

***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 FIRST PANEL MEETING**

**January 4, 2017**

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<b>Exhibit</b>	<b>Citation</b>
Exhibit US-91 [ <b>BCI</b> ]	APP/SMG Initial Questionnaire Response (Dec. 29, 2009)
Exhibit US-92 [ <b>BCI</b> ]	APP/SMG Supp. Questionnaire Response, Part One (Feb. 16, 2010)
Exhibit US-93 [ <b>BCI</b> ]	Calculation Memorandum for the Final Affirmative Countervailing Duty Determination at 2 (Sept. 20, 2010)
Exhibit US-94	Petitioners' Postconference Brief and Answers to Questions from Staff, Response to Staff Question 6
Exhibit US-95	APP's Prehearing Brief, selected pages
Exhibit US-96	19 U.S.C. 1671d(d)
Exhibit US-97	19 U.S.C. 1673d(d)
Exhibit US-98	U.S. Court of International Trade Rule 73.2
Exhibit US-99	Federal Rule of Appellate Procedure 10(a)(1)

## TABLE OF REPORTS

SHORT FORM	FULL CITATION
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R, 2013 and Add.1, adopted 25 September 2013
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>Japan – DRAMs (Korea) (Panel)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, 2007, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R
<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 – Countervailing Duty Investigation on DRAMs (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R
<i>US – Countervailing Duty Investigation on DRAMs (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, 2005, adopted 20 July 2005
<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 – Countervailing Measures on Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003

<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 – Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<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

## 1 GENERAL

**Question 2: (to the United States) Please identify what evidence on the record of the CFS investigation(s) and determinations in the CFS investigation(s) were part of the record in the coated paper investigation.**

**ANSWER:**

1. We identify key documents below from the prior CFS investigation that were placed on the CCP investigation record.
2. Certain documents from the prior CFS investigation were placed on the record of the CCP investigation by interested parties. For example, at the beginning of the investigation, the CFS final determination was included in the domestic petitioners' application in support of their countervailable subsidy allegations.<sup>1</sup> Additionally, in their application in this case, petitioners included USDOC's post-preliminary analysis from the CFS investigation regarding the two subsidy programs related to the IBRA.<sup>2</sup> Finally, in their factual information submission dated June 21, 2010, petitioners provided a copy of the public memorandum in which USDOC initiated an investigation of the two programs related to the IBRA in the CFS investigation, which summarized the evidence supporting those subsidy allegations.<sup>3</sup>
3. Additional documents from the CFS investigation were integrated into the record of the CCP investigation by APP/SMG and the GOI. In one instance, the GOI provided excerpts from a CFS questionnaire response instead of drafting a new response to USDOC's inquiries about the IBRA programs.<sup>4</sup> This is the only instance USDOC has identified where either the GOI or APP/SMG placed excerpts from its prior questionnaire responses in the CFS investigation on the record of the CCP case. Other pieces of evidence from the CFS record were placed on the CCP record at USDOC's request. APP/SMG placed the calculation memorandum for APP/SMG from the CFS investigation was on the CCP record.<sup>5</sup> Regarding other such submissions, the United

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<sup>1</sup> See Initiation Checklist (Ex. US-75) at 12 (referencing that a copy of the CFS final determination and accompanying I&D memorandum were included in the application). These documents are on the Panel record at Exs. US-74 and US-43, respectively.

<sup>2</sup> Application at Exhibit 14 (CFS new subsidy allegation analysis memo). This document is not currently on the Panel record.

<sup>3</sup> See Petitioners' Factual Information Submission at Exhibit 20 (CFS new subsidy allegation initiation memo). Excerpts of this factual information submission are on the Panel record at Exhibit US-40. However, Exhibit 20 to that document is not excerpted in the exhibit before the Panel.

<sup>4</sup> See GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 31. Although excerpts from this GOI questionnaire response are on the Panel record at Exhibit US-32, Exhibit 31 to that response is not part of Exhibit US-32.

<sup>5</sup> See APP/SMG Initial Questionnaire Response (Dec. 29, 2009) at Exhibit 65. Exhibit 65 to this questionnaire response is not currently on the Panel record. However, it is referred to in the CCP Preliminary Determination. See CCP Preliminary Determination, 75 Fed. Reg. at 10,771 (Exhibit US-48) ("At our request, APP/SMG placed the calculation memorandum from *Indonesia CFS Final Determination* on the record of the instant investigation). Because this document contained proprietary information belonging to APP/SMG, it was necessary for APP/SMG, itself, to release it on the CCP record.



States draws the Panel’s attention to footnote 7 in the CCP Preliminary Determination. There, USDOC explained that:

In the coated free sheet paper investigation (hereinafter referred to as the CFS investigation or CFS), APP/SMG was also the sole respondent, and all of the used programs examined in the CFS investigation were alleged in the current investigation of CCP. The [period of investigation] in CFS was calendar year 2005. Because the programs and company in this investigation mirror the programs and company under investigation in CFS, we requested that the GOI and APP/SMG place on the record of this investigation the following documents from the CFS investigation: all verification reports as well as certain verification exhibits (on the record as Exhibits 32-33 of GOI Initial Questionnaire Response, dated December 29, 2009 and Exhibits 2-9 of APP/SMG Supplemental Questionnaire Response, dated February 16, 2010); business proprietary memoranda pertaining to cross-ownership and the subsidy calculations, including benchmarks (on the record as Exhibit 65 of APP/SMG Initial Questionnaire Response, dated December 29, 2009 and Exhibit 1 of APP/SMG Supplemental Questionnaire Response, dated February 16, 2010).<sup>6</sup>

4. As noted in the quoted passage, the GOI provided its complete verification report from the CFS investigation, as well as certain verification exhibits.<sup>7</sup> APP/SMG provided the business proprietary version of the CFS cross-ownership memorandum and excerpts from the verification reports and exhibits pertaining to itself and certain affiliates.<sup>8</sup> APP/SMG also provided another copy of the CFS Issues and Decision Memorandum, which was already on the CCP record as an exhibit to petitioners’ application.<sup>9</sup> With regard to the above-listed documents from the CFS investigation that are on the CCP record, USDOC explained in the CCP Preliminary Determination that “[w]here appropriate and necessary, we have relied on these documents as well as all of the information in the GOI’s questionnaire responses to reach this preliminary determination.”<sup>10</sup> In addition, the memorandum summarizing USDOC’s meeting with an independent expert in the CFS investigation, was also placed on the record of the CCP investigation by APP/SMG.<sup>11</sup>

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<sup>6</sup> CCP Preliminary Determination, 75 Fed. Reg. at 10,764 n.7 (Exhibit US-48).

<sup>7</sup> See GOI Initial Questionnaire Response (Dec. 29, 2009) at Exhibit 32 (GOI CFS verification report), and Exhibit 33 (GOI CFS verification exhibits re: IBRA programs). Although portions of this questionnaire response are excerpted at Exhibit US-32, Exhibits 32 and 33 are not part of the Panel record.

<sup>8</sup> See APP/SMG First Supplemental Questionnaire Response, Part I (Feb. 16, 2010) at Exhibit 1 (CFS cross-ownership memo), Exhibit 2 (CFS verification report excerpts re: cross-ownership and IBRA programs), Exhibit 3 (CFS verification exhibits re: cross-ownership and IBRA programs), Exhibit 4 (CFS forestry company verification report excerpts), Exhibit 5 (CFS forestry company verification exhibits), Exhibit 6 (CFS pulp producer verification report), Exhibit 7 (CFS pulp producer verification exhibits), Exhibit 8 (PD, TK, and CMI verification report excerpts), and Exhibit 9 (PD, TK, and CMI verification exhibits). These documents are not on the Panel record.

<sup>9</sup> See APP/SMG Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 1. This document is not on the Panel record.

<sup>10</sup> CCP Preliminary Determination, 75 Fed. Reg. at 10,764 n.7 (Exhibit US-48).

<sup>11</sup> See CCP Preliminary Determination, 75 Fed. Reg. at 10,772 & n.10 (Exhibit US-48) (referring to “Memorandum to the File from Dana S. Mermelstein, Program Manager: *Countervailing Duty Investigation of Coated free Sheet*

5. Finally, because the company respondent and many of the programs under examination in the CCP investigation were identical to the company respondent and the programs under examination in the CFS investigation, a large portion of the CCP record is the same as or similar to the earlier CFS record (*i.e.*, incorporation documents, implementing regulations, and other static documents that would not change across periods of review). For example, GOI Regulation SK-7/BPPN/0101, governing the IBRA’s operations, was on the record of both investigations.<sup>12</sup> The World Bank report and several newspaper articles that were relevant to the debt buy-back were also on the record of both investigations.<sup>13</sup>

6. Again, because these documents were placed on, and formed part of the record of, the underlying investigation, they were considered in USDOC’s final and preliminary determinations in this investigation.<sup>14</sup>

## 2 UNITED STATES' REQUEST FOR A PRELIMINARY RULING

**Question 3: (to the United States) Please confirm the United States' statement in paragraph 6 of its opening statement at the first meeting of the Panel to the effect that, provided that the Panel finds that Indonesia has advanced no claim pursuant to Article 1.1(a) of the SCM Agreement, it no longer seeks a ruling from the Panel that certain of Indonesia's arguments are outside the Panel's terms of reference and that it no longer asks that the Panel issue a ruling to this effect prior to the issuance of its Report.**

### **ANSWER:**

7. As explained in the U.S. first written submission, we submit that Indonesia’s arguments on benefit and specificity with respect to the log export ban<sup>15</sup> involve only financial contribution as defined in Article 1.1(a) of the SCM Agreement.

8. Had Indonesia merely *cited* cases discussing financial contribution by analogy and then connected them to substantive and germane arguments concerning the use of an out of country

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*Paper from Indonesia: Meeting with an Independent Expert*, dated August 24, 2007, on the record as Exhibit 52 of APP/SMG Supplemental Questionnaire Response, dated February 22, 2010”). The United States provided excerpts of this memorandum to the Panel at the first Panel meeting. See Exhibit US-81.

<sup>12</sup> See CCP Preliminary Determination, 75 Fed. Reg. at 10,771 (Exhibit US-48) (“explaining that “[i]n the CFS investigation, the Department found that, under the GOI’s Regulation Sk-7/BPPN/0101 (Regulation SK-7), IBRA was prohibited from selling assets that were under its control back to the original owner, or to a company affiliated with the original owner”). The IBRA’s law is on the Panel record. See “Decree of Head of the Indonesian Bank Restructuring Agency Regarding Prohibition on Sale Back of Assets to the Original Owner,” Regulation No. SK-7/BPPN/0101 (Ex. US-84).

<sup>13</sup> Compare IDM (Ex. US-31) at 6 & n.6, with CFS IDM (Ex. US-43) at 115-116. Several of these newspaper articles and the World Bank report are on the Panel record. See Petitioners’ General Factual Information Submission (June 21, 2010) (Exhibit US-40).

<sup>14</sup> See, e.g., CCP Preliminary Determination (Ex. US-48), 75 Fed. Reg. at 10,764 n.7 (“Where appropriate and necessary, we have relied on these documents as well as all of the information in the GOI’s questionnaire responses to reach this preliminary determination”).

<sup>15</sup> See Indonesia First Written Submission, paras. 44-45, 79.

benchmark and the existence of a subsidy program, respectively, the United States would not have requested a preliminary ruling. Instead, Indonesia addressed only financial contribution.<sup>16</sup>

9. The issue is one of jurisdiction: Under Article 6.2 of the DSU, the parties and third parties must be sufficiently apprised of the basis of the complaint as stated in the panel request to be able to assess the claims and prepare their responses. The Appellate Body has stated that “Article 6.2 of the DSU requires that the *claims* ... must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint,”<sup>17</sup> and that, “[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission.”<sup>18</sup> There is nothing in Indonesia’s panel request that would alert the United States and the third parties in this dispute that Indonesia’s claims with respect to the log export ban involves a breach of WTO obligations with respect to *financial contribution under Article 1.1(a)* of the SCM Agreement. .

10. Although Indonesia has now stated that it is not raising a *facial* Article 1.1(a) claim,<sup>19</sup> it has nonetheless introduced financial contribution as the sole basis on which to rest its benefit and specificity claims, as they relate to the log export ban. If the portions on financial contribution are removed, no substance remains. Again, in the words of the Appellate Body, “a faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission.”<sup>20</sup> Accordingly, it is not accurate to say the United States is no longer pursuing its preliminary ruling request. Nonetheless, to the extent the Panel by necessity would reject those arguments on financial contribution – even if styled as Article 14(d) and Article 2.1(c) arguments – the United States is not wedded to the form such a finding would take. This recognition underlies paragraph 6 of our opening statement that, “[w]e request the Panel to make the preliminary finding requested by the United States, or otherwise to make a finding that Indonesia has advanced no claim pursuant to Article 1.1(a) of the SCM Agreement.”<sup>21</sup> The latter clause posits, in the alternative, that even if the Panel does not grant our ruling, it should reject Indonesia’s line of argument.

11. **ANSWER:**

**Question 5: (to the United States) In its request for a preliminary ruling, the United States asks that the Panel find that certain of the arguments put forward by Indonesia are outside the Panel's terms of reference.**

- a. What support (prior decisions, text of the DSU or other covered agreements, etc.) is there for the proposition that arguments, as opposed to claims or measures, may be found to be outside a panel's terms of reference?**

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<sup>16</sup> United States First Panel Meeting Opening Statement, para. 7 (*as delivered version*).

<sup>17</sup> *EC – Bananas III (AB)*, para. 143. (emphasis in original).

<sup>18</sup> *EC – Bananas III (AB)*, para. 143.

<sup>19</sup> Indonesia Resp. to U.S. Prelim. Rul. Req., para. 3.

<sup>20</sup> *EC – Bananas III (AB)*, para. 143.

<sup>21</sup> United States First Panel Meeting Opening Statement, para. 6 (*as delivered version*).

**ANSWER:**

12. The United States is not contending that any “argument” is *per se* outside a panel’s terms of reference in the sense that, for example, an argument must be stricken from the record of the dispute. Rather, the point is that if an argument goes to a claim that is outside the terms of reference in the dispute, there would be no legal basis for the Panel to address the merits of such arguments. To do so would be to address matters outside the Panel’s terms of reference, and would be legal error.

13. For example, consider the situation in which Indonesia presented arguments under the Agreement on the General Agreements on Services. Indonesia would be free to do so, and the Panel would need to read those arguments to determine whether they were germane to the specific SCM or AD Agreement claims within the terms of reference. If those arguments were not, the Panel would note this and would not otherwise engage in the merits of the arguments related to the GATS. To do otherwise would be improper, as the Panel would be addressing matters outside the terms of reference of the dispute.

14. Articles 6.2 and 7 of the DSU are the relevant textual provisions. Article 6.2 provides (in relevant part) that the panel request “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Article 7 sets forth panels’ standard terms of reference, which also apply here: to examine the matter referred to the DSB in the panel request in light of the textual provisions of the cited covered agreements.

15. Indonesia’s difficulty here is that its first written submission makes clear that the purported legal problem with the U.S. CVD measure, according to Indonesia, is that export restraints can never constitute a financial contribution,<sup>22</sup> and that the government cannot direct or entrust suppliers of timber within the meaning of Article 1.1(a) of the SCM Agreement via the log export ban.<sup>23</sup> Thus, the problem, as argued by Indonesia, is that the United States has breached Article 1.1(a). The panel request, however, does *not* enumerate Article 1.1(a) as a claim that is part of this dispute. Therefore, there is no jurisdictional basis for the Panel cannot examine the whether the U.S. CVD measure is consistent with Article 1.1(a) of the SCM Agreement.

16. What Indonesia has done is a textbook example of what the Appellate Body cautioned against in *EC – Bananas III*. In that case, the Panel had found that “even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants ‘cured’ that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly.”<sup>24</sup> The Appellate Body disagreed, noting that the *claims* must be set forth in the panel request and subsequent argumentation would not “cure” a faulty request.

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<sup>22</sup> Indonesia First Written Submission, paras. 44, 79.

<sup>23</sup> Indonesia First Written Submission, para. 44.

<sup>24</sup> *EC – Bananas III (AB)*, para. 143 (citing Panel Reports, para. 7.44).

17. If there is any misunderstanding as to what the United States has sought, we hope to clarify it now. In particular, the United States submits that it is appropriate for the Panel either to: 1) issue a preliminary ruling that Indonesia's putative Article 1.1(a) claims are outside of the Panel's terms of reference, or 2) issue a preliminary ruling rejecting Indonesia's financial contribution arguments on the basis that they are not germane to the actual claims set out in the request for panel establishment. As noted above, in our opening statement, we proposed the latter in the alternative.

18. We further note that to the extent the Article 14(d) and Article 2.1(c) claims with regard to the log export ban are in fact financial contribution claims, the Panel likewise should find that those claims as well are outside of the Panel's terms of reference.

- b. Please explain why the United States considers that the Panel needs to find that these arguments by Indonesia are outside its terms of reference, as opposed to merely disregarding Indonesia's arguments to the extent that they are irrelevant to the claims that it pursues.**

**ANSWER:**

19. As noted above,<sup>25</sup> the United States agrees that one option would be for the Panel to disregard Indonesia's financial contribution arguments because they are irrelevant to the claims actually within the terms of reference in this dispute. There would be considerable value, however, in making a preliminary ruling to that effect, rather than waiting until the issuance of the report. Otherwise, if the issue is not addressed now, the parties may end up wasting considerable time and resources on addressing the merits of complex arguments that are not germane to claims within the Panel's terms of reference.

