pub. 4192 (Exhibit US-1) at 28 & n180. The Commission also recognized that subject producers took the position that most of their new capacity would be filled with increased shipments to home market customers, but found this projection unrealistic in light of other evidence, specifically RISI data. USITC Pub. 4192 (Exhibit US-1) at 28.

The Commission reasonably assessed Chinese excess capacity using RISI data, notwithstanding its recognition that RISI’s definition of coated paper was “likely to be somewhat broader than the paper defined by Commerce’s scope.” USITC Pub. 4192 (Exhibit US-1) at 28 & n181. As the Commission explained, RISI was an information provider for the forest products industry that both petitioners and respondents relied upon. USITC Pub. 4192 (Exhibit US-1) at 28. Indeed, respondents themselves provided these data to the Commission, as exhibit 28 to their prehearing brief. USITC Pub. 4192 (Exhibit US-1) at 28 & n181. RISI data was also comprehensive, with capacity projections covering the entire Chinese industry and consumption projections covering every major market in Asia, including China. *See* USITC Pub. 4192 (Exhibit US-1) at 28 n.181 (citing Respondents’ Prehearing Brief at Exhibit 28 (Exhibit US-106)). By contrast, the Commission’s foreign producer questionnaire responses covered only a subset of the Chinese industry, and reported projected shipments to home market and Asian customers but not projected consumption in China and Asia. *See* USITC Pub. 4192 (Exhibit US-1) at VII-2, table VII-2. Accordingly, the Commission reasonably relied on the more comprehensive RISI data, provided by respondents, while recognizing that Chinese producers own data also constituted positive evidence that Chinese producers would likely possess the ability to increase their shipments to the U.S. market significantly in the imminent future. USITC Pub. 4192 (Exhibit US-1) at 28.

The United States appropriately relied on questionnaire responses in rebutting Indonesia’s speculative claim that Chinese producers might have filled their massive excess capacity, 740,000 metric tons, with increased

107. Indonesia’s arguments in paragraphs 51-53 of its opening oral statement highlight an additional point emphasized by the United States at the second meeting: that Indonesia’s claims rest on the patently incorrect proposition that the Commission should have considered the import of individual facts in isolation, instead of assessing what the evidence shows when viewed in totality. In fact, Indonesia’s theory of Article 3.8 and 15.8, illustrated by the argument in the oral statement, seems to be that special care requires such disjointed analysis. In other words, Indonesia’s view seems to be that if any subset of facts could be plucked from the record and taken in isolation as suggestive of lack of threat – without consideration of countervailing or contextualizing facts – special care requires the investigating authority to do so, and then to repeat with any other subsets of facts that could be selected and decontextualized so as to appear to mitigate against threat. But the ADA and SCMA explicitly explain that investigating authorities should consider all relevant evidence before the authorities<sup>184</sup> and should consider the totality of factors bearing on the existence of injury or threat without taking any to give decisive guidance in and of itself.<sup>185</sup> The special care provisions clearly do not provide for disjointed and decontextualized analysis when Articles 3 and 15 – as well as simple logic – make clear the need for the investigating authority to consider the record as a whole.

108. As the United States has explained repeatedly throughout this proceeding, it is clear that the Commission’s analysis of all of the issues mentioned in paragraphs 51-53 of Indonesia’s opening statement is amply supported when the facts and the Commission’s determination is considered as a whole. More importantly, it clear that the Commission’s analysis of the ultimate question – whether subject imports threatened material injury – is amply supported when the determination is considered as a whole. Indonesia’s factual arguments are as unfounded as its apparent view of what the special care provision entails.

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exports to third country markets outside of Asia. *See* U.S. Responses to Panel Questions, para. 154. Specifically, the United States pointed out that responding Chinese producers themselves did not project a significant increase in their exports to third country markets outside of Asia through 2011, in the event that orders impeded their access to the U.S. market. *See* U.S. Responses to Panel Questions, para. 154. The United States did not “mix and match” the data, as Indonesia claims (*see* Indonesia’s Opening Statement, para. 41; Indonesia’s Closing Statement, para. 52), because RISI provided no projection of Chinese industry exports of coated paper to third country markets outside of Asia. *See* Indonesia’s Opening Statement, para. 41; Indonesia’s Closing Statement, para. 52. Rather, the United States simply cited the only record evidence directly relevant to Indonesia’s claim to demonstrate that the claim was inconsistent with the record before the Commission.

<sup>184</sup> ADA Article 3.5; SCMA Article 15.5.

<sup>185</sup> ADA Article 3.7; SCMA Article 15.7.

#### **4. "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**

**Question 100: (to the United States) Please explain the operation of the "tie vote" rule (19 U.S.C. § 1677(11)), in particular, the various potential scenarios as to how the Commissioners may vote in a given investigation. Please walk the Panel through the process.**

**ANSWER:**

109. The Commission holds a public briefing and vote in its antidumping and countervailing duty investigations.<sup>186</sup> The vote date is announced to the public through publication in the U.S. Federal Register.<sup>187</sup> Prior to the vote date, each Commissioner independently conducts a detailed and thorough review of the record in the investigation. On the vote date, role is taken and each Commissioner announces his or her vote for each subject country and for each domestic industry that he or she has determined to produce domestic like products. The Commission Secretary then tallies the votes and announces for each country and each domestic industry whether the Commission's institutional determination is affirmative or negative.

110. In making their individual assessments, each Commissioner first considers whether the evidence demonstrates present material injury by reason of the subject imports.<sup>188</sup> Any Commissioners who answer this question in the affirmative will reach an affirmative present material injury determination. Any Commissioners who do not find present material injury will proceed in their analysis to determine whether the evidence demonstrates that a domestic industry is threatened with material injury by reason of the subject imports.<sup>189</sup> For example, in the *Coated Paper* investigation that is the subject of this dispute, one Commissioner reached an affirmative present material injury determination.<sup>190</sup> The five other Commissioners were unable to find a "sufficient causal nexus necessary to make the determination that the subject imports are currently having a significant adverse impact on the domestic industry,"<sup>191</sup> and as result they proceeded to analyse whether the domestic industry was threatened with material injury by reason of the subject imports in the imminent future. If a Commissioner finds neither present nor threatened material injury, that Commissioner will reach a negative determination. All Commissioners provide a full explanation of their Views in the Commission's published

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<sup>186</sup> See, generally, 19 C.F.R. Part 201, Subpart E (Exhibit US-114).

<sup>187</sup> 19 C.F.R. 201.35(e)(2)(iii) (Exhibit US-114).

<sup>188</sup> See 19 U.S.C. §§ 1677(7)(A)-(E) (Exhibit US-12).

<sup>189</sup> See 19 U.S.C. § 1677(7)(F) (Exhibit US-12)

<sup>190</sup> See Separate Views of Commissioner Charlotte R. Lane, USITC Pub. 4192 (Exhibit US-1) at 41-47.

<sup>191</sup> USITC Pub. 4192 (Exhibit US-1) at 38.



determination, whether they vote in the affirmative or negative, and whether or not they join the majority.

111. With respect to the vote regarding subject imports from any particular country, there are only a limited number of scenarios in which the “tie vote” rule could come into play. Assuming there is a full Commission complement and no Commissioner is recused from the investigation,<sup>192</sup> the tie vote rule would apply only if there was a three-three split between affirmative and negative votes.<sup>193</sup>

**Question 102: (to the United States)**

- a. Which agency (USITC, USDOC, other) decides the "application" of countervailing or anti-dumping duties? Please walk the Panel through the process.**

**ANSWER:**

112. In the United States, an antidumping or countervailing duty investigation is typically initiated based on a petition filed by the domestic industry.<sup>194</sup> USDOC determines whether dumping or countervailable subsidization is occurring. The USITC determines whether such dumping or countervailable subsidization is causing injury or threat of material injury to the domestic industry. Thus, both the USITC and USDOC play a role in determining whether an antidumping or countervailing duty order should be imposed in order to remedy material injury suffered by the domestic industry as a result of dumped or subsidized imports.

113. Each agency first makes a preliminary determination. The USITC issues a preliminary injury determination before USDOC issues its preliminary determination of dumping or subsidization.<sup>195</sup> If the USITC's preliminary injury determination is negative, then the USITC's and USDOC's investigation “shall be terminated.”<sup>196</sup> However, if the USITC's preliminary injury determination is affirmative, then USDOC will preliminarily determine whether there is above *de minimis* dumping or countervailable subsidization.<sup>197</sup> Provided that both the USITC's and USDOC's preliminary determinations are affirmative, USDOC will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation (i.e., the final assessment of duties) for entries of merchandise subject to the scope of the investigation and to require a deposit for each

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<sup>192</sup> On occasion, Commissioners will recuse themselves from a particular investigation, usually to avoid any appearance of a conflict of interest. See 18 U.S.C. § 208 (Exhibit US-110).

<sup>193</sup> 19 U.S.C. § 1677(11)(B) (Exhibit US-12).

<sup>194</sup> 19 U.S.C. §§ 1671a(b)-(c) (Exhibit US-54); 19 U.S.C. §§ 1673a(b)-(c) (Exhibit US-58).