- c. The United States submits that Indonesia "raises arguments tantamount to claims" (United States' first written submission, paragraph 34) (emphasis added). Please explain what the United States means by this.**

**ANSWER:**

20. As explained above and during the first Panel meeting, the United States' view is that Indonesia's arguments on financial contribution are equivalent to, or the same as, new claims based on Article 1.1(a) of the SCM Agreement. On its face, Indonesia's first written submission urges the Panel to consider that export restraints can never be a subsidy within the meaning of Article 1.1(a) and that the log export ban does not entrust or direct suppliers to sell at low prices.<sup>26</sup> Indonesia does not demonstrate the relevance of either of these points to benefit or specificity – other than to imply that there cannot be benefit and specificity without financial contribution. Thus, the United States considers Indonesia to have raised so-called arguments that are tantamount to Article 1.1(a) claims.

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<sup>25</sup> *E.g.*, US First Written Submission, para. 36.

<sup>26</sup> Indonesia First Written Submission, paras. 44, 79.

**Question 7: (to the United States) In paragraph 39 of its first written submission, the United States acknowledges that investigating authorities must give a reasoned and adequate explanation of how the evidence supported their factual findings and how those findings in turn support the determination. The United States adds that, however, the level of detail memorialized in the USDOC's notices about those findings and determinations is a separate issue that must be challenged under Article 22 of the SCM Agreement.**

- a. Is the United States' position consistent with the Appellate Body's indication that an investigating authority must explain the basis for its conclusions to arrive at a benchmark price (see, for instance, Appellate Body Report in US – Carbon Steel (India), paragraphs 4.153 and 4.157)? Please explain.**

**ANSWER:**

21. The United States' position is consistent with the Appellate Body's findings in other disputes. In *US – Carbon Steel (India)*, the Appellate Body noted, as we do in our first written submission,<sup>27</sup> that what an investigating authority must do is a fact dependent inquiry to be measured on a case-by-case basis, given, *inter alia*, the circumstances, market factors, quality and quantity of evidence available.<sup>28</sup> This standard was again recognized in *US – Countervailing Measures (China)*.<sup>29</sup> While an investigating authority, regardless of the benchmark outcome, must explain the basis for its conclusions,<sup>30</sup> nowhere has the Appellate Body stated that the explanation must be exhaustive.<sup>31</sup> Given the voluminous amount of information on the record in this case – literally thousands of pages – such a requirement would indeed be onerous and unfeasible. Thus, there is no rigid quantum of explanation or “magic words” that must be used in every instance an investigating authority undertakes a benchmark analysis.

22. Nonetheless, as a factual matter, USDOC did explain the basis for its conclusions here at length.<sup>32</sup>

- b. Where should the line be drawn between the "explanation" that must be provided by authorities and the "level of detail memorialized" in the notices of their determinations?**

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<sup>27</sup> US First Written Submission, para. 51.

<sup>28</sup> *US – Carbon Steel (India) (AB)*, para. 4.153.

<sup>29</sup> *US – Countervailing Measures, (China) (AB)*, paras. 4.84-4.86.

<sup>30</sup> *US – Carbon Steel (India) (AB)*, para. 4.157.

<sup>31</sup> See, e.g., *US – Antidumping and Countervailing Measures (China) (AB)*, paras. 453-55Cf. *US – Countervailing Duty Investigation on DRAMS (Korea) (AB)*, paras. 159-165.

<sup>32</sup> See Ex. US-31 at 7-12, 28-47; Ex. US-43 at 19-25, 33-35, 66-82.

**ANSWER:**

23. As an initial matter, the United States would again emphasize the level of detail in USDOC’s notices was sufficient.
24. Indonesia’s insistence that an explanation is not “adequate” because, for example, it does not contain certain rote phrases or elements is more in line with a claim brought under Article 22.3 than under Article 14(d).
25. Article 22 is expressly concerned with the contents of public notices, including an investigating authority’s final determination. Article 14(d) merely charges an investigating authority with adequately explaining any method used to calculate the benefit conferred by a subsidy. There is no mention in Article 14(d) about what form the explanation shall take and the specific kinds of detail it must contain.<sup>33</sup> We note that such requirements also do not appear in the provisions governing the standard of review in trade remedy disputes generally, Article 11 of the DSU or Article 17.6 of the AD Agreement, or the cases interpreting them.<sup>34</sup> An investigating authority simply must make an objective assessment of the facts,<sup>35</sup> and explain its assessment in a way that is reasoned and adequate.<sup>36</sup>
26. Even under an Article 22 standard, the requisite level of detail is not a rigid assessment. In discussing a similar provision in Article 22, paragraph 5, the Appellate Body noted that “Article 22.5 does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination.”<sup>37</sup>
27. In closing, we draw the Panel’s attention back to the evidentiary burden in this dispute. Indonesia, as the complaining party, has the burden of establishing that the United States’ explanation of its benchmark analysis is not adequate.

**c. Why does the United States consider that Indonesia has crossed the line between the explanation that must be provided and the content of the notice of the determination?**

**ANSWER:**

28. Indonesia appears to be concerned about the particular words USDOC used in its explanations and the amount of space taken up by them,<sup>38</sup> without regard to the circumstances of this case, which must form the basis for judging whether an explanation is adequate in the first

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<sup>33</sup> *But see US – Countervailing Measures (China) (AB)*, at paras. 4.84-4.86 (noting that an Article 14(d) explanation should be memorialized in the determination).

<sup>34</sup> *China – Broiler Products*, para. 7.4 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

<sup>35</sup> DSU, art. 11; AD Agreement, art. 17.6.

<sup>36</sup> *China – Broiler Products*, para. 7.4 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

<sup>37</sup> *US – Countervailing Duty Investigation on DRAMS (Korea) (AB)*, para. 164.

<sup>38</sup> Indonesia First Written Submission, paras. 42, 74, 78-79, 81, 95.

place.<sup>39</sup> The United States considers that because the analysis of whether an explanation is adequate must be fact-specific and judged on a case-by-case basis,<sup>40</sup> there can be no rigid insistence on using particular words or a certain quantity of words in every instance.

- d. Precisely which arguments of Indonesia does the United States consider are outside the Panel's terms of reference? Specifically, the Panel notes that paragraph 39 and footnote 51 of the United States' first written submission state that these arguments include the arguments in paragraphs 33, 34, and 41 of Indonesia's first written submission, and include whether the USDOC "made findings of specificity," in accordance with Article 2.1(c); "identified the relevant jurisdiction," in accordance with the chapeau of Article 2.1; and "adequately explained" its decisions with respect to Article 14(d). Please indicate if there are other arguments of Indonesia that, in the United States' view, are outside the Panel's terms of reference**

**ANSWER:**

29. The United States confirms that arguments in paragraphs 33, 34 and 41 of Indonesia's first written submission are addressed to Article 22.3 claims that are outside of the Panel's terms of reference. In addition, we consider the arguments advanced in paragraphs 42, 74, 78-79, 81, and 95 of Indonesia's first written submission are addressed to claims outside the Panel's terms of reference.

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

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

**Question 9: (to the United States) In paragraph 65 of its first written submission, the United States refers to the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*. The United States argues on the basis of this report that "depending on the information obtained in a given countervailing duty investigation, a government's role as provider in a marketplace can be sufficient on its own to explain price distortion and, as a result, support a decision to rely on out-of-country benchmark prices for the benefit analysis" (emphasis added). The United States thus suggests that there are situations in which it is permissible for an authority to find distortion on the sole basis that the government is the predominant supplier of the good at issue. However, during the meeting with the Panel, the United States indicated that it is not advocating such a position. Please clarify the United States' position.**

**ANSWER:**

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<sup>39</sup> *ESee, e.g., US – Antidumping and Countervailing Measures (China) (AB)*, paras. 453-55.

<sup>40</sup> *US – Countervailing Measures (China) (AB)*, paras. 4.84-4.86 (citing *US – Carbon Steel (India) (AB)*, para. 4.157).



30. The United States recognizes the Appellate Body’s approach – namely, that the link between market predominance and distortion is an evidentiary one.<sup>41</sup> The Appellate Body has never endorsed a per se rule with respect to market share, but has acknowledged that government predominance is associated with a likelihood of distortion and the absence of other relevant factors and evidence.<sup>42</sup> Paragraph 65 of our first written submission, read in conjunction with the paragraphs that follow, is consistent with this recognition.

31. Furthermore, the Appellate Body’s collective findings in the relevant disputes support the conclusion that different cases should be treated differently: there is no rote, one-size-fits-all rule – as Indonesia apparently advocates – governing the relationship between government involvement in the market and an investigating authority’s market distortion analysis. Indonesia seeks to superimpose the Appellate Body’s findings in one dispute, *US – Countervailing Measures (China)*, on the present dispute. The facts of the present dispute, however, much more closely resemble those of *US – Softwood Lumber IV* in terms of the government’s role as a direct supplier of the input and as the entity that administratively controls stumpage prices; and the present facts are much more closely aligned with *US – Anti-Dumping and Countervailing Measures (China)* in terms of government market share. The Appellate Body in *US – Countervailing Measures (China)* acknowledged that “depending of the particular circumstances at hand, an investigating authority may not be required to conduct a market analysis addressing all the elements mentioned above as examples of relevant inquiries.”<sup>43</sup>

32. Notwithstanding the above, USDOC in fact examined all the record (and available) evidence that pertained to distortion, including that associated with factors other than market share: administratively set stumpage fees and reference prices, the impact of the log export ban, the negligible volume of imports, and the comparatively low prices for pulpwood logs in Indonesia compared with the rest of the region.<sup>44</sup> Thus, as the United States has consistently represented, we have never advocated for or applied a per se rule regarding government market share.

**Question 10: (to both parties) What is the parties' understanding of the Appellate Body's statement in *US – Anti-Dumping and Countervailing Duties (China)*, that "[t]here may be cases ... where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight" (emphasis added)?**

- a. How does other evidence carrying only limited weight affect the requirement placed on the investigating authority to conduct a distortion analysis that is not exclusively based on the government's predominant role as provider of goods?**

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<sup>41</sup> See *US – Countervailing Measures (China) (AB)*, para. 4.52; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Anti-Dumping and Countervailing Measures (China) (AB)*, paras. 453-455; *US – Softwood Lumber IV*, para. 100.

<sup>42</sup> *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Anti-Dumping and Countervailing Measures (China) (AB)*, para. 455.

<sup>43</sup> *US – Countervailing Measures (China) (AB)*, n.552.

<sup>44</sup> US First Written Submission, paras. 65-69; IDM (Ex. US-31) at 6-12; 24-47.

**ANSWER:**

33. These two principles are easily reconciled. The Appellate Body has consistently found that there is no *per se* rule and that an investigating authority cannot ignore evidence pertaining to other market factors.<sup>45</sup> It has at the same time addressed the reality that a government's role in the market as a predominant supplier is a significant factor and must be given significant weight.<sup>46</sup> Therefore, an investigating authority must look at all of the evidence, but should give considerable weight to such a significant factor.

34. Similarly, an investigating authority cannot be expected to give consideration to so-called market factors where there is a dearth of information about the very existence of a market.<sup>47</sup> It naturally follows that where there is overwhelming evidence of predominance and control, it would be unusual to find significant contravening evidence of market based activity. Indeed, none was found here. USDOC considered all of the evidence before the agency, but did not find there were market factors that undermined the significance of the government's predominant role. Indonesia has yet to identify what concrete, material evidence USDOC rejected or failed to consider. Indeed, Indonesia itself, when asked to provide representative in-country pricing data that may have helped establish the existence of meaningful market activity, could not do so.<sup>48</sup>

**b. What type of evidence might, in your view, establish that notwithstanding a very high market share (for instance, 90-95%) by the government as a supplier of a certain good, the remaining portion of the market is not influenced by the predominant presence of the government as a supplier?**

**ANSWER:**

35. The United States is reluctant to speculate on what kind of evidence could, in theory, counter evidence of government predominance in the market. Depending on the facts of a specific investigation, one possible source of inquiry is to review data on private sales. In fact, in this dispute, USDOC specifically requested evidence about in-country prices from private sales of identical or similar goods (in this case, species-specific pulpwood logs). The respondents, however, failed to provide such information.<sup>49</sup>

36. In sum, it is difficult at such a high market share to conceive of a scenario where private prices would not be affected. Nonetheless, if reliable evidence existed demonstrating that these

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<sup>45</sup> See *US – Countervailing Measures (China) (AB)*, paras. 4.51-4.52; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Anti-Dumping and Countervailing Measures (China) (AB)*, paras. 453; *US – Softwood Lumber IV*, para. 102.

<sup>46</sup> *US – Countervailing Measures (China) (AB)*, para. 4.52; *US – Carbon Steel (India) (AB)*, paras. 4.156-4.157; *US – Anti-Dumping and Countervailing Measures (China) (AB)*, paras. 455-56; *US – Softwood Lumber IV*, paras. 100, 102.

<sup>47</sup> *US – Carbon Steel (India) (AB)*, para. 4.157.

<sup>48</sup> See GOI Initial Questionnaire Response (Dec. 29, 2009) at 17-18 & Exhibit 27 (Exhibit US-32); CFS IDM (at 19, 66-72 (Exhibit US-43).

<sup>49</sup> See GOI Initial Questionnaire Response (Dec. 29, 2009) at 17-18 & Exhibit 27 (Exhibit US-32); CFS Final Determination IDM at 19, 66-72 (Exhibit US-43).

prices are market determined, an investigating authority would be required to give such evidence due consideration.

**Question 11. (to both parties) In case there is no data on the record concerning in-country prices of private transactions, what should an investigating authority do? Should it collect in-country data from private suppliers or may it rely on the fact that no in-country data concerning private, market-determined, sales is available? Why or why not?**

**ANSWER:**

37. The implications of the absence of in-country prices for private transactions to evaluate for use as a benchmark depend on the facts and circumstances of the case. As noted above, the Appellate Body has explained that the investigating authority’s analysis of whether in-country prices provide a proper benchmark “will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.”<sup>50</sup>

38. Pursuant to Article 12.1 of the SCM Agreement, investigating authorities may require “Interested Members and all Interested Parties” to supply evidence, and must ensure that such parties have notice and “ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.” The SCM Agreement does not obligate investigating authorities to collect data from non-interested parties, who in any event lack the incentive to respond and to provide complete and accurate information.

39. Here, at the outset of the underlying investigation, USDOC requested that Indonesia provide the “volume and value” of commercial log harvesting that occurred during the period of investigation “broken down by company and species.”<sup>51</sup> Indonesia responded that it collects only “information regarding the total volume of timber harvested from private forests,” and not the prices of such timber.<sup>52</sup>

40. Similarly, USDOC requested that APP/SMG provide a description of each arrangement through which it harvested private timber during the period of investigation, the stumpage fee, the total quantity harvested, and the value of the fees and charges paid to the owner.<sup>53</sup> APP/SMG identified only a single arrangement under which one of its cross-owned companies rented land from private owners, on which the affiliate paid expenses to grow and maintain timber.<sup>54</sup> APP/SMG did not report any other data, including any price data, with respect to

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<sup>50</sup> *US – Carbon Steel India (AB)*, para. 4.157.

<sup>51</sup> GOI Initial Questionnaire Resp. (Dec. 29, 2009), at 17 (Exhibit US-32).

<sup>52</sup> *Id.* at 18.

<sup>53</sup> APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 27-30 (Exhibit US-91).

<sup>54</sup> *Id.* at 27.

timber harvested from private land.<sup>55</sup> The GOI and APP/SMG did not comment or provide further explanation on the absence of in-country prices for domestic timber from private land.

41. The GOI and APP/SMG were the only Indonesian parties in the proceeding. Indeed, the USDOC explained in its initiation of the investigation that it was selecting APP/SMG as a mandatory respondent because “record information indicates that APP/SMG is the producer of nearly all of the coated paper in Indonesia.”<sup>56</sup> Thus, the parties best situated to provide price information on timber harvested from private land were before USDOC, and were provided the requisite notice and opportunity to submit such information, but did not do so.

42. The unavailability of this information is consistent with the near absence of a private market for standing timber in Indonesia, including the GOI data that showed that the GOI supplied 94% of standing timber during the POI (2008), and 95% and 98% in 2006 and 2007, respectively.<sup>57</sup> Given these circumstances, and the nature of the information the parties provided – and failed to provide – there was no reason for the USDOC to further inquire regarding the availability of in-country data for stumpage fees for private timber.