<sup>195</sup> 19 U.S.C. § 1671b(a) (Exhibit US-55); 19 U.S.C. § 1673b(a) (Exhibit US-59).

<sup>196</sup> 19 U.S.C. § 1671b(a)(1) (Exhibit US-55); 19 U.S.C. § 1673b(a)(1) (Exhibit US-59).

<sup>197</sup> 19 U.S.C. § 1671b(b)(1) (Exhibit US-55); 19 U.S.C. § 1673b(b)(1) (Exhibit US-59).

entry.<sup>198</sup> If USDOC’s preliminary determination is negative, then no cash deposits are collected, but both agencies’ investigations continue.

114. Provided that the USITC has issued an affirmative preliminary injury determination, each agency will issue its final determination. USDOC issues its final determination first.<sup>199</sup> If USDOC’s final determination is affirmative, USDOC instructs CBP to require a deposit for each entry of merchandise subject to the scope of the investigation.<sup>200</sup> The USITC then makes its final injury determination.<sup>201</sup> After the USITC votes, as described above in response to Question 100, it reports its determinations to USDOC. If either the USITC’s or USDOC’s final determinations are negative, then USDOC’s and the USITC’s investigations “shall be terminated” and USDOC will instruct CBP to terminate suspension of liquidation and refund any deposits that were collected.<sup>202</sup> However, if USDOC and the USITC both reach affirmative final determinations, an antidumping or countervailing duty order will be issued by USDOC.<sup>203</sup> USDOC will then instruct U.S. Customs and Border Protection to collect cash deposits on entries of merchandise subject to the order equivalent to the estimated antidumping or countervailing duty rates determined in USDOC’s final determination.<sup>204</sup>

115. The United States would emphasize that the process detailed above for imposing countervailing duties under the U.S. system in no way supports Indonesia’s as such challenge to the U.S. statute governing ITC voting rules. As the United States has amply explained throughout this dispute, to the extent the special care provision applies to process used in the ITC’s threat of injury determination, it would be satisfied through the application of special care in the substantive analysis of the Commission’s determination. The provision would not apply to, or say anything about, the procedure by which the views of individual Commissioners are aggregated. Accordingly, regardless of the answer to question 102(a), there would be no basis for a “special care” challenge to a Commission voting procedure, such as the tie vote rule.

116. As discussed in the U.S. answers to panel question 59, the special care provision does apply to the substantive analysis in an injury determination, as evidenced by various considerations. And nothing about the tie vote rule precludes the Commission from applying special care because nothing about the tie vote rule affects the substantive analysis of threat of injury undertaken by the Commission, and by each Commissioner individually. In fact, the U.S. Congress has made clear that the Commission is *required* to apply special care when making determinations of threat of injury. Following the Uruguay Round, when amending U.S. law to more closely track ADA Article 3.7 and SCMA Article 15.7, the committee of the U.S. House of

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<sup>198</sup> 19 U.S.C. § 1671b(d) (Exhibit US-55); 19 U.S.C. § 1673b(d) (Exhibit US-59).

<sup>199</sup> 19 U.S.C. § 1671d(a)(1) (Exhibit US-56); 19 U.S.C. § 1673d(a)(1) (Exhibit US-60).

<sup>200</sup> 19 U.S.C. § 1671d(c)(1) (Exhibit US-56); 19 U.S.C. § 1673d(c)(1) (Exhibit US-60).

<sup>201</sup> 19 U.S.C. § 1671d(b) (Exhibit US-56); 19 U.S.C. § 1673d(b) (Exhibit US-60).

<sup>202</sup> 19 U.S.C. § 1671d(c)(2) (Exhibit US-56); 19 U.S.C. § 1673d(c)(2) (Exhibit US-60).

<sup>203</sup> See 19 U.S.C. § 1671d(c)(2) (Exhibit US-56); 19 U.S.C. § 1673d(c)(2) (Exhibit US-60).

<sup>204</sup> See 19 U.S.C. § 1671e(a)(3) (Exhibit US-57); 19 U.S.C. § 1673e(a)(3) (Exhibit US-61).

Representatives considering the U.S. implementing legislation for the WTO Agreement, known as the Uruguay Round Agreements Act ("URAA"), explained in its report that the URAA "makes conforming changes to section 771(7)(F)(ii) of the [Tariff] Act requiring that further dumped or subsidized imports must be 'imminent' and that 'material injury would occur' absent relief. . . . Because of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such determinations as provided in the Agreements."<sup>205</sup> Moreover, a Statement of Administrative Action was approved by the U.S. Congress along with the URAA, and under U.S. statute the Statement of Administrative Action constitutes "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."<sup>206</sup> In that Statement of Administrative Action, Congress emphasized that "[b]ecause of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such determinations as provided in the Agreements."<sup>207</sup>

117. Accordingly, the question of what decision constitutes the "application" of duties does not govern the outcome of Indonesia's as such claim – regardless of which decision amounts to application of duties, the special care provision does not speak to the procedure for aggregating the views of investigating authority members on the subject of threat of injury.