**Question 12: (to the United States) With respect to the provision of standing timber, to what extent was the USDOC's finding of distortion and finding that the GOI is the predominant supplier based on:**

- a. The fact that the GOI supplied 94% of standing timber during the period of investigation (POI);**
- b. The fact that the GOI owned 99.5% of harvestable forest land;**
- c. Both; or**
- d. Other information?**

**ANSWER:**

43. The United States provides the following combined response to the subparts of question 12.

44. As plainly stated in the record of the investigation, the USDOC identified *both* the GOI’s supply of 94% of standing timber during the POI and its ownership of 99.5% of harvestable forest land as factors supporting its conclusions that the GOI “plays a predominant role in the market for standing timber” and “there are no market-determined stumpage fees in Indonesia.”<sup>58</sup>

45. The USDOC also identified other information from the record to support its findings. This other information included the GOI’s administrative control of stumpage fees, its imposition of a log export ban, the negligible level of import penetration in the market for logs,

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<sup>55</sup> *Id.* at 27-30.

<sup>56</sup> CVD Initiation, 74 FR at 53709 (Oct. 20, 2009) (Ex. US-65).

<sup>57</sup> GOI Supp. Questionnaire Resp. at 13 (Feb. 22, 2010) (Ex. US-34) (BCI version).

<sup>58</sup> IDM at 8 (Ex. US-31).

and the significant price difference between Malaysian exports of logs to Indonesia compared to neighboring countries.

46. In addition, the United States respectfully refers the Panel to the further explanation of these factors in the U.S. response to Question 14 below.

**Question 13: (to the United States) Please react to Indonesia's assertion in paragraph 30 of its opening statement at the first meeting that the "GOI's ownership of virtually all harvestable forest land ... is not another factor at all" but that it is rather the "same factor on which USDOC stated it was basing its determination – the GOI's predominant role in the market for standing timber".**

**ANSWER:**

47. Indonesia's assertion is plainly wrong. As a matter of simple economics, market share – that is the share of a particular product (here, logs) sold in a particular market at a particular period of time – is not coextensive with ownership of the raw materials (here, standing timber) or means of producing the product at issue.

48. On the facts of this dispute, the GOI's 94% market share for logs during the period of investigation is a separate, distinct fact from its ownership of over 99.5% of harvestable forest land. USDOC cited both factors in concluding that the GOI had a "predominant role in the market for standing timber."<sup>59</sup>

49. With respect to the GOI's ownership of virtually all harvestable forest land, USDOC explained that such ownership indicates that it "has almost complete control over access to the timber supply."<sup>60</sup> This fact further demonstrates the GOI's control over timber prices, beyond mere reference to the minimal market share of private land owners, because it shows there was a substantial barrier to entry for new market participants and that the GOI had the capacity to both maintain and increase its market share and, accordingly, control prices.

**Question 14: (to the United States) In paragraph 67 of its first written submission, the United States submits that the USDOC's analysis of other elements in addition to the GOI's market share and its ownership of harvestable land establish that it actually possessed and exercised near-complete control over the domestic supply of timber, which resulted in depressing and distorting domestic market prices for standing timber. Please indicate where in the USDOC's preliminary and/or final determinations the USDOC reached these precise conclusions.**

**ANSWER:**

50. These findings can be inferred from USDOC's Issues and Decision Memorandum, which discusses many factors. On page 9 of the Issues and Decision Memorandum for its final determination, USDOC evaluated whether the GOI's stumpage fees were set in accordance with

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<sup>59</sup> IDM at 8 (Ex. US-31).

<sup>60</sup> IDM at 9 (Ex. US-31).

market principles. USDOC concluded that the stumpage fees were not market-based because of the following:

- GOI administratively set the stumpage fees and the log reference prices on which they were based.
- GOI controlled virtually all of Indonesia’s harvestable forests.
- GOI banned the export of logs.<sup>61</sup>
- There were a negligible level of imports, which were less than one percent of logs produced domestically.
- USDOC explained that the record evidence supported a finding that Indonesian prices were artificially low because they “demonstrat[ed] a significant difference between Malaysian exports of acacia to Indonesia and Malaysian exports of acacia to other countries in the surrounding region.”<sup>62</sup>

51. USDOC explained that the GOI set PDSH fees for plantation timber, the principal stumpage fees at issue, to a percentage of the reference price for the log species based on weighted average of domestic price and export price but, given Indonesia’s log export ban, the reference price was determined solely with respect to the domestic price.<sup>63</sup>

52. Furthermore, at pages 31-32 of the Issues and Decision Memorandum, USDOC concluded that the GOI’s control over the market depressed prices.

53. Finally, once shipments to Indonesia were removed from the Sabah, Malaysia dataset gathered by Indonesia’s consultant, the result was nearly identical to the out-of-country benchmark USDOC utilized.<sup>64</sup>

**Question 17: (to both parties) What information was there on the record concerning private stumpage prices for standing timber and private prices for logs in the Indonesian market, including but not limited to information on private prices that was contained in the investigated Indonesian producers/exporters' responses to USDOC questionnaires?**

- a. Please explain and provide any relevant documentation that may assist the Panel in understanding the nature of the information (the parties need not provide extensive purchase or sales lists to the Panel).**
- b. Please discuss whether and how the USDOC considered or used this information.**

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<sup>61</sup> IDM at 9 (Ex. US-31).

<sup>62</sup> IDM at 32 (Ex. US-31).

<sup>63</sup> IDM at 9 (Ex. US-31).

<sup>64</sup> IDM at 40 (Ex. US-31).

**ANSWER:**

54. The United States provides the following combined response to the subparts of question 17.

55. There were no domestic, private prices for standing timber or logs on the record. As indicated in the United States' *supra* response to Question 11, USDOC requested that APP/SMG report the stumpage fees it paid for timber harvested on private land, but APP/SMG had no such information to report. APP/SMG's responses on this issue are provided in U.S. Exhibit91.

56. APP/SMG provided four sets of import data for sales from Malaysia to Indonesia in 2008, some of which also included Malaysian exports to third countries: (1) World Trade Atlas (WTA) species-specific export data;<sup>65</sup> (2) Sabah-wide species-specific export data collected by APP/SMG's consultant;<sup>66</sup> (3) Sabah-wide non-species-specific export data for "plantation logs" in a report published by the Sabah Forestry Department;<sup>67</sup> and (4) eighteen sales of *acacia mangium* by a single firm in Sabah, Malaysia to Indonesia, collected by APP/SMG's consultant.<sup>68</sup>

57. USDOC considered the various import data to Indonesia provided by APP/SMG and concluded that none provided a viable benchmark because of the GOI's predominant share of the harvest volume, as well as the negligible level of log imports into Indonesia, which were less than one percent of the timber harvested domestically. Thus, USDOC concluded that a shipper from Malaysia would be forced to match the prices of the predominant supply of timber by the GOI for less than adequate remuneration.<sup>69</sup> USDOC explained that this fact was demonstrated empirically by the Sabah-wide data collected by APP/SMG's consultant, which reflected a vast price difference in acacia exports from Malaysia to Indonesia compared to third countries, and aligned with the WTA data for Malaysian exports to third countries.<sup>70</sup>

58. With respect to the particular datasets enumerated above, USDOC ultimately used the WTA dataset, after removing exports to Indonesia and making certain adjustments. USDOC explained that the second, Sabah-wide species-specific data gathered by APP/SMG's consultant, produced a nearly identical benchmark once exports to Indonesia were removed, and was less preferable to the public, widely-recognized WTA data because it was confidential and gathered by a consultant from his acquaintances.<sup>71</sup> USDOC rejected the third dataset, contained in a Sabah government report, because it was not species-specific, was based overwhelmingly on

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<sup>65</sup> APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 34 & Ex. 55 (Ex. US-91); APP/SMG Supp. Questionnaire Resp., Part One (Feb. 16, 2010) at Ex. 20 (Ex. US-92) (BCI Version).

<sup>66</sup> APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 35 & Ex. 56 (Ex. US-91) (BCI Version).

<sup>67</sup> APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 37-38 & Ex. 57 (Ex. US-91).

<sup>68</sup> APP/SMG Supp. Questionnaire Resp., Part One at 10-14 & Ex. 19 (Feb. 16, 2010) (Ex. US-92) (BCI Version).

<sup>69</sup> IDM at 31-32 (Ex. US-31).

<sup>70</sup> IDM at 32 (Ex. US-31).

<sup>71</sup> IDM at 36 (Ex. US-31).

shipments to Indonesia, and did not segregate prices by country of destination.<sup>72</sup> The fourth dataset, the individual sales by a single Sabah-based firm collected by APP/SMG's consultant, were all sales to Indonesia and, thus, rejected on that basis.<sup>73</sup>

**Question 18: (to the United States) Please indicate whether, apart from asking the GOI to provide information related to private prices and volumes in the initial questionnaire, the USDOC requested the GOI, APP/SMG or any other entity in the Indonesian market to provide information related to standing timber and log prices.**

**ANSWER:**

59. As referenced above, USDOC requested that APP/SMG provide a description of each arrangement through which it harvested private timber during the period of investigation, the stumpage fee, the total quantity harvested, and the value of the fees and charges paid to the owner.<sup>74</sup>

**Question 20 (to the United States) Please react to Indonesia's argument, in paragraph 36 of its opening statement at the first meeting of the Panel, that the USDOC incorrectly concluded that Malaysian exports to export markets other than Indonesia showed price distortion in Indonesia.**

**ANSWER:**

60. The GOI's argument that USDOC incorrectly concluded that Malaysian exports to markets other than Indonesia showed price distortion in Indonesia is not supported by the evidence. This contention apparently is based on an uncorroborated claim made by APP/SMG's consultant during the investigation. Specifically APP/SMG's consultant claimed at Malaysian exports to other markets were classified under incorrect HTS codes, and that the WTA data USDOC relied upon reflected higher-value "saw logs" rather than pulp logs (and, conversely, was missing pulp log prices misclassified by customs authorities as other types of logs).<sup>75</sup> As discussed below, and as set out in the record of the investigation, USDOC addressed these issues during the course of the investigation.<sup>76</sup>

61. At verification of APP/SMG, the company requested that its retained consultant be permitted to make a presentation.<sup>77</sup> The consultant stated that he obtained invoices and related documents from former colleagues within the Malaysian customs authorities for certain sales from Sabah to third countries that appeared in the WTA dataset.<sup>78</sup> In his opinion, these documents indicated quantities of acacia too low to represent pulp log shipments, and were

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<sup>72</sup> IDM at 36-37 (Ex. US-31).

<sup>73</sup> IDM at 31-32 (Ex. US-31).

<sup>74</sup> APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 27-30 (Ex. US-91).

<sup>75</sup> See IDM at 40 (Ex. US-31).

<sup>76</sup> See IDM at 40 (Ex. US-31).

<sup>77</sup> APP/SMG Verification Report at 18 (Aug. 4, 2010) (Ex. US-37).

<sup>78</sup> APP/SMG Verification Report at 18 (Aug. 4, 2010) (Ex. US-37).



transported in containers, which he viewed as uneconomical for pulp logs.<sup>79</sup> This information was not previously received in APP/SMG's responses and, thus, could not be verified by USDOC.

62. This information did not change USDOC's analysis for multiple reasons. First, the theory of misclassifications was contradicted by the similarity of the species-specific Sabah-wide data for pulpwood exports to third countries, which the APP/SMG consultant had collected, and the data the WTA published for such exports.<sup>80</sup> If the WTA data contained misclassifications, one would expect a different result, but USDOC observed that the result was "[s]o close in fact, that it is hard to see this [Sabah-wide data from the APP/SMG consultant] as anything other than confirming the accuracy of the WTA benchmark."<sup>81</sup> Second, USDOC explained that, although it had no way to corroborate the consultant's claims, it examined whether the WTA had captured under other HTS categories certain shipments of acacia he identified and concluded that the volume and value figures did not match the shipments in question.<sup>82</sup>

63. Finally, the United States notes that USDOC specifically adjusted the WTA data for acacia to exclude two HTS categories that the respondents argued were outliers because the timber would likely be used for higher-value applications (HTS 4403.99.950 and 4403.99.450).<sup>83</sup>

64. Accordingly, the GOI's argument that USDOC relied on data containing misclassifications for its distortion analysis and calculation of benefit is inconsistent with the record evidence.

**Question 21: (to both parties) The Panel understands the parties to have agreed, during the first meeting, that no export ban on wood chips was in place during the period of investigation. The Panel also understands "wood chips" to refer to a downstream product of logs destined for producing pulp.**

**a. Please confirm. Also, please confirm that no ban on pulp was in place during the POI.**

**ANSWER:**

65. The United States appreciates the opportunity to clarify its position. As explained further below (in the United States' response to subpart c), the record reflects that the export ban *did* apply to wood chips during the POI.

66. The United States confirms that wood chips are a downstream, intermediate product made from logs. Wood chips are used for producing pulp.

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<sup>79</sup> APP/SMG Verification Report at 18-19 (Aug. 4, 2010) (Ex. US-37).

<sup>80</sup> IDM at 40 (Ex. US-31); Calculation Memorandum for the Final Affirmative Countervailing Duty Determination at 2 (Sept. 20, 2010) (Ex. US-93) (BCI Version).

<sup>81</sup> IDM at 40 (Ex. US-31).

<sup>82</sup> IDM at 40 (Ex. US-31).

<sup>83</sup> IDM at 42-43 (Ex. US-31).

67. There was no ban on the export of pulp during the period of investigation.

68. We also note that at the first Panel meeting, the United States emphasized that even if the log export ban had not included wood chips, the exemption would not be material to USDOC’s analysis because it is a separate product with its own market.

**b. What was the relevant HS number for wood chips?**

**ANSWER:**

69. The relevant HS numbers are 4401 and 4404, which are described as “timber chips.”<sup>84</sup>

**c. Please indicate what information was before the USDOC concerning the existence of an export ban concerning wood chips during the POI.**

**ANSWER:**

70. In its initial questionnaire response of December 29, 2009, the GOI stated that Government Regulation No. 6 of 2007 “has begun the process of legalizing the export of forest products.”<sup>85</sup> The GOI explained that, “[d]espite the authority granted under this regulation, such authority has not to date been exercised to formally implement this regulation.”<sup>86</sup> In its first supplemental questionnaire response of February 16, 2010, the GOI stated: “The implementing decree for Government Regulation No. 6 of 2007, is Minister of Trade Decree No. 20/M-DAG/Per/5/2008 regarding the Regulation of Export of Forestry Industry Products dated May 29, 2008. Under this regulation, logs (including pulpwood) may not be exported, whereas chipwood may be exported (under HS 4401 and 4404).”<sup>87</sup> This decree describes HS 4401 and 4404 as “timber chips.”<sup>88</sup>

71. At verification, GOI officials discussed both Government Regulation No. 6 of 2007 and the 2008 Decree No. 20/M-DAG/Per/5/2008, and explained that “neither of these laws have been implemented.”<sup>89</sup> That is, although the 2007 and 2008 decrees had begun the process of legalizing the export of certain downstream forestry products, including “timber chips,” the export ban was still fully intact during the POI. USDOC made clear in its final determination that it understood that “the GOI’s regulation authorizing the exportation of wood chips was not in effect during the POI, as confirmed by the GOI at verification.”<sup>90</sup> Accordingly, USDOC concluded that “this exemption from the ban, whatever its effects on timber prices might be, is irrelevant to the POI.”<sup>91</sup>

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<sup>84</sup> GOI First Supp. Questionnaire Resp., Part I (Feb. 16, 2010), at Ex. 14 Att. I (Ex. US-39) (English translation) (PDF pp. 13-14, 38-79).

<sup>85</sup> GOI Initial Questionnaire Resp. (Dec. 29, 2009), at 25 & Ex. 8 (Ex. US-32).

<sup>86</sup> GOI Initial Questionnaire Resp. (Dec. 29, 2009), at 25 (Ex. US-32).

<sup>87</sup> GOI First Supp. Questionnaire Resp., Part I (Feb. 16, 2010), at 7 & Ex. 14 (Ex. US-39).

<sup>88</sup> GOI First Supp. Questionnaire Resp., Part I (Feb. 16, 2010), at Ex. 14 Att. I (Ex. US-39) (English translation) (PDF pp. 13-14, 38-79).

<sup>89</sup> GOI Verification Report (Aug. 4, 2010) at 13.

<sup>90</sup> IDM at 28 (Ex. US-31).

<sup>91</sup> IDM at 28 (Ex. US-31).

- d. (to the United States) Paragraphs 91 and 185 of the United States' first written submission states that while Indonesia had begun the process of legalizing the export of forest products, the regulation was not formally implemented and that the USDOC found during verification that the regulation authorizing the exportation of wood chips was not in effect during the POI. How can this finding be reconciled with the parties' indication, during the meeting, that there was no export ban on wood chips?

**ANSWER:**

72. The above clarification is responsive to this question. The United States' position, as clarified, is consistent with paragraphs 91 and 185 of its first written submission.

**Question 23: (to the United States) With respect to the log export ban, in paragraph 77 of its first written submission, the United States submits that the "USDOC addressed an argument from Indonesia and APP/SMG that USDOC had inappropriately assumed the existence of distortive effects of the log export ban" and that by doing so the "USDOC fully addressed the parties' arguments about the existence of a benefit provided by the log export ban, and provided a reasoned and adequate explanation for its determination of benefit". The United States refers to Exhibit US-31, Issues and Decision Memorandum, pp. 27 and 40.**

- a. **Is the United States arguing that this was part of the analysis the USDOC carried out in order to determine that there were no market-determined prices for logs in Indonesia? To what extent was this part of the USDOC's distortion analysis?**

**ANSWER:**

73. Yes, it was a part of the distortion analysis. In the portion of the U.S. first written submission quoted above, the United States addressed an argument by the GOI and APP/SMG that the log export ban has no effect on price, reasoning that the presence of imports implies that domestic consumption exceeds domestic output.<sup>92</sup> USDOC explained that the respondents' logic ignored the essential fact "that without the ban domestic consumers would have to compete with foreign consumers. If foreign consumers were willing to pay higher prices than domestic consumers, there would indeed be exports, no matter how large the potential for domestic consumption. With the ban, however, domestic consumers face no price competition from foreign buyers, and the price settles to a value low enough to clear the domestic market."<sup>93</sup> Furthermore, USDOC explained that the empirical evidence on the record rebutted the respondents' claim, and demonstrated distortion in the Indonesian market.<sup>94</sup>

- b. **Please explain step by step the USDOC's analysis of factors or characteristics of the Indonesian market beyond the GOI's market share and ownership of forest land with respect to the log export ban.**

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<sup>92</sup> IDM at 27 (Ex. US-31).

<sup>93</sup> IDM at 27 (Ex. US-31).

<sup>94</sup> IDM at 27 (Ex. US-31); *see also id.* at 39-40.

**ANSWER:**

74. USDOC analyzed the provision of standing timber and export ban in tandem. USDOC explained that because standing timber cannot be imported, it reviewed log prices as a proxy to determine if the provision of standing timber conferred a benefit. USDOC's reasoning was that "the value of a standing tree is derived from the demand for logs produced from that tree and the demand for logs is, in turn, derived from the demand for the products produced from those logs."<sup>95</sup> Thus, USDOC had already analyzed the Indonesian market for logs in the course of analysing the stumpage program.

75. Although the stumpage program and log export ban operated separately, they were interdependent and each suppressed prices for timber inputs for paper producers. Furthermore, as noted above, the log export ban also was a factor USDOC examined, separate and apart from market share, when examining whether Indonesian prices for standing timber were market-determined.

76. In terms of mechanics, USDOC utilized the same WTA data for logs as a benchmark for the log export ban, and calculated a benefit by determining the extent that the prices APP/SMG paid to unaffiliated logging companies were less than the benchmark price.<sup>96</sup> The import data addressed in Question 17, above, was the only information available as an Indonesian price for both logs and standing timber, and USDOC's analysis of those prices applies equally to the log export ban program.

**Question 24: (to the United States) In footnote 52 of its first written submission, the United States refers to "Government of Indonesia and APP-Indonesia Case Brief at 11-42 (Aug. 16, 2010)". Please confirm whether this is a reference to Exhibits US-44 / US-45 (BCI).**

**ANSWER:**

77. Yes, this is a reference to Exhibits US-44 and US-45 (BCI).

**Question 25: (to the United States) Footnote 116 of the United States' first written submission refers to "First Written Submission by the Government of Indonesia, para. 43". Please clarify precisely which document this is referring to.**

**ANSWER:**

78. The document referred to is Indonesia's first written submission in this dispute, cited elsewhere as "Indonesia First Written Submission."

79. We do note that footnotes 116 and 117 were inadvertently switched. Footnote 117 should cite to Indonesia's first written submission and footnote 116 should cite to the Issues and Decision Memorandum.

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<sup>95</sup> IDM at 9 (Ex. US-31).

<sup>96</sup> IDM at 13 (Ex. US-31).

### 3.3 Claims under Article 2.1 of the SCM Agreement

**Question 31: (to the United States) Please react to Indonesia's argument, in paragraph 57 of its opening statement at the first meeting of the Panel, that the USDOC "cannot have it both ways" with respect to its findings of specificity concerning the debt buy-back.**

**ANSWER:**

80. Indonesia's opening statement at paragraph 57 suggests that the United States "misses the point" when it noted that the jurisdiction of the granting authority for the APP/SMG debt buy-back was discernible from the determination because "[i]f newspaper reports are sufficiently credible to find a government violated its own law . . . then newspaper reports are also sufficient to refute USDOC's specificity finding that the APP/SMG debt was the only instance where an affiliate bought back its own debt."<sup>97</sup>

81. Contrary to Indonesia's assertions, the United States is not "having it both ways," and it is Indonesia – not the United States – who "misses the point."<sup>98</sup> It is important to recall that, Indonesia argued in its first written submission that "USDOC did not identify the government entity that allegedly forgave debt."<sup>99</sup> In response, the United States explained that the granting authority was "the GOI,"<sup>100</sup> which was "'discernible from the determination."<sup>101</sup> In fact, USDOC identified the particular agency within Indonesia that provided the financial contribution, the IBRA,<sup>102</sup> which Indonesia reported "was responsible for administering the program," which "the GOI created."<sup>103</sup> Indonesia does not dispute these findings, which are *all* that is relevant in determining the meaning of the chapeau to Article 2.1.<sup>104</sup>

82. Paragraph 57 of Indonesia's opening statement, in our view, has nothing to do with Article 2.1 and only serves to rehash aspects of Indonesia's Article 12.7 claim that USDOC impermissibly relied on the facts available in finding APP/SMG and Orleans to be affiliated companies. Indeed, prior to its opening statement, Indonesia never pointed to the newspaper article as supporting its specificity arguments in any way.

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<sup>97</sup> Indonesia Opening Statement at the First Panel Meeting, para. 57.

<sup>98</sup> Indonesia Opening Statement at the First Panel Meeting, para. 57.

<sup>99</sup> Indonesia First Written Submission, heading preceding para. 93.

<sup>100</sup> U.S. First Written Submission, para. 158; CCP Final Determination I&D Memo at 20 (Exhibit US-31).

<sup>101</sup> U.S. First Written Submission, para. 158 (quoting *US – Countervailing Measures (China) (AB)*, para. 4.169).

<sup>102</sup> U.S. First Written Submission, para. 158; CCP Final Determination I&D Memo, at 20 (Exhibit US-31).

<sup>103</sup> U.S. First Written Submission, para. 158 (quoting GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 21 (Exhibit US-34 (BCI))).

<sup>104</sup> See *US – Countervailing Measures (China) (AB)*, para. 4.169 ("The chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination. This identification of the jurisdiction of the granting authority is merely a preliminary step providing a framework to conduct the specificity analysis. In this regard, it has to be kept in mind that the analysis of specificity focuses on the question of whether *access* to a subsidy is limited to a particular class of recipients.").

83. In any event, the points Indonesia cites are not mutually exclusive such that “USDOC cannot have it both ways.”<sup>105</sup> USDOC determined that certain information on the record of this investigation, including newspaper articles and a World Bank report, could be relied on as available facts under Article 12.7. Although some of this factual information speaks in general terms about companies buying back their own debt through the PPAS,<sup>106</sup> this does not undermine USDOC’s finding that the APP/SMG debt sale was *de facto* company-specific. After all, only the specific company debtor is “eligible to receive that same subsidy.”<sup>107</sup> If an unaffiliated company had purchased APP/SMG’s debt, there would be no financial contribution or benefit because there would be no debt forgiven.<sup>108</sup> The debt buy-back’s structure demonstrates that, as a matter of fact, it was company-specific.<sup>109</sup> If, as Indonesia hypothesizes, other companies were permitted to buy back their own debt through the PPAS, those subsidies would have been *de facto* company-specific to the debtor companies.<sup>110</sup> Speaking hypothetically, even if the PPAS transactions at large all involved IBRA officials ignoring related companies buying back debt, the targeted nature of the program to select conglomerates in a particular industry also would meet the requirements of being *de facto* -specific under Article 2.1.

### 3.4 Claims under Article 12.7 of the SCM Agreement)

**Question 32: (to both parties) What textual or other basis is there for your view as to whether Articles 27 of the SCM Agreement and 15 of the Anti-Dumping Agreement affect the requirements for the use of facts available under Article 12.7 of the SCM Agreement as it applies in investigations concerning developing countries?**

**ANSWER:**

84. In responding to this question, the United States makes four threshold observations. First, Indonesia’s panel request does not raise claims under Article 27 of the SCM Agreement or Article 15 of the AD Agreement. Second, the United States agrees with the European Union’s observation that “it does not consider that Indonesia has specifically explained or demonstrated how its status as a developing country Member would be of relevance in the context of this particular dispute under Article 12.7” of the SCM Agreement.<sup>111</sup> Third, Indonesia’s panel request does not challenge any antidumping determination by USDOC. For this reason, the

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<sup>105</sup> Indonesia Opening Statement at the First Panel Meeting, para. 57.

<sup>106</sup> See Petitioners’ General Factual Information Submission (June 21, 2010), at Exhibit 24 (Exhibit US-40) (“Nevertheless, some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency”).

<sup>107</sup> U.S. First Written Submission, para. 134 (quoting *US – Countervailing Measures (China) (AB)*, para. 4.140).

<sup>108</sup> U.S. First Written Submission, para. 134.

<sup>109</sup> U.S. First Written Submission, para. 134; CCP Final Determination I&D Memo, at 20 (Exhibit US-31). For example, the “terms of reference” specifically refers to the sale as being of APP/SMG’s debt. The terms of reference state 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.” See GOI First Supplemental Questionnaire Response, Part II (Feb. 22, 2010), at Exhibit 24 (page 4) (Exhibit US-33).

<sup>110</sup> The United States adds that, if Indonesia’s assertion is correct, this *supports* USDOC’s finding that APP/SMG and Orleans were affiliated companies.

<sup>111</sup> EU Third Party Submission, para. 22.

United States will refrain from commenting on the relevance of Article 15 of the AD Agreement in the context of countervailing duty investigations concerning developing country Members. Fourth, Indonesia does not articulate any concrete difficulties related to its status as a developing country.

85. With regard to Article 27 of the SCM Agreement, that provision provides for “[s]pecial and [d]ifferential [t]reatment of [d]eveloping [c]ountry Members.” Article 27 qualifies the application of certain provisions of the SCM Agreement to developing country Members.<sup>112</sup> However, the text of Article 27 does not preclude or otherwise qualify an investigating authority’s ability to resort to the facts available under Article 12.7 (assuming the conditions in Article 12.7 are satisfied).<sup>113</sup>

**Question 33: (to Indonesia) Please react to the European Union's argument that Indonesia did not raise specific difficulties in providing the missing information that resulted from its status as a developing country Member (see European Union's third-party submission, paragraph 22).**

**Question 35: (to both parties) Do you agree with the European Union that investigating authorities should have wide discretion to decide what constitutes "necessary information"? (European Union's third-party submission, paragraph 27).**

**ANSWER:**

86. Yes, the United States agrees that “investigating authorities should have a considerable degree of discretion as to what information they consider necessary.”<sup>114</sup> The question of whether to resort to “the facts available” rests in the first place with the investigating authority, and one ground for resorting to “the facts available” is where “any interested Member or interested party . . . does not provide, necessary information within a reasonable period.”<sup>115</sup> In making its determination of whether to resort to “the facts available,” the investigating authority must determine whether the missing information is “necessary” to its determination. The information that is “necessary” will depend on the nature of the alleged subsidy under investigation and will vary from case to case.

87. Here, USDOC found that information pertaining to whether APP/SMG and Orleans are affiliated was missing from the record. This information was “necessary” because it was relevant to whether the APP/SMG debt buy-back constituted a countervailable subsidy that

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<sup>112</sup> For example, Article 27.3 of the SCM Agreement provides that: “[t]he provision of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least-developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.”

<sup>113</sup> See U.S. First Written Submission, para. 156 (“Article 27 contains no limitation or prohibition to an investigating authority having resort to Article 12.7”).

<sup>114</sup> EU Third Party Submission, para. 27.

<sup>115</sup> See Article 12.7 of the SCM Agreement.

conferred a benefit to APP/SMG.<sup>116</sup> Although Indonesia provided Orleans’ bidding documents for the APP/SMG sale, these documents, contrary to Indonesia’s suggestion, contained *no* ownership information for Orleans. Simultaneously, other record evidence indicated that “[t]he methods and structures employed by Indonesia corporates [sic.] to ‘buyback’ their debt using investment banks and offshore special purpose vehicles as fronts for the founding shareholders [of the debtors] is well known.”<sup>117</sup> In light of this competing information, USDOC sought to develop further the record in an effort to analyze the due diligence procedures that the IBRA employed under the PPAS, including on affiliation. USDOC, thus, offered Indonesia further opportunity to fill the gaps on the affiliation issue.

88. Indonesia’s reporting to USDOC signaled that the IBRA placed substantial weight on the bidding documents in examining possible affiliation between the bidder and the original debtor.<sup>118</sup> To understand whether the IBRA approached possible affiliation any differently in the APP/SMG debt sale, USDOC reasonably requested the bidding documents for other PPAS sales to satisfy itself as to the accuracy of Indonesia’s assertion that the IBRA would not sell the debt to an affiliated buyer and that the IBRA followed its own law with a level of diligence typical of other IBRA transactions. This information pertaining to the other PPAS sales was “necessary” because USDOC needed a baseline to confirm whether the IBRA’s due diligence procedures were followed, or whether the Orleans transaction was subject to less scrutiny of whether the bidder and debtor were affiliated,<sup>119</sup> particularly in light of the competing record information that “some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency.”<sup>120</sup> However, Indonesia failed – twice – to provide this “necessary” information to USDOC.<sup>121</sup>

**Question 38: (to the United States)**

- a. With respect to Exhibit US-81, without divulging his identity, what were the expert’s credentials?**

**ANSWER:**

89. The United States relied upon the public version of the summary of USDOC’s meeting with the independent expert during the prior CFS investigation, i.e., Exhibit US-81, which is on

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<sup>116</sup> CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48) (“The identification of Orleans’ shareholders is pivotal to the Department’s ability to analyze the alleged affiliation between APP/SMG and Orleans”).

<sup>117</sup> See Meeting with an Independent Expert (Aug. 24, 2007), at 2 (Ex. US-81.).

<sup>118</sup> See GOI Third Supplemental Questionnaire Response (May 27, 2010) at 7-8 (Exhibit IDN-15 (BCI)) (“IBRA had the legal authority to undertake further due diligence, but given the circumstances of the times IBRA relied primarily upon the contractual obligations and the enforceability of those provisions” in the bidding documents).

<sup>119</sup> CCP Final Determination IDM at 53 (Exhibit US-31) (“This information is necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities”).

<sup>120</sup> Petitioners’ General Factual Information Submission (June 21, 2010) at Exhibit 24 (Exhibit US-40); see also CCP Final Determination IDM at 6 & n.6 (Exhibit US-31).

<sup>121</sup> See CCP Final Determination IDM at 53-54 (Exhibit US-31).



the record of the CCP investigation.<sup>122</sup> The independent expert’s credentials are not part of the record of the CCP investigation.

- b. Please explain the use that the USDOC made of the comments by the expert – in particular the expert's statements that he believed the speculation that Orleans was related to the debtor (APP/SMG) and that Indonesian corporates were using investment banks and offshore special purpose vehicles as fronts for their founding shareholders – and the weight that the USDOC attached to these comments in the CFS investigation and in the coated paper investigation. Please identify relevant record evidence and determinations.**

**ANSWER:**

90. In the investigation, USDOC relied upon the independent expert’s comments in its examination of the alleged APP/SMG debt buy-back, which were made during verification in the prior CFS investigation.<sup>123</sup> The CFS final determination Issues and Decision Memorandum, which paraphrased various discussions with the independent expert,<sup>124</sup> was included in petitioners’ CCP application.<sup>125</sup> The CFS final determination, and by implication the references to the independent expert comments that were on the CCP record, formed an evidentiary basis for USDOC to initiate an investigation into the APP/SMG debt buy-back as a potentially countervailable subsidy.<sup>126</sup>

91. The independent expert’s comments were added to the record<sup>127</sup> at an early stage in the CCP investigation.<sup>128</sup> They were relied upon in the preliminary determination as “other information on the record to indicate that Orleans is affiliated with APP/SMG.”<sup>129</sup> The independent expert’s comments were inadvertently not cited in the CCP final determination. Other record evidence was cited -- various newspaper articles and a World Bank report were cited as the basis for facts available in the final determination.<sup>130</sup> These newspaper articles and report are

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<sup>122</sup> Respondent APP/SMG placed the public version of this document on the record at USDOC’s request. As explained in response to the next sub-question, this document was included in APP/SMG’s First Supplemental Questionnaire Response, Part II (Feb. 22, 2010), at Exhibit 52.

<sup>123</sup> Meeting with an Independent Expert (Aug. 24, 2007) (Exhibit US-81).

<sup>124</sup> See CFS Final Determination IDM, at 44-45 (Exhibit US-43).

<sup>125</sup> See Application, at 14 (Exhibit US-80).

<sup>126</sup> See CCP Initiation Checklist, at 12 (Exhibit US-75).

<sup>127</sup> Meeting with an Independent Expert (Aug. 24, 2007) (Exhibit US-81).

<sup>128</sup> CCP Preliminary Determination, 70 Fed. Reg. at 10,764 n.7 (Exhibit US-48) (explaining that “[b]ecause the programs and company in this investigation mirror the programs and company under investigation in CFS, [USDOC] requested that the GOI and APP/SMG place on the record of this investigation” several documents from the CFS investigation, including “all verification reports”). Although the independent expert meeting report was not cited in this explanation, it was included in APP/SMG’s First Supplemental Questionnaire Response, Part II (Feb. 22, 2010), at Exhibit 52. That APP/SMG questionnaire response is not on the Panel record.