**b. Is there a possibility that duties will not be applied if the USITC made an affirmative threat of injury determination? If so, who makes that decision?**

**ANSWER:**

118. See answer to question 102(a).

**Question 103: (to both parties) Do you agree that the tie vote rule would find application where the facts on record are such that the decision one way or the other is very finely balanced, in other words, the facts could support either a positive or a negative threat of injury determination, and reasonable minds may differ on whether the domestic industry is threatened with injury or not? Given the "special care" language, in such a situation, should the outcome not be that the authorities do not impose duties?**

**ANSWER:**

119. The WTO obligation at issue 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. Had the

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<sup>205</sup> H.R. REP. 103-826(I), H.R. REP. 103-826, H.R. Rep. No. 826(I), 103rd Cong., 2nd Sess. 1994, 1994 U.S.C.C.A.N. 3773, 1994 WL 548728 at \*70 (Exhibit US-115).

<sup>206</sup> 19 U.S.C. § 3512(d) (Exhibit US-111).

<sup>207</sup> Statement of Administrative Action for the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I at 855 (1994) (Exhibit US-116).

drafters of the ADA and SCMA desired to require negative determinations in situations with finely balanced facts, they would have so stated explicitly.

120. Indeed, deciding with special care in the context of finely balanced facts does not necessarily 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. In the context of a situation involving finely balanced facts, this means thinking carefully about the decision and evaluating relevant considerations thoroughly to reach a conclusion about whether the finely balanced facts point slightly more in the direction of threat or slightly more in the direction of an absence thereof. 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.

121. As discussed in prior U.S. submissions, each Commissioner of the USITC applies special care in his or her analysis of threat. Accordingly, regardless of the final vote tally, each Commissioner who addressed threat has done so with special care. The underlying facts that yielded the tie vote might or might not be “finely balanced.” Some sets of evidence could support a wide spectrum of views – particularly where contradictory evidence or testimony requires choices about which documents or statements to credit and which to reject. Some tie votes thus could reflect the fact that three Commissioners concluded, after application of special care, that the evidence in support of a threat finding is overwhelming, while three concluded that the evidence was barely insufficient to support a finding of threat, or that they had just enough doubt about which evidence to credit that they would decline to find threat.

122. Turning to the second sentence of the Panel question, the answer is a clear “no.” The second sentence suggests a legal theory that cannot be supported under the text of the SCM Agreement and under the standard of review for an “as such” claim to a statutory provision. The theory suggested by this second sentence has two fundamental flaws – above and beyond the interpretive question (which the United States has explained at length, including by citing relevant Appellate Body findings) that ADA Article 3.8 and SCMA Article 15.8 do not apply to voting procedures.

123. First, and most fundamentally, the theory in the second sentence does not respect the language of 3.8/15.8 and the nature of an as-such claim. To prevail on an as-such claim, the complaining Member has the burden of establishing that the statute **mandates** a WTO-inconsistent result, and that absolutely no discretion is providing to administering authorities to take decisions that comply with WTO rules.<sup>208</sup> The second sentence of the question posits that this discretion is not afforded in the case of tie vote on threat. But this theory not consistent with the text of Article 15.8. To recall, Article 15.8 states:

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<sup>208</sup> See, e.g., *US – Carbon Steel (India) (AB)*, paras. 4.464, 4.470, 4.482.

With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

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. The agreement does not state, for example, as follows:

With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care *in all steps of the consideration and decision process.*

124. To be sure, and as explained further below, the United States does not agree with the proposition that a tie-breaking rule involves any sort of care at all – special or non-special, it is just a tie-breaking rule. But in terms of this particular flaw in the theory, the point is this: 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 Article 15.8.

125. Indeed, the U.S. statute at issue does not forbid the Commissioners from exercising special care in their threat determinations. Rather, it only applies to one single step in the overall process of determining whether to find threat of injury. Accordingly, and leaving aside for the moment that a tie breaking rule does not involve “special care” or “regular care”, the U.S. statute cannot be in breach of Article 15.8, because the statute fully allows the decisionmakers to apply “special care” in every other aspect of the process.