<sup>129</sup> CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48) (citing Meeting with an Independent Expert (Aug. 24, 2007) (Exhibit US-81)).

<sup>130</sup> CCP Final Determination IDM at 6 (Exhibit US-31) (citing Petitioners’ General Factual Information Submission (June 21, 2010) at Exhibits 10-12, 16, 18, 22, 24, 33 & 36 (Exhibit US-40)).

consistent with the independent expert’s comments on the issue of affiliation,<sup>131</sup> and should be viewed together with the independent expert’s comments as the basis for USDOC’s determination that APP/SMG and Orleans were affiliated.

92. With regard to the CFS investigation, USDOC relied on the independent expert’s comments, coupled with various news articles that suggested that APP/SMG was “surreptitiously buying back its debt” and a World Bank report indicated that “IBRA allowed some parties to buy back their own debt through third parties.”<sup>132</sup>

- c. c. Why did the USDOC expect that the bid documents for the other PPAS sales would contain ownership information given the expert’s view that special ownership vehicles were being used and that information on ownership may not be available in the bidding documents? What value was placed on this information when deciding to use facts available and making an adverse inference? Please refer to where this was considered in the determinations and/or the record.**

**ANSWER:**

93. USDOC’s understanding at the start of this investigation was that the Orleans bidding documents would contain ownership information. This understanding was based on “statements made at the CFS verification by former IBRA officials that ownership information would be part of a purchaser’s file.”<sup>133</sup> This expectation did not materialize because “[t]he articles of association, which [USDOC] was led to believe would reveal Orleans’ shareholders, contained no ownership information.”<sup>134</sup>

94. To analyze whether the IBRA’s examination of possible affiliation differed in the context of those sales as compared to the APP/SMG sale, USDOC requested the bidding documents for the other debt sales under the PPAS.<sup>135</sup> The expert explained at the prior CFS verification that “IBRA documents *should* hold that information, but that even if [USDOC] were able to obtain

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<sup>131</sup> Compare, e.g., Petitioners’ General Factual Information Submission (June 21, 2010), at Exhibit 24 (Exhibit US-40) (“some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency”), with Meeting with an Independent Expert (Aug. 24, 2007) (Exhibit US-81) (explaining that “[i]t is not uncommon for hedge funds to set up special purpose vehicles (SPVs) for the purpose of participating in one particular deal and that these SPVs could easily be established in a way that would make their ultimate ownership unknowable,” and that “[t]he methods and structures employed by Indonesia corporates to “buyback” their debt using investment banks and offshore special purpose vehicles as fronts for the founding shareholders [of the debtors] is well known”).

<sup>132</sup> See CFS Final Determination IDM at 44-45 (Exhibit US-43) (citations omitted). The United States reiterates that the CFS investigation is not within the Panel’s terms of reference.

<sup>133</sup> CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48).

<sup>134</sup> CCP Final Determination IDM at 19 (Exhibit US-31); see also CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48).

<sup>135</sup> See CCP Final Determination IDM at 19 (Exhibit US-31) (“we altered our focus to test the validity of the GOI’s claims not to have inquired into the ownership of Orleans, or any other company purchasing debt, beyond requiring certain affirmations from bidders regarding their *bona fides*, which the GOI stated was consistent with IBRA’s evaluation procedures for sales in the PPAS”).

those documents, the information might not be conclusive because of the common practices that purposefully provide layers of ownership to make it difficult to identify the true, controlling, shareholders.”<sup>136</sup> The independent expert’s view that the bidding documents “should” hold that information was consistent with USDOC’s decision to seek the other bidding documents.

**Question 39: (to the United States)**

- a. Why did the USDOC decide to cancel the verification with respect to the debt buy-back shortly before it was to be held?**

**ANSWER:**

95. USDOC explained in a June 24, 2010 letter to the GOI that it was cancelling verification with respect to the APP/SMG debt buy-back because “the GOI did not provide the information and documentation concerning the other sales conducted under the PPAS program.” The GOI failed to provide this information despite having seven weeks and two opportunities to do so.<sup>137</sup> USDOC also explained that “[g]iven that the GOI has not provided the requested information and documentation, it has deprived the Department and other interested parties of the opportunity to examine this information before verification,” such that “neither the Department nor interested parties can conduct a meaningful analysis or verification of the GOI’s claims that information on the bidders’ ownership structure was not required to be submitted to IBRA, or of other aspects of IBRA’s standard operating procedures under the PPAS program.”<sup>138</sup> This letter was issued four days before the beginning of the GOI’s scheduled verification.

96. USDOC expounded on its rationale in the final determination. In addition to reiterating the reasons that were stated in the June 24, 2010 letter, USDOC explained that “it is well-established that verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted,” and that “[b]eside[] the fact that neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions, the resources available at verification are completely different than those available at Department headquarters.”<sup>139</sup>

97. For the reasons discussed below, USDOC’s cancelation of verification of the debt buy-back program strikes an appropriate balance between providing the GOI with a reasonable period of time to respond to USDOC’s questionnaires, and the very limited time remaining in the CCP investigation to conduct verification of both the GOI and APP/SMG, to issue verification reports,

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<sup>136</sup> Meeting with an Independent Expert at 3 (Aug. 24, 2007) (Exhibit US-81) (emphasis added).

<sup>137</sup> Letter from USDOC to Indonesia Canceling Verification of the Debt Buy-Back (June 24, 2010), at 1 (Exhibit US-76).

<sup>138</sup> Letter from USDOC to Indonesia Canceling Verification of the Debt Buy-Back (June 24, 2010), at 1-2 (Exhibit US-76).

<sup>139</sup> CCP Final Determination IDM at 56 (Exhibit US-31).

to allow for case and rebuttal briefs by interested parties, to analyze any arguments received, and to prepare a final determination that responds to all arguments raised by the parties.<sup>140</sup>

98. At the first meeting of the Panel, the United States provided and explained Exhibit US-90, which illustrated the timeline for completing USDOC’s investigation of the debt buy-back from initiation through issuance of the final determination. Exhibit US-90 shows that USDOC first sought the bidding documents for the other PPAS debt sales on April 29, 2010, approximately two months before verification.<sup>141</sup> After receiving an extension, the GOI responded on May 27, 2010, that “[t]hese documents are not available at this time,” and the GOI questioned their relevance.<sup>142</sup> USDOC issued another supplemental questionnaire to the GOI again seeking this information on June 11, 2010, approximately three weeks before verification.<sup>143</sup> The GOI responded to this questionnaire on June 22, 2010, and stated that “these document [sic] are still not available. The GOI will continue making its best efforts to collect and organize these documents so they will be available during the verification.”<sup>144</sup>

99. Meanwhile, on June 18, 2010, USDOC issued a verification outline to Indonesia, in which it identified the APP/SMG debt buy-back as a verification item, which was to take place beginning approximately 10 days later, from June 28, 2010 through July 1, 2010. In that verification outline, USDOC placed Indonesia on notice that:

You currently have two questionnaire responses due on Tuesday, June 22, 2010. Depending on our analysis of these responses, the attached outline may be amended. If your responses are deemed unresponsive on some issues, those issues may be deleted from the verification agenda.<sup>145</sup>

As the United States explained above, Indonesia failed to adhere to that deadline. Indonesia also failed to seek an extension of time with USDOC.<sup>146</sup> As USDOC explained, “[p]roviding the opportunity to review the information at verification is not a substitute for providing the information for review beforehand.”<sup>147</sup>

100. Indeed, USDOC did not receive any concerns on the record from the GOI about USDOC’s refusal to conduct verification of the debt buy-back until one month *after* verification

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<sup>140</sup> See Timeline for Investigation of the Debt Buy-Back (Exhibit US-90).

<sup>141</sup> Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at 3 (Exhibit US-41).

<sup>142</sup> GOI Third Supplemental Questionnaire Response (May 27, 2010) (Exhibit IDN-15 (BCI)).

<sup>143</sup> Fifth Supplemental Questionnaire to the GOI (June 11, 2010) (Exhibit US-42) (Question 8).

<sup>144</sup> GOI Fifth Supplemental Questionnaire Response (June 22, 2010), at 7 (Exhibit IDN-16 (BCI)).

<sup>145</sup> GOI Verification Agenda (June 18, 2010), at cover letter (Exhibit US-77).

<sup>146</sup> See Fifth Supplemental Questionnaire to the GOI (June 11, 2010), at cover letter (Exhibit US-42) (“The Department reminds you that if you find there is insufficient time to provide a complete response to a questionnaire, you must, as stated in 19 CFR 351.302(c), file a written request for an extension before the questionnaire’s current due date”).

<sup>147</sup> CCP Final Determination I&D Memo, at 56 (Exhibit US-31).

was completed.<sup>148</sup> Furthermore, Indonesia never provided or attempted to provide the missing documents to USDOC.

101. As Exhibit US-90 illustrates, when USDOC cancelled verification of the debt buy-back program, there remained just over three months to complete the CCP investigation. During that three months, USDOC was faced with a formidable task. USDOC travelled to Indonesia and conducted verifications of both the GOI and of APP/SMG which included several cross-owned companies, prepared and issued verification reports for both respondents, solicited and accepted case and rebuttal briefs from interested parties, analyzed all arguments raised in those briefs, and prepared the CCP final determination in which USDOC responded to all arguments raised by interested parties in their briefs.

- b. Could the USDOC not have accepted to receive the information on other sales under the PPAS programme at verification, given that the GOI had indicated that it would provide the information and that it would make available officials that had knowledge of the Orleans sale at verification?**
- c. How would the USDOC have considered the presence and testimony of ex-IBRA officials at verification: as new evidence, as evidence supporting evidence on the record, etc.?**
- d. Would it not have been reasonable for the USDOC to either accept the documents at verification or to postpone verification of the debt buy-back issue, particularly given the importance of the issue of Orleans' ownership to the investigation?**

**ANSWER:**

102. The United States responds to sub-questions (b), (c), and (d) together, because they involve overlapping issues.

103. First, it would not have been reasonable for USDOC to accept the documents at verification. As USDOC explained, “it is well-established that verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted.”<sup>149</sup> USDOC’s decision not to accept the bidding documents at verification is likewise supported by Annex VI(7) of the SCM Agreement, which provides that “[a]s the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out *after* the response to the questionnaire has been received.”<sup>150</sup> In any event, the purpose of verification should not (and cannot) be to provide Indonesia with a third opportunity to supply necessary, missing information, where Indonesia

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<sup>148</sup> GOI Letter to USDOC Expressing Concerns about Refusal to Conduct Verification of Debt Buy-back (Aug. 3, 2010) (Exhibit US-87).

<sup>149</sup> CCP Final Determination IDM at 56 (Exhibit US-31).

<sup>150</sup> Annex VI(7) of the SCM Agreement (emphasis added); *see also* U.S. Closing Statement at the First Panel Meeting, para. 8.

already had two opportunities over a seven-week period to provide that same information.<sup>151</sup> To require an investigating authority to accept information that the exporting Member failed to provide within a reasonable period of time prior to verification, would undermine an investigating authority’s ability properly to verify information and satisfy its deadlines in completing the investigation.

104. USDOC also explained why it was critical to have these documents prior to the outset of verification: “neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions.”<sup>152</sup> In addition, USDOC identified that “the resources available at verification are completely different than those available at Department headquarters,” such that “[w]hen information is reviewed as part of a questionnaire response at headquarters, the Department has available several analysts, attorneys, accountants, economists, and policy analysts, as well as senior management, to either examine the information firsthand, or to provide comments in response to briefings, and to offer advice and counsel regarding what additional inquiries should be pursued.”<sup>153</sup> “By contrast, at verification the Department typically has on hand a team of two or three, which may or may not include staff . . . that assist the operations unit in conducting investigations.”<sup>154</sup>

105. The United States disagrees with the premise of sub-question (a), which suggests that the GOI definitively stated that it would provide the missing information at verification. In its fifth supplemental questionnaire response, the GOI merely explained that it “will continue making its best efforts to collect and organize these documents so they will be available during the verification.”<sup>155</sup> This qualified declaration provided no assurances to USDOC that the GOI would have the missing documents available. In any event, as USDOC explained, “it was not satisfactory to respond to a questionnaire with a promise to continue trying to locate responsive information.”<sup>156</sup>

106. Indonesia’s claim that it would have former IBRA officials available at the verification does not affect the United States’ position. Had verification proceeded on the debt buy-back, USDOC would have considered any information provided by former IBRA officials to confirm the completeness and accuracy of evidence already on the record. USDOC’s verification outline clearly stated what new information would be accepted at verification:

Please note that verification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor

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<sup>151</sup> U.S. Closing Statement at the First Panel Meeting, para. 7; CCP Final Determination IDM at 56 (“our request for information was not issued on short notice, nor was it overly burdensome. Therefore, the information should have been provided in a timely manner such that it could have been analyzed by both the Department and Petitioners before verification began”).

<sup>152</sup> CCP Final Determination IDM at 56 (Exhibit US-31).

<sup>153</sup> CCP Final Determination IDM at 56 (Exhibit US-31).

<sup>154</sup> CCP Final Determination IDM at 56 (Exhibit US-31).

<sup>155</sup> GOI Fifth Supplemental Questionnaire Response (June 22, 2010), at 7 (Exhibit IDN-16 (BCI)).

<sup>156</sup> CCP Final Determination IDM at 54 (Exhibit US-31).

corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record. In such instances, you must file the information at the Department and serve it by hand on the petitioners within two business days after the information is presented at verification. Our acceptance of such information for examination at verification does not guarantee that we will be able to use it for our final determination.<sup>157</sup>

107. These procedures are in place in every investigation. USDOC did not subject Indonesia to different treatment than other government participants in other investigations.

108. Finally, it would not have been reasonable for USDOC to postpone verification of the debt buy-back. The United States refers the Panel to its response to sub-question (a) above, in which the United States highlights the time remaining in the investigation as of June 24, 2010 (when USDOC cancelled verification of the debt buy-back), to conduct verifications of Indonesia's and APP/SMG's questionnaire responses, issue the verification reports for all respondents, solicit case and rebuttal briefs from interested parties, analyze the many arguments raised, and prepare its final determination that responded to all of the parties' arguments. As of June 24, 2010, USDOC had approximately three months remaining to perform these investigatory steps.<sup>158</sup> Given these many remaining steps, and the SCM Agreement's recognition of an investigating authority's need to impose deadlines for the orderly conduct of its investigations, it was reasonable for USDOC not to postpone verification of the debt buy-back program, but to cancel it in light of Indonesia's repeated failure to provide necessary information within a *more than reasonable* period of time.

**e. Please indicate when and where the USDOC informed the GOI that if the missing information was not provided, the verification concerning the debt buy-back would be cancelled.**

**ANSWER:**

109. The verification outline USDOC issued to Indonesia on June 18, 2010, approximately 10 days before verification was to begin, placed Indonesia on notice that if the bidding documents for the other PPAS sales were not provided, USDOC reserved its ability to delete certain items from the verification outline:

You currently have two questionnaire responses due on Tuesday, June 22, 2010. Depending on our analysis of these responses, the attached outline may be amended. If your responses are deemed unresponsive on some issues, those issues may be deleted from the verification agenda.<sup>159</sup>

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<sup>157</sup> GOI Verification Outline (June 18, 2010), at 1 (Exhibit US-77).

<sup>158</sup> See Timeline for Investigation of the Debt Buy-Back (Exhibit US-90).

<sup>159</sup> GOI Verification Outline (June 18, 2010), at cover letter (Exhibit US-77).

The excerpt above referred to the fifth supplemental questionnaire to Indonesia dated June 11, 2010, which represented Indonesia's second opportunity to provide the bidding documents for the other PPAS sales.<sup>160</sup>

110. When Indonesia failed to provide that information, USDOC explained in a June 24, 2010 letter to Indonesia that, after reviewing Indonesia's fifth supplemental questionnaire response, USDOC was removing section B from the verification outline, which pertained to the APP/SMG debt buy-back.<sup>161</sup> This letter was issued on June 24, 2010, after the expiration of the June 22, 2010 deadline (which Indonesia did not request to extend) to provide its remaining responses to the fifth supplemental questionnaire. June 24, 2010 was four days prior to the scheduled verification of Indonesia's questionnaire responses.

- f. Would the United States not agree that the following statements by the USDOC in Exhibit US-77 would have created reasonable expectations on the part of the GOI that the USDOC would meet with IBRA officials at verification and/or that the GOI could expect not to have needed to provide additional information until that time?**
- i. "we request that any current or former IBRA officials who were directly involved with APP/SMG's debt restructuring and its sale of debt, and who prepared any reports or audits regarding the sales process related to IBRA's auctioning of similar debt to outside parties, are also available to address this topic". (Exhibit US-77, USDOC letter to the GOI, p. 2)**
- ii. "[p]lease have available the 'senior officials' who were involved in the PPAS sale of the APP/SMG debt to Orleans to discuss the details of this sale (e.g. the bid protocols and the bid evaluation process)". (Exhibit US-77, verification outline, p. 5)**

**ANSWER:**

111. We answer both subparts ((i) and (ii)) together.

112. The United States respectfully disagrees that the quoted statements in subparts (i) and (ii) would have created reasonable expectations on the part of Indonesia. USDOC was clear in the third and fifth supplemental questionnaires about the need to provide timely responses (*i.e.*, the bidding documents) to information it requested – twice.<sup>162</sup> The United States also refers to the verification outline cited in the Panel's question. Significantly, the two statements quoted by the Panel above are qualified by another statement in the verification outline, which placed the GOI on notice that if it failed to provide those bidding documents in its fifth supplemental

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<sup>160</sup> Fifth Supplemental Questionnaire to the GOI (June 11, 2010) (Exhibit US-42) (Question 8).

<sup>161</sup> Letter from USDOC to the GOI Canceling Verification of the Debt Buy-Back (June 24, 2010), at 1-2 (Exhibit US-76).

<sup>162</sup> Third Supplemental Questionnaire to the GOI (Apr. 29, 2010) (Exhibit US-41); Fifth Supplemental Questionnaire to the GOI (June 11, 2010) (Exhibit US-42).



questionnaire response, “issues may be deleted from the verification agenda.”<sup>163</sup> When read in context, it is clear that the two statements quoted by the Panel presumed that the GOI was going to provide the necessary documents prior to verification. However, the GOI failed to do so.

- g. Was the intended purpose of the meeting with these officials to discuss the Orleans sales, or was it to discuss the other PPAS sales?**

**ANSWER:**

113. Given that USDOC cancelled verification of the APP/SMG debt buy-back, it is difficult for the United States to speculate as to how discussions with former IBRA officials would have progressed, had they taken place. However, USDOC’s verification outline shows that the intended purpose of meeting with former IBRA officials was to discuss both the APP/SMG debt sale, for which Orleans was the winning bidder,<sup>164</sup> as well as to discuss other PPAS sales.<sup>165</sup> Similar to the United States’ responses to sub-questions (e) and (f) above, the statements in the verification outline as they pertained to the debt buy-back were contingent on Indonesia providing the necessary information sought in USDOC’s fifth supplemental questionnaire,<sup>166</sup> which it failed to do.<sup>167</sup>

**Question 40: (to the United States)**

- a. Please explain the competing considerations that were at play with respect to the USDOC's decision to resort to facts available to "fill the hole in the record" concerning Orleans' ownership and with respect to how it decided to fill this hole in the record?**

**ANSWER:**

114. To be clear, there existed two holes in the CCP investigation record with regard to the APP/SMG debt buy-back. The first hole in the record was that Orleans’ ownership information was missing. With this information missing, which went to the “critical question [of] whether

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<sup>163</sup> GOI Verification Outline (June 18, 2010), at cover letter (Exhibit US-77).

<sup>164</sup> See, e.g., GOI Verification Outline (June 18, 2010), at 5 (Exhibit US-77) (“Referencing your May 22, 2010 supplemental questionnaire response at page 26, please have available the ‘senior officials’ who were involved in the PPAS sale of the APP/SMG debt to Orleans to discuss the details of this sale (e.g., the bid protocols and the bid evaluation process”).”).

<sup>165</sup> See GOI Verification Outline (June 18, 2010), at 4 (Exhibit US-77) (“Please be prepared to compare and contrast how sales within the PPAS were conducted. That is, were the due diligence requirements the same across all sales that were conducted within the PPAS? Were the bids submitted in the PPAS all evaluated and scored using the same processes?”).

<sup>166</sup> GOI Verification Outline (June 18, 2010), at cover letter (Exhibit US-77).

<sup>167</sup> See Letter from USDOC to the GOI Canceling Verification of the Debt Buy-Back (June 24, 2010), at 1-2 (Exhibit US-76).

APP/SMG was affiliated with Orleans at the time of the debt sale,<sup>168</sup> USDOC had to determine how to fill this first hole in the record.

115. In filling this gap in the record, there were two competing considerations. The first was record evidence that suggested APP/SMG bought back its own debt through Orleans using the PPAS,<sup>169</sup> coupled with petitioners’ allegation that APP/SMG was allowed to buy back its own debt through the guise of Orleans.<sup>170</sup> The second was “the GOI’s claims that IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders are not affiliated with the debtor companies,”<sup>171</sup> as well as the affirmations themselves. In filling the gap in the record created by the absence of Orleans’ ownership information – which remained unknown even after the GOI provided the Orleans bid documents – and in light of the competing evidence suggesting that APP/SMG bought back its own debt through Orleans, USDOC sought other information from the GOI. USDOC sought this information to “test the validity of the GOI’s claims not to have inquired into the ownership of Orleans, or any other company purchasing debt, beyond requiring certain affirmations from bidders regarding their *bona fides*, which the GOI stated was consistent with IBRA’s evaluation procedures for sales in the PPAS.”<sup>172</sup> In other words, USDOC wanted to understand whether the IBRA approached possible affiliation any differently in the APP/SMG debt sale compared to other sales under the PPAS.<sup>173</sup> To do so, USDOC sought the bidding documents for the other PPAS sales.

116. The United States views USDOC’s request for the PPAS sales documents for the other transactions as having provided the GOI with yet another opportunity to provide information that was responsive on the question of affiliation and could be taken into account when selecting among the facts available, given that Article 12.7 of the SCM Agreement already had been triggered by the initial gap in the record.

117. Despite USDOC providing two opportunities and seven weeks,<sup>174</sup> including extensions of time, for the GOI to provide this information,<sup>175</sup> the GOI repeatedly failed to provide the documents. This left a second gap in the record, namely, the need to establish a baseline to compare the transaction in question against. USDOC sought to discover if IBRA’s due diligence procedures were followed, or if the Orleans transaction was subject to less scrutiny of whether

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<sup>168</sup> See CCP Final Determination IDM at 54 (Exhibit US-31); see also CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48) (“The identification of Orleans’ shareholders is pivotal to the Department’s ability to analyze the alleged affiliation between APP/SMG and Orleans”).

<sup>169</sup> See Meeting with an Independent Expert (Aug. 24, 2007), at 3 (Exhibit US-81); Petitioners’ General Factual Information Submission (June 21, 2010), at Exhibits 10-12, 16, 18, 22, 24, 33 & 36 (Exhibit US-40).

<sup>170</sup> See CCP Initiation Checklist, at 12 (Exhibit US-75).

<sup>171</sup> CCP Final Determination I&D Memo, at 52-53 (Exhibit US-31).

<sup>172</sup> CCP Final Determination I&D Memo, at 19 (Exhibit US-31).

<sup>173</sup> See U.S. Opening Statement at the First Panel Meeting, para. 26.

<sup>174</sup> CCP Final Determination I&D Memo, at 54 (Exhibit US-31).

<sup>175</sup> See Timeline for Investigation of the Debt Buy-Back (Exhibit US-90).

the bidder and debtor were affiliated, given that the GOI itself was proposing that USDOC accept that a lack of affiliation had been demonstrated on the basis of those procedures.<sup>176</sup>

118. Therefore, the GOI's claim that the IBRA did not inquire into the ownership of bidders under this program and accepted various affirmations that the bidders were not affiliated with the debtor companies was unsubstantiated, which was based on the GOI's failure to provide necessary information within a reasonable period of time. This evidentiary failure included the GOI's failure to cooperate to the best of its ability in timely providing the information sought.<sup>177</sup> To fill this second gap in the record, which was relevant to filling the first gap in the record discussed above, USDOC relied on the evidence that suggested APP/SMG bought back its own debt through Orleans under the PPAS program.<sup>178</sup> USDOC weighed the competing evidence and found, in selecting among the facts available, the World Bank and news reportage, as well as the expert report, to be more credible than generalized affirmations in the Orleans bid package. Even though the selected facts available created a less favorable result for the GOI, USDOC acted consistently with Article 12.7, for all the reasons stated in the United States' first written submission.<sup>179</sup>

- b. Even though the USDOC may not have received the precise documents that it was looking for, the USDOC had in its possession other documentation relevant to the issue of Orleans' ownership: Orleans' self-certification that it was not affiliated with APP/SMG; the opinion letter from the outside counsel; and the fact that Indonesian law provided for heavy penalties in case the debt buyer was found to be affiliated with the debtor. What importance did the USDOC accord to this other record evidence in its determination concerning Orleans' ownership? Was this other record evidence taken into account, and if so, where? What value did the USDOC attribute to it?**

**ANSWER:**

119. With regard to the Orleans bidding documents, such as Orleans' self-certification that it had complied with the bid protocol (which included the requirement that the bidder be unaffiliated with the debtor) and the opinion letter from outside counsel, USDOC acknowledged that the GOI had provided them.<sup>180</sup> However, they were of limited relevance in establishing non-affiliation because they provided no ownership information. The only extrinsic evidence provided, the Orleans bid package, did not reveal ownership information for Orleans. As

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<sup>176</sup> See U.S. Opening Statement at the First Panel meeting, para. 26.

<sup>177</sup> CCP Final Determination I&D Memo, at 5-6, 20, 54-55 (Exhibit US-31).

<sup>178</sup> See Meeting with an Independent Expert (Aug. 24, 2007), at 3 (Exhibit US-81); Petitioners' General Factual Information Submission (June 21, 2010), at Exhibits 10-12, 16, 18, 22, 24, 33 & 36 (Exhibit US-40).

<sup>179</sup> See U.S. First Written Submission, para. 141.

<sup>180</sup> CCP Final Determination IDM at 18-19 (Exhibit US-31); see also CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48).

USDOC explained, knowing who owned Orleans was “pivotal to the Department’s ability to analyze the alleged affiliation between APP/SMG and Orleans.”<sup>181</sup>

120. Nonetheless, the fact that these documents contained self-certifications of non-affiliation,<sup>182</sup> coupled with statements by the GOI that the “IBRA relied primarily on the contractual obligations and the enforceability of those provision [sic],”<sup>183</sup> suggested that the IBRA placed substantial emphasis on the bidding documents themselves in examining possible affiliation in PPAS sales. This information, along with the fact that Indonesian law prohibited the IBRA from selling debt back to the original owner or to an affiliate,<sup>184</sup> were all relevant to USDOC’s decision following the preliminary determination 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.”<sup>185</sup>

121. Furthermore, in the CCP final determination, USDOC did not discount the Orleans bidding documents. USDOC explained that it was using “the other information regarding APP/SMG’s debt sale to Orleans (and the other debt sales transactions) that was submitted by the GOI . . . to some extent” and was “not disregarding every piece of information and applying an adverse inference for the entire program.”<sup>186</sup> Specifically, USDOC relied on this and other information provided by the GOI as credible evidence of other aspects of the debt sale program, such as “the amount of debt involved or the amount paid for the debt by Orleans,” the finding “that the debt was state-owned and that the PPAS program involved a very small number of companies,” and in supporting “the nature of the financial contribution, the specificity of the subsidy, or the amount of the benefit (if any).”<sup>187</sup>

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<sup>181</sup> CCP Final Determination IDM at 19 (Exhibit US-31); *see also* CCP Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit US-48).

<sup>182</sup> *See* GOI First Supplemental Questionnaire Response, Part II (Feb. 22, 2010), at 29 (Exhibit US-34 (BCI)) (“The mechanisms implemented by IBRA – the required certificate of compliance, the buyers specific representation of non-affiliation in the asset sale and purchase agreement, and the opinion letter by outside counsel – all represent the procedures implemented by IBRA to ensure the prohibition against sale of debt to the original debtor was not happening”).

<sup>183</sup> *See* GOI Third Supplemental Questionnaire Response (May 27, 2010), at 8 (Exhibit IDN-15 (BCI)).

<sup>184</sup> “Decree of Head of the Indonesian Bank Restructuring Agency Regarding Prohibition on Sale Back of Assets to the Original Owner,” Regulation No. SK-7/BPPN/0101, at Article 1 (prohibiting the IBRA “to perform such sale of assets to and or cause a buyback of assets by: . . . Original owner” or “[t]he Affiliated Parties of the Original Owner”) (Exhibit US-84).

<sup>185</sup> CCP Final Determination IDM at 19 (Exhibit US-31).

<sup>186</sup> CCP Final Determination IDM at 53-54 (Exhibit US-31).

<sup>187</sup> *See* CCP Final Determination IDM at 57 (Exhibit US-31).

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

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

###### Question 46: (to the United States)

- a. Please explain, step by step, the USITC's findings with respect to the "black liquor" tax credit, both during the POI and for the imminent future.

###### ANSWER:

122. In its determination, the Commission first addressed the black liquor tax credit as a condition of competition in the U.S. market that informed its material injury analysis.<sup>188</sup> As the Commission explained, the black liquor tax credit was an "alternative fuel tax credit pursuant to 642 of the Internal Revenue Code" that "went into effect in late 2007 and expired at the end of 2009."<sup>189</sup> During that time, domestic producers were allowed to receive a tax credit of "\$0.50 per gallon of kraft pulp by-product ('black liquor') that they produced," which "result[ed] from the production of certain coated paper and other papers, including other coated free sheet papers and coated groundwork paper."<sup>190</sup> The Commission found that "certain U.S. paper mills applied for and received" black liquor tax credits in 2009.<sup>191</sup> The Commission also summarized the party arguments concerning the black liquor tax credit, observing that respondents claimed that producers used the credits to lower their prices in 2009 while petitioners denied that the credits influenced pricing decisions that year.<sup>192</sup>

123. In addressing the price effects of subject imports, the Commission explicitly considered the effect of the black liquor tax credit on domestic prices and found it to be a factor that "also contributed importantly to lower prices," together with subject imports and significantly depressed demand.<sup>193</sup> As the Commission explained, "[t]he black liquor tax credit spurred

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<sup>188</sup> USITC Pub. 4192 (Exhibit US-1) at 25. Consistent with ADA Article 3.4 and SCMA Article 15.4, U.S. law requires the Commission to examine the impact of subject imports on the domestic industry by "evaluating all relevant economic factors which have a bearing on the state of the industry," including enumerated factors that mirror the factors listed under AD Agreement Article 3.4 and SCM Agreement Article 15.4, "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii) (Exhibit US-12). Accordingly, the Commission prefaced its analysis of material injury with a section addressing the conditions of competition distinctive to the U.S. coated paper industry, including the black liquor tax credit.

<sup>189</sup> USITC Pub. 4192 (Exhibit US-1) at 25.

<sup>190</sup> USITC Pub. 4192 (Exhibit US-1) at 25.

<sup>191</sup> USITC Pub. 4192 (Exhibit US-1) at 25. The Commission noted the black liquor tax credits reported by each beneficiary from production of CCP in 2009, including \$317 million reported by NewPage, \$375 million reported by MeadWestvaco, \$132 million reported by Sappi, and \$170.6 million reported by Clearwater. *Id.* at 25 n.164. International Paper reported black liquor tax credits of \$2.1 billion for production of all qualifying paper products, and not just CCP. *Id.*

<sup>192</sup> USITC Pub. 4192 (Exhibit US-1) at 25.

<sup>193</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

greater pulp production by domestic producers in 2009, contributing to lower prices for fiber/pulp which is a key input to production of coated paper.”<sup>194</sup> In this regard, the decline in the average unit value of the domestic industry’s total raw material costs between 2008 and 2009, from \$435 to \$411 per short ton, mirrored the decline in the industry’s fiber/pulp costs during the same period, from \$197 to \$170 per short ton.<sup>195</sup> These declining production costs, resulting from increased pulp production, would have contributed to lower CCP prices, as the Commission found. Given this, and the 14.7 percent decline in CCP demand between 2008 and 2009 that also contributed to lower domestic prices, the Commission declined to find that subject imports *significantly* depressed domestic prices in 2009, despite “some evidence of price depression by subject imports.”<sup>196</sup>

124. While declining to find that subject imports *significantly* depressed domestic prices in 2009, the Commission did find some evidence that subject imports depressed domestic prices, including the prevalence of underselling by subject imports and evidence that domestic producers reduced their prices in response to declining subject import prices in 2009. Specifically, the Commission found underselling by subject imports to be significant based on evidence that subject imports undersold the domestic like product in 48 out of 58 quarterly comparisons at margins ranging from 7.2 to 19.1 percent, which exceeded any price premium domestic products might obtain because of advantages in lead times and supply chains and purchaser preferences.<sup>197</sup> The Commission also observed an apparent relationship between price declines for the subject imports beginning in the fourth quarter of 2008 and price declines for the domestic like product in early 2009 for products 1 and 4, which accounted for a majority of Chinese imports for which pricing data were reported.<sup>198</sup> Domestic producers testified that they lowered their prices to compete with declining subject import prices, and numerous responding purchasers confirmed as much.<sup>199</sup> Consequently, the Commission concluded that “subject imports depressed domestic prices at least to some extent for part of the period under examination,” but the Commission could not conclude that subject imports did so to a significant degree in light of the other factors that also depressed domestic prices, namely depressed demand and the black liquor tax credit.<sup>200</sup>

125. In looking to the imminent future for purposes of its threat analysis, the Commission was able to examine the relationship between the domestic industry and the unfairly traded imports without the interference of the black liquor tax credit. In finding that subject imports were likely to have significant adverse effects on domestic prices in the imminent future, the Commission observed that the black liquor tax credit had expired in 2009. Specifically, the Commission contrasted the likelihood that significant subject import underselling would continue in the imminent future, as a means for subject producers to gain market share, with the reduced

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<sup>194</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>195</sup> USITC Pub. 4192 (Exhibit US-1) at 33 n.218.