126. As described above, the United States in implementing the Uruguay Round Agreements carefully considered this special care provision, and decided that the way the United States would choose to meet this obligation was to exercise special care in the deliberations of each Commissioner. Given that Article 15.8 requires that special care should be used, but does not mandate its use in each and every step of the process, this decision by the United States was reasonable and fully consistent with the text of the Agreement.

127. Any finding that Article 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. Or put another way, such a finding would breach the fundamental DSU requirement that DSB rulings “cannot add to or diminish rights and obligations provided under the covered agreements. DSU Article 3.2; *see also* DSU Article 19.2 (explicitly applying this requirement to panels and the Appellate Body).

128. In this regard, the United States would emphasize that the tie vote rule was in existence at the time of the Uruguay Round Agreements, and well before. It has never been found WTO-inconsistent, or even been challenged, in the over 20-year history of the WTO. It simply 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. This is especially the case in a dispute, such as this one, where the issue is not even raised by the facts of the determination at issue. As the Panel is well aware, and as Indonesia agrees, in the determination at issue there was no tie vote, and accordingly 19 U.S.C. § 1677(11)(B) did not even apply.

129. Second, there is nothing about a rule requiring that a tie vote be considered either affirmative or negative that in any precludes the application of special care. It is simply an administrative rule to handle a voting pattern that may occur from time to time. Nothing about the rule even bears on the care applied in the analysis of existence of threat – let alone has an impact preclusive of careful analysis of either underlying facts or the ultimate question of whether injury is threatened. Indeed, in the case of the USITC, each Commissioner will have already completed the process of considering different facts and deciding whether they establish the existence of a threat of material injury prior to casting a vote. Each Commissioner will have had an opportunity to (and, as established above, will have taken that opportunity to) apply special care in so doing. Regardless of the number of affirmative votes, moreover, in the event of an affirmative determination of threat of injury, the relevant special care will be reflected in the written determination. Because determinations of threat of injury made by three ITC Commissioners can certainly reflect special care – and because whether threat determinations reflect special care is unrelated to any administrative rule governing the handling tie votes – the tie vote provision is certainly not inconsistent as such with the special care provisions of the ADA or SCMA.

130. As the United States has explained extensively in this proceeding, the “special care” provisions of the ADA and SCMA do not discipline decision-making procedure. However, the above shows that 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. Rather, the rule would be satisfied in any particular case provided that the requisite analytical rigor had been applied. Accordingly, the Panel could choose not to reach the question of whether ADA Article 3.8 and SCMA Article 15.8 necessarily do or do not cover decision-making procedure. The Panel could instead simply conclude that the tie vote rule is not necessarily inconsistent with the “special care” discipline, and that accordingly Indonesia’s claim should be dismissed.

**Question 104: (to both parties) Would Articles 3.8 and 15.8 apply differently to a Member where the decision to apply duties automatically follows from the determination concerning the substantive requirements to find injury vs. a Member where there is some discretion whether to apply duties following an affirmative decision on the substantive requirements?**

**ANSWER:**

131. No. Regardless of whether a Member’s application of duties follows automatically from a positive determination concerning the substantive requirements for injury or threat, or whether the Member has discretion whether to apply duties following an affirmative determination on the

substantive requirements, Articles 3.8 and 15.8 apply only to the substantive analysis of whether injury is threatened. The United States has elsewhere explained why numerous considerations, including the placement of the special care discipline in Articles 3 and 15 (“Determination of Injury”), dictate this understanding of the discipline.

132. Consistent with the U.S. response to question 103, however, Indonesia’s claim can be rejected without reaching many questions about the scope of the special care provision. This includes the question of whether the provision applies differently depending on whether a Member’s imposition of duties follows automatically from a threat determination. Whether the special care provision applies in the same way or differently in these two different systems, there would be no reason why any particular resolution of tie vote situations would be necessary to ensure that the special care requirement had been met. In other words, any differences or similarities in the application of the special care provision in these two different types of national systems would not affect the resolution of the question actually presented by Indonesia’s claim here – concerning the ITC’s resolution of tie votes on threat of injury.

133. All of the previously-discussed indicia that the special care discipline applies to substance show that, whether applied to different Members’ systems differently (i.e., to the last decision before the application of duties) or in the same manner to all Members, a special care discipline still would not cover the procedure used to aggregate the views of decision-makers evaluating threat. Indeed as discussed in response to question 103, on its face, a requirement to consider and decide the application of duties with special care is satisfied by means of substantively thorough and careful analysis. Nothing about the U.S. system’s application of duties following a threat determination in any way suggests that this would not be the case with respect to the U.S. system. Thus, the Panel can reject Indonesia’s challenge without need to address the query posed in question 104.