<sup>196</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>197</sup> USITC Pub. 4192 (Exhibit US-1) at 31.

<sup>198</sup> USITC Pub. 4192 (Exhibit US-1) at 32.

<sup>199</sup> USITC Pub. 4192 (Exhibit US-1) at 32 & V-12-14.

<sup>200</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

significance of the other factors that depressed domestic prices during the period of investigation.<sup>201</sup> In this regard, the Commission found that “[d]omestic consumption is likely to decline only modestly from 2010 to 2011” and that “the ‘black liquor’ tax credit expired in 2009 and is not likely to be renewed.”<sup>202</sup> “Without the prominence of these other market forces,” the Commission explained, “a key driver of domestic market prices will be the significant volumes of subject imports,” particularly in light of the evidence that “subject imports led domestic prices downward in late 2008 and early 2009.”<sup>203</sup> In light of this imminent change in circumstances, the Commission concluded that the significant increase in subject import volume that was likely, fueled by significant underselling, would “put pressure on domestic producers to lower prices in a market with depressed demand in order to complete for sales and prevent an accelerated erosion of their market share,” thereby depressing or suppressing domestic prices in the imminent future.<sup>204</sup>

126. As noted, the Commission factored the black liquor tax credit into its analysis of the impact of subject imports on the domestic industry. The Commission found that there was no “sufficient causal nexus” between subject imports and present material injury in part because the domestic industry’s performance during the period of investigation was influenced not only by subject imports, but also by other factors, including the black liquor tax credit.<sup>205</sup> Citing its analysis “in earlier sections,” the Commission found that “there is some evidence that the imports depressed domestic prices, but the record does not establish that the effects of subject imports on domestic prices were significant” – clearly referencing its earlier finding that depressed demand and the black liquor tax credit also depressed domestic prices.<sup>206</sup> The Commission also found that despite “a sharp decline in demand,” “the domestic industry remained profitable and steadily increased its market share,” noting that “domestic producers had a significant revenue stream from the black liquor tax credit in 2009” – the only year in which they derived revenues from the credit – “which encouraged domestic producers to produce greater volumes of pulp, and may have insulated them to some degree from price declines in 2009.”<sup>207</sup>

127. In assessing the domestic industry’s vulnerability to material injury in the imminent future for purposes of the threat analysis, the Commission considered, among other factors, the expiration of the black liquor tax credit. In finding the industry vulnerable, the Commission relied on “the downward trends in virtually all of the domestic industry’s performance indicators during the period examined,” including “double-digit percentage declines in production, shipments, capacity utilization, net sales, production workers, operating income, and capital expenditures.”<sup>208</sup> The Commission also observed that the domestic industry’s reported financial performance in 2009 might understate the industry’s degree of vulnerability, because some of the

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<sup>201</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>202</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>203</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>204</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>205</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

<sup>206</sup> USITC Pub. 4192 (Exhibit US-1) at 37.

<sup>207</sup> USITC Pub. 4192 (Exhibit US-1) at 37 & n.249.

<sup>208</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

revenue received by domestic producers came from the black liquor tax credit and not from paper sales:

We recognize that the domestic industry’s financial indicators may have been worse in 2009 if not for the revenue it received from the black liquor tax credit. As discussed, this tax credit expired in 2009, and therefore any benefit that the domestic industry received from it in 2009 will not continue into the imminent future.<sup>209</sup>

128. Thus, insofar as the tax credits yielded any benefit to the industry, the Commission considered the black liquor tax credit as a one-time event that might have obscured the full extent of the domestic industry’s vulnerability in 2009. Indeed, any benefit that the domestic industry received from the black liquor tax credit was insufficient to prevent the industry’s operating income from declining from \$95.1 million in 2008 to \$61.8 million in 2009.<sup>210</sup> Respondent APP took the position that the credit was passed along to purchasers “almost one-for one”.<sup>211</sup> For APP, this was evidence that the credit depressed prices and therefore that its *existence* needed to be considered as an other factor causing injury to the domestic industry during the POI.

129. Crucially, while the Commission recognized that domestic producers received revenues from the black liquor tax credit in 2009,<sup>212</sup> the Commission never found that the black liquor tax credit yielded a net benefit to the domestic industry. Rather, as noted, to the extent that the tax credits yielded any benefit to the industry, the Commission considered the black liquor tax credit as a one-time event that might have obscured the full extent of the domestic industry’s vulnerability in 2009. The Commission, moreover, reached the obvious conclusion that the price-depressing effect of the credit that it had found, and that respondents had asserted to be an other factor causing present material injury and obscuring the effect of subject imports on domestic industry during the POI, would not continue going forward in light of the credit’s expiration.

130. Finally, we note that, at the first Panel meeting, the Panel inquired as to why the tax credit was established in the first place. We are providing information from the Commission’s investigation record that addressed this inquiry:

131. In the preliminary phase of the Commission’s investigation, petitioners explained that the tax credit for alternative fuels made from biomass, such black liquor, was intended to promote environmentally responsible industry practices:

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<sup>209</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

<sup>210</sup> USITC Pub. 4192 (Exhibit US-1) at 37. The domestic industry’s operating income as a share of net sales also declined from 4.9 percent in 2008 to 3.8 percent in 2009. *Id.* The Commission traditionally focuses its analysis of a domestic industry’s financial performance on the industry’s operating income, as the financial indicator most closely related to production and sales of the domestic like product. Domestic producers reported revenues received from the black liquor tax credit as a separate “other” non-operating item. *Id.* at VI-19.

<sup>211</sup> APP’s Prehearing Brief (Exhibit US-95) at 53.

<sup>212</sup> *See* USITC Pub. 4192 (Exhibit US-1) at 25 & n.164, 37 n.249.



By way of background, in 2005, the Internal Revenue Code was amended (IRC Section 6426(e)) to allow an excise credit to be applied to a mixture of alternative fuel and taxable fuel. In 2007, Congress amended the provision to include liquid fuel derived from biomass. The purpose of the provision is to encourage environmentally responsible behavior and to reduce the carbon footprint of certain fuel users and producers.<sup>213</sup>

132. U.S. integrated CCP producers qualified for the alternative fuel mixture credit because they used black liquor, a byproduct of their wood pulping process, as an alternative fuel to power their paperboard mills.<sup>214</sup>

**b. Is it correct to say that the USITC considered that the black liquor tax credit benefited domestic producers' costs and production-related activities?**

**ANSWER:**

133. The Commission found that the black liquor tax credit “contributed importantly to lower prices” in 2009.<sup>215</sup> As the Commission explained, “[t]he black liquor tax credit spurred greater pulp production by domestic producers in 2009, contributing to lower prices for fiber/pulp which is a key input to production of coated paper.”<sup>216</sup> The Commission also noted that “domestic producers had a significant revenue stream from the black liquor tax credit in 2009, which encouraged domestic producers to produce greater volumes of pulp, and may have insulated them to some degree from price declines in 2009.”<sup>217</sup> The Commission, “recognize[d] that the domestic industry’s financial indicators may have been worse in 2009 if not for the revenue it received from the black liquor tax credit.”<sup>218</sup> As noted in response to question 46(a), while recognizing that additional revenues from the black liquor tax credit might have masked the full extent of the domestic industry’s vulnerability in 2009, the Commission did not find that such credits yielded a net benefit to the industry.

**c. Would the United States not agree that by not considering the impact of the repeal of the black liquor tax credit in terms of the producers no longer benefiting from the subsidy, the USITC overlooked one factor that had benefited the domestic industry in the past, the repeal of which was, logically, likely to negatively affect it in the future?**

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<sup>213</sup> Petitioners’ Postconference Brief (Exhibit US-94), Response to Staff Question 6 at 1.

<sup>214</sup> USITC Pub. 4192 (Exhibit US-1) at VI-18; *see also* Petitioners’ Postconference Brief (Exhibit US-94), Response to Staff Question 6 at 2 (“There are many types of alternative fuels, including biomass, liquefied petroleum gas, P Series Fuels, compressed or liquefied natural gas, liquefied hydrogen, and any liquid derived from coal. The Kraft chemical pulp production process results in the creation of a byproduct called black liquor, which is derived from biomass.”).

<sup>215</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>216</sup> USITC Pub. 4192 (Exhibit US-1) at 33.

<sup>217</sup> USITC Pub. 4192 (Exhibit US-1) at 37 n.249; *see also id.* at 25 n.164 (listing the black liquor tax credits reported by specific domestic producers).

<sup>218</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

**ANSWER:**

134. No. Expiration of the black liquor tax credit was not a “known factor[] other than subject imports which at the same time [was] injuring the domestic industry,” within the meaning of ADA Article 3.5 and SCM Article 15.5.

135. First, as discussed above, the Commission did not find that the black liquor tax credit yielded a net benefit to the domestic industry. Rather, consistent with respondents’ argument that the credit’s *existence* had a price depressing effect that precluded a finding that subject imports caused present material injury, the Commission declined to find present material injury in part because it considered the credit’s downward effect on prices to mitigate against such a finding. Having concluded that the credit’s existence constituted an other factor preventing a finding of material injury, the Commission logically did not consider its *removal* to constitute a factor mitigating against a finding of imminent future injury caused by the subject imports.

136. As noted above, while the Commission recognized that the credit did provide a source of revenues to the domestic industry, insofar as the tax credits yielded any benefit to the industry, the Commission considered the black liquor tax credit as a one-time event that might have obscured the full extent of the domestic industry’s vulnerability in 2009. As further noted above, respondent APP took the position that the credit was passed along to purchasers “almost one-for one”.<sup>219</sup> For APP, this was evidence that the credit depressed prices and therefore that its *existence* needed to be considered an alternative cause of injury to the domestic industry during the POI. Indeed, respondents made no argument to the Commission that expiration of the black liquor tax credit was relevant to the Commission’s threat analysis, belying Indonesia’s claim that this was a “known factor” that also threatened to injure the domestic industry in the imminent future.

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

**Question 49: (to the United States) During the period 2007-2009, the domestic industry and subject imports gained market share at the expense of nonsubject imports and any gains in market shares by subject imports were at the expense of nonsubject imports, not at the expense of the domestic industry. What was the USITC's reasoning as to why this would not hold true for the future?**

**ANSWER:**

137. As an initial matter, the United States would emphasize that the increase in subject import volume between 2007 and 2009 did not come entirely at the expense of nonsubject imports, but also adversely affected the domestic industry’s U.S. shipments. Although both the domestic industry and subject imports gained market *share* at the expense of nonsubject imports from 2007 to 2009 in a shrinking market, the Commission found that the *quantity* of U.S.

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<sup>219</sup> APP’s Prehearing Brief (Exhibit US-95) at 53.

producers’ domestic shipments fell each year during this period, for an overall decline of 15.0 percent.<sup>220</sup> By contrast, as the Commission explained,<sup>221</sup> during this same three-year period, subject import volume *increased* by 3.8 percent,<sup>222</sup> notwithstanding a 21.3 percent decrease in apparent U.S. consumption.<sup>223</sup> Indeed, between 2008 and 2009, the quantity of subject imports increased by 8.2 percent, and their market share concurrently increased by 3.9 percentage points, while U.S. producers’ shipments dropped 10.4 percent and apparent consumption “plummeted” by 14.7 percent.<sup>224</sup>

138. Coupled with these increasing volume trends in subject imports, the Commission observed that the capacity for production of subject imports was increasing and projected to continue doing so. As set out in the Commission determination, using the RISI numbers and taking into account the ability of the Chinese and Indonesian home and regional markets to absorb some of the increased capacity, there would still be excessive amounts of new production that would likely be aimed at the attractive U.S. market. Specifically, as the Commission explained, subject producers would likely have the ability to increase their exports to the United States significantly given respondents’ admission that that Chinese coated paper production capacity would increase between 2009 and 2011 by 1.5 million short tons.<sup>225</sup> Relying on RISI data, the Commission also noted that Chinese producers would likely possess 740,000 metric tons of excess capacity in 2011, equivalent to 815,709 short tons, even after satisfying all projected consumption growth in China and Asia.<sup>226</sup> Based on this massive level of excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009 and over double non-subject producers’ share of the U.S. market in 2009, the Commission found that subject producers had the ability to significantly increase their exports to the U.S. market.

139. The Commission also explained that subject producers had the incentive to increase significantly their exports to the United States. In this regard, the Commission noted the behavior of APP, whose affiliates accounted for a large share of subject imports in 2009. APP, on the heels of losing the account of Unisource, a major purchaser of CCP, in 2009, made an investment to establish Eagle Ridge in order to provide an e-commerce distribution network for APP’s products to retain and grow its U.S. market presence.<sup>227</sup> As a Unisource official attested, APP expressed the intent to double its sales to the U.S. market from 2008 levels by reducing its already low prices.<sup>228</sup> Adding to the attractiveness of the U.S. market to subject producers, the Commission explained that prices in the United States were generally higher than in China or other Asian markets,<sup>229</sup> that the United States market was large and well understood by subject

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<sup>220</sup> USITC Pub. 4192 (Exhibit US-1) at C-4 (Table C-3).

<sup>221</sup> USITC Pub. 4192 (Exhibit US-1) at 27-28.

<sup>222</sup> USITC Pub. 4192 (Exhibit US-1) at C-6 (Table C-3).

<sup>223</sup> USITC Pub. 4192 (Exhibit US-1) at C-3 (Table C-3).

<sup>224</sup> USITC Pub. 4192 (Exhibit US-1) at 27-28 and Table C-3.

<sup>225</sup> USITC Pub. 4192 (Exhibit US-1) at 28.

<sup>226</sup> USITC Pub. 4192 (Exhibit US-1) at 28 n.181.

<sup>227</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Unisource Affidavit (Exhibit US-2).

<sup>228</sup> Unisource Affidavit (Exhibit US-2) at para. 3. APP indicated to Unisource that it had the capability and desire to double its exports to the United States from 30,000 metric tons per month in 2008 to 60,000 metric tons per month.

<sup>229</sup> USITC Pub. 4192 (Exhibit US-1) at 29 & n.188, Table VII-2.

producers, particularly after APP's creation of Eagle Ridge;<sup>230</sup> and that the prevalence of spot sales and private label products enabled them to readily increase shipments to the U.S. market without an advertising or distribution infrastructure.<sup>231</sup> Given these factors, and corroborated by the Unisource affidavit, the Commission reasonably concluded that subject producers were likely to use their excess capacity to increase significantly their exports to the United States.

140. Likewise, the evidence supports the Commission's finding that the likely significant increase in subject import volume would come in significant part at the expense of domestic producers. As explained in the U.S. first written submission, the Commission found that the likely significant increase in subject imports would necessarily take sales from current suppliers, including domestic producers, rather than simply satisfying increased demand, based on RISI's projection that apparent U.S. consumption would decline 3.3 percent in 2011 and another 2.5 percent in 2012.<sup>232</sup> Also supported by the record is the Commission's finding that a portion of the increase in subject import volume would likely come at the domestic industry's expense based on the moderately high degree of interchangeability between subject imports for the domestic like product, and the adverse impact of increased subject import volume during the POI on the domestic industry's U.S. shipments.<sup>233</sup> The Commission also found it likely that subject imports would capture market share from the domestic industry due to the likelihood that subject imports would continue to pervasively undersell the domestic like product, as they had during the period of investigation. In particular, the Commission found it likely that subject producers would use underselling as a means of recouping the 6.8 percentage points of market share lost to the domestic industry during the interim period, due to the pendency of the investigations.<sup>234</sup> Based on all of these factors, the Commission concluded that the likely increase in subject import market share would come at the domestic industry's expense.<sup>235</sup>

141. Other evidence on the record lent further support to this conclusion. As the Commission found, Chinese producers would likely possess 740,000 metric tons of excess capacity in 2011, equivalent to 815,709 short tons, even after satisfying all projected consumption growth in China and Asia.<sup>236</sup> This massive level of excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009, was over double non-subject producers' 16.1 percent share of the U.S. 2,254,299 short ton market in 2009<sup>237</sup> – a market that the Commission had projected to shrink slightly further going forward.

142. The Commission also found that the likely significant increase in subject import volume, facilitated by significant underselling, would effectively force domestic producers to choose between reducing their prices and losing market share. As the Commission explained, subject

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<sup>230</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>231</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>232</sup> USITC Pub. 4192 (Exhibit US-1) at 38; Petitioner's Posthearing Brief, Question 3 to Commissioner Pinkert, Exhibit 1 (Exhibit US-4).

<sup>233</sup> USITC Pub. 4192 (Exhibit US-1) at 26-27.

<sup>234</sup> USITC Pub. 4192 (Exhibit US-1) at 34.

<sup>235</sup> USITC Pub. 4192 (Exhibit US-1) at 39.

<sup>236</sup> USITC Pub. 4192 (Exhibit US-1) at 28 n.181.

<sup>237</sup> USITC Pub. 4192 (Exhibit US-1) at C-3 (Table C-3).

import underselling during the period of investigation was significant, and was likely to continue in the imminent future as subject producers sought to regain lost market share and fill their massive excess capacity with increased exports to the United States.<sup>238</sup> Due to the prevalence of spot sales and the propensity of purchasers to switch suppliers quickly, the Commission reasoned that such underselling would pressure domestic producers to reduce their own prices to compete for sales and defend their market share, thereby depressing domestic prices to a significant degree.<sup>239</sup> The Commission therefore reasonably found that the U.S. market could not accommodate growth of subject imports without injury to the domestic industry, either by aggressively priced subject imports quickly gaining market share from the domestic industry as well as nonsubject imports, or, alternatively, forcing domestic producers to lower their prices substantially in order to retain volume and prevent an accelerated erosion in their market share.<sup>240</sup> Thus, the Commission demonstrated that subject imports would have adverse effects on the domestic industry independent of projected demand declines and nonsubject imports in the imminent future.

**Question 50: (to the United States) What was the factual basis for the USITC's projection that subject imports would not only regain the market share that they had lost from 2009 to 2010, but that they would actually increase their market share beyond any level achieved previously?**

**ANSWER:**

143. As discussed in response to Question 49, the Commission found that, as apparent U.S. consumption declined from 2007 to 2009, subject import market share increased notably, and, in contrast to domestic shipments, the quantity of subject imports increased during that period. Indeed, during that time, subject imports were the only source of increased volume into the U.S. market, as both the volume of the domestic industry's U.S. shipments and that of nonsubject imports declined.<sup>241</sup> Although subject imports declined in interim 2010 as a direct result of the pending investigations,<sup>242</sup> the aggressive pricing practices and sales pitches, as well as the

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<sup>238</sup> USITC Pub. 4192 (Exhibit US-1) at 31, 34.

<sup>239</sup> USITC Pub. 4192 (Exhibit US-1) at 34-35, 38. .

<sup>240</sup> USITC Pub. 4192 (Exhibit US-1) at 29, 34-35, 38. The evidence suggested that this occurred during the period of investigation. In particular, as explained in the U.S. First Written Submission, *see* paras 275-276, for both products 1 and 4, subject import and domestic prices increased irregularly during 2007 and much of 2008 until subject import prices declined sharply in the fourth quarter of 2008 and continued to decline into 2009. As subject import prices declined, domestic prices initially increased in the fourth quarter of 2008, causing underselling margins to increase, before declining through the first half of 2009 for product 1 and through the third quarter of 2009 for product 4. The Commission found that declining domestic prices in 2009 resulted in part from declining subject import prices. Domestic producers testified that they reduced prices to compete with subject imports during the period, and numerous purchasers reported that domestic producers had lowered prices to meet subject import prices. The Commission also noted that prices for higher-grade products that encountered less subject import competition, declined beginning in the third quarter of 2009, consistent with domestic producer testimony that the increasing price spread between high-grade and low-grade products became unsustainable.

<sup>241</sup> USITC Pub. 4192 (Exhibit US-1) at 26-27.

<sup>242</sup> USITC Pub. 4192 (Exhibit US-1) at 27.

excessive increases in home market capacity, indicated that the volumes of subject imports would likely be greater absent countervailing and antidumping duty orders.<sup>243</sup> In other words, it was the pending investigations that restrained the growth in the volume of subject imports during the period of investigation, and without that restraining effect, the likely volume of subject imports would likely have continued to grow and would likely be higher absent an order. Moreover, as the Commission explained, subject producers would be in a better position to take sales from domestic producers in the imminent future than they were during the 2007-2009 period due to clearly foreseen and imminent changes in circumstances; namely, the 1.5 million short ton increase in Chinese CCP capacity through 2011 and the establishment of Eagle Ridge, a distributor of subject imports in the second half of 2009.<sup>244</sup>

144. Furthermore, record evidence demonstrated that, prior to the imposition of provisional duties, APP intended to use aggressive pricing practices to double its shipments to the U.S. market.<sup>245</sup> As explained in the Unisource affidavit, APP indicated in 2008 that it intended to increase its monthly shipments from 30,000 metric tons to 60,000 metric tons, and would use aggressive pricing methods to achieve that goal.<sup>246</sup> Had APP succeeded, it therefore would have increased its shipments in 2009 by 396,831 short tons,<sup>247</sup> which would have almost doubled the 413,593 short ton volume of all subject imports in 2009, and the total volume of shipments, 810,424 short tons, would have accounted for approximately 36 percent of apparent U.S. consumption in 2009.<sup>248</sup> In sum, the Commission properly found, based on an objective evaluation of the facts, that, absent the orders, subject imports would likely have increased their market share beyond the level observed during the period of investigation.

**Question 52: (to the United States) Brazil argues (third-party statement, paragraph 15) that when preliminary duties are lifted, an increase of imports into the domestic market is likely to happen and it is only natural that the market will progressively return to the situation before the imposition of duties and that in such a situation, one cannot properly speak of a change in circumstances. Please react.**

**ANSWER:**

145. Brazil misapprehends the Commission’s findings. The Commission did not consider the lifting of the provisional CVD order to be a changed circumstance. To the contrary, the Commission noted that the imposition was a temporary order, and the consequent decline in subject import volumes and market share was a direct result of the preliminary duties. Specifically, after the Department of Commerce issued its preliminary affirmative finding in its countervailing duty investigation of subject CPP – on March 9, 2010, subject imports “dropped

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<sup>243</sup> USITC Pub. 4192 (Exhibit US-1) at 27.

<sup>244</sup> USITC Pub. 4192 (Exhibit US-1) at 28-29.

<sup>245</sup> USITC Pub. 4192 (Exhibit US-1) at 29, n. 186.

<sup>246</sup> Unisource Affidavit (Exhibit US-2) at para.3.

<sup>247</sup> 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>248</sup> USITC Pub. 4192 (Exhibit US-1) at Table C-3.

precipitously.”<sup>249</sup> As the Commission noted, respondents themselves acknowledged that the steep declines in subject import volume were due to the pending trade cases.<sup>250</sup>

146. Thus in discussing how behavior during the POI indicated the likely future volume and price effects of subject imports absent antidumping and countervailing duty orders, the Commission simply explained that it was discounting (*i.e.*, giving little weight) to the fact that subject import volume declined during at the end of the interim 2010, from March-June. In other words, absent the pendency of the investigations and Commerce's imposition of temporary provisional duties, the evidence in the record indicated that the aggressive pricing and volume increases of the subject imports would have continued in interim 2010, and would resume and continue absent imposition of final antidumping and countervailing duty orders.

147. The Commission's discussion of how the pendency of the investigations affected subject import volume did not reflect a finding of a change in circumstances that showed a threat of material injury; rather it reflected a recognition that the precipitous exit of these imports from the market after March 2010 was not indicative of an actual change in circumstances regarding the imports' likely behavior and effects on the domestic industry.

148. Furthermore, the Commission did not find that the market would “progressively return to the situation before the imposition of duties” in the absence of antidumping and countervailing duty orders, as suggested by Brazil's question, but rather that subject import volume was likely to increase significantly beyond the levels that prevailed during the period of investigation. As discussed in response to question 49 above, the Commission found that the 1.5 million short ton increase in Chinese capacity that was likely between 2009 and 2011 would result in substantial excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009, available for export to the United States.<sup>251</sup> The Commission found it likely that subject producers would use their excess capacity to increase exports to the United States based on APP's avowed determination to double its exports to the U.S. market using low prices, as memorialized in the Unisource affidavit; APP's establishment of Eagle Ridge in furtherance of that goal; and the relatively higher prices available in the U.S. market relative to third country markets, among other factors.<sup>252</sup>

**Question 53: (to the United States) Please react to Indonesia's argument in paragraph 73 of its opening statement at the first meeting of the Panel that "[i]f [the USITC's] reasoning is sufficient, a threat finding will be compelled in nearly every case because the investigating authority can start an investigation, observe a decline in subject imports once preliminary measures are imposed, and then infer subject imports will increase significantly to regain lost market share".**

**ANSWER:**

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<sup>249</sup> USITC Pub. 4192 (Exhibit US-1) at 27

<sup>250</sup> USITC Pub. 4192 (Exhibit US-1) at 27; APP's Prehearing Brief (Exhibit US-95) at 30, 72.

<sup>251</sup> USITC Pub. 4192 (Exhibit US-1) at 28 & n.181.

<sup>252</sup> See USITC Pub. 4192 (Exhibit US-1) at 29 (citing the Unisource Affidavit); Petitioner's Posthearing Brief, Exhibit 1 (Unisource Affidavit) (Exhibit US-2).

149. As explained in our response to Question 52, the Commission did not consider the likely bump in subject import volume that would occur after the provisional CVD order was lifted to be a changed circumstances justifying a finding of threat of injury. Rather, vis-à-vis the subject imports, the Commission simply discussed the reaction to Commerce's preliminary CVD determination in March 2010 to explain the decline in imports during the end of interim 2010. While the temporary exit of the subject imports did provide a parameter for demonstrating that the absence of such imports would allow the domestic industry to regain sales and market share, notwithstanding the continued presence of nonsubject imports, the Commission did not use the interim 2010 subject imports volume as a baseline to project the likely significance of future subject import volumes.

**Question 54: (to the United States) Indonesia argues (opening statement at the first meeting of the Panel, paragraph 68) that it is speculative to say that the Chinese industry will export all of its excess capacity to the United States. Please react.**

**ANSWER:**

150. The premise of Indonesia's argument, that the Commission somehow "assumed" that "the Chinese industry will export all of its excess capacity to the United States," is erroneous.<sup>253</sup> The Commission made no such finding. Instead, the Commission found that subject producers had both the ability, through massive excess capacity, and the incentive to increase their exports to the United States significantly in the imminent future, and were therefore likely to do so.<sup>254</sup>

151. The Commission's analysis of the Chinese industry's excess capacity was fully supported by the record in the investigation, and fully consistent with AD Agreement Article 3.7 and SCM Agreement Article 15.7. The United States recalls that these provisions state that investigating authorities "should consider . . . sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped [or subsidized] exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports." (Emphasis added.) Nothing under the agreements requires investigating authorities to find that all of an exporter's excess capacity will be used to increase exports to the importing Member before making an affirmative threat determination. Here, the record contains, and the Commission cited, ample record support for its finding that subject producers were likely to use their substantial excess capacity to increase significantly their exports to the United States in the imminent future.<sup>255</sup>

152. The Commission also had ample evidentiary support for its finding that subject producers had every incentive to use their excess capacity to increase significantly their exports to the United States. In particular, the record contained direct, un rebutted evidence that APP, which

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<sup>253</sup> Indonesia's Opening Statement, para. 68 (emphasis added).

<sup>254</sup> USITC Pub. 4192 (Exhibit US-1) at 28-29; *see also id.* at 30-31 (concluding that "subject import volume is likely to be significant within the imminent future, both in absolute terms and relative to consumption and production in the United States, and that the increase in subject imports' market share will likely be significant.").

<sup>255</sup> USITC Pub. 4192 (Exhibit US-1) at 28.



was the leading exporter of CCP from China and Indonesia that accounted for “the large majority” of subject imports,<sup>256</sup> was determined to double its exports to the United States from 2008 levels by reducing its already low prices. As explained in the United States’ first written submission and at the first Panel meeting, an official from Unisource Worldwide, Inc., a leading U.S. distributor of CCP, submitted an affidavit concerning his interactions with APP.<sup>257</sup> In the affidavit, he stated that APP told Unisource in November 2008 that APP wished to double its CCP exports to the United States and that it was willing to cut its prices to increase volume immediately, notwithstanding that APP’s 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>258</sup> Unisource declined the offer because it believed that APP’s increased volume and reduced pricing would seriously disrupt the U.S. market.<sup>259</sup> While acknowledging that APP lost the Unisource account after making this proposal, the Commission found that APP compensated by establishing Eagle Ridge, its own U.S. distribution network, to retain and increase its U.S. market presence.<sup>260</sup> Indeed, subject imports continued to increase in 2009 even after APP lost the Unisource account, and subject imports also continued to be priced aggressively.<sup>261</sup> It was therefore reasonable for the Commission to assume that APP would continue to use low prices in pursuit of its goal of substantially increasing its exports to the United States in the imminent future, in the absence of antidumping and countervailing duty orders.<sup>262</sup>

153. Also supported by the record is the Commission’s finding that the United States represented a highly attractive market to subject Chinese and Indonesian producers for several reasons.<sup>263</sup> Specifically, the Commission observed that prices in the United States were generally higher than in China or other Asian markets, with responding Chinese producers reporting that the unit value of their exports to the United States was over \$100 higher than the unit value of their shipments to home market customers and exports to Asian markets.<sup>264</sup> The Commission also explained that the United States market was large and well understood by subject producers, particularly after APP’s creation of Eagle Ridge.<sup>265</sup> Further facilitating the subject producers’ access to the U.S. market was the prevalence of spot sales and private label products, which enabled them to increase shipments to the U.S. market without an advertising or distribution infrastructure.<sup>266</sup> Given these factors, and corroborated by the Unisource affidavit, the Commission had ample evidentiary support for its finding that subject producers were likely to use their excess capacity to increase significantly their exports to the United States.

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<sup>256</sup> USITC Pub. 4192 (Exhibit US-1) at 24.

<sup>257</sup> See USITC Pub. 4192 (Exhibit US-1) at 29 (citing the Unisource Affidavit); Petitioner’s Posthearing Brief, Exhibit 1 (Unisource Affidavit) (Exhibit US-2).

<sup>258</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2).

<sup>259</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2).

<sup>260</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>261</sup> See USITC Pub. 4192 (Exhibit US-1) at 26, 32.

<sup>262</sup> USITC Pub. 4192 (Exhibit US-1) at 24.

<sup>263</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>264</sup> USITC Pub. 4192 (Exhibit US-1) at 29 & n.188, Table VII-2.

<sup>265</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>266</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

154. Likewise, the Commission had ample evidentiary support for its finding that subject producers had the ability to increase their exports to the United States significantly.<sup>267</sup> Indonesia readily concedes that Chinese producers (including APP) possessed net excess capacity of “740,000 metric tons available for export to the rest of the world,” including the United States, in 2011.<sup>268</sup> Relying on the same RISI data, the Commission also found that Chinese producers would likely possess 740,000 metric tons of excess capacity in 2011, equivalent to 815,709 short tons, even after satisfying all projected consumption growth in China and Asia.<sup>269</sup> Given this massive level of excess capacity, equivalent to 36.3 percent of apparent U.S. consumption in 2009, Chinese producers could have significantly increased their exports to the United States from 2009 levels using a fraction of their excess capacity. Indeed, Chinese producers could have doubled their exports to the United States from the 2008 level of 339,324 short tons – APP’s avowed goal, as noted in the Unisource affidavit<sup>270</sup> – using only 42 percent of their excess capacity. Given this, there is simply no merit to Indonesia’s suggestion that increased exports to third country markets outside of Asia, which accounted for only 39.6 percent of Chinese exports in 2009,<sup>271</sup> would prevent Chinese producers from having sufficient excess capacity to increase significantly their exports to the United States. On the contrary, Chinese producers themselves projected that such exports would increase by only 43,578 short tons, or 7.5 percent, between 2009 and 2011.<sup>272</sup> Thus, Chinese producers would have possessed more than enough excess capacity to increase their exports to the United States significantly, even as they increased their exports to third country markets.

155. Based on the significant increase in subject import volume during the period of investigation, and evidence that subject producers had both the ability and the incentive to increase exports to the United States substantially, the Commission reasonably concluded that subject import volume and market share was likely to increase significantly in the imminent future.<sup>273</sup>

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<sup>267</sup> USITC Pub. 4192 (Exhibit US-1) at 28.

<sup>268</sup> Indonesia’s Opening Statement, para. 68.

<sup>269</sup> USITC Pub. 4192 (Exhibit US-1) at 28 n.181. As noted in the United States’ First Written Submission, the Commission also relied on 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.

<sup>270</sup> Petitioner’s Posthearing Brief, Exhibit 1 (Unisource Affidavit) (Exhibit US-2).

<sup>271</sup> USITC Pub. 4192 (Exhibit US-1) at Table VII-2.

<sup>272</sup> USITC Pub. 4192 at Table VII-2. Importantly, Chinese producers themselves projected that their exports to third country markets outside of Asia would increase only 7.5 percent between 2009 and 2011 despite a projected decline in their exports to the U.S. market of 91.0 percent, presumably due to the pending investigations. *Id.* In other words, Chinese producers did not see much room to grow their exports to third country markets outside of Asia even if they were compelled to increase such exports by antidumping and countervailing duty orders that shut them out of the U.S. market.

<sup>273</sup> USITC Pub. 4192 (Exhibit US-1) at 30-31.

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

**Question 56: (to both parties) Please react to the European Union's suggestion, relying on the panel report in *US – Softwood Lumber VI* (paragraphs 7.33-7.34) that, to succeed in Articles 3.8 and 15.8 claims, the complainant must present arguments that go beyond its arguments under the other provisions of the Anti-Dumping and SCM Agreements that govern injury determinations. (European Union's third-party submission, paragraphs 94-96).**

#### **ANSWER:**

156. As the U.S. First Written Submission makes clear,<sup>274</sup> the United States fully agrees with the European Union that “an inconsistency under the special care provision of Articles 3.8 ADA / 15.7 SCM could only be invoked as a separate violation under particular circumstances, namely when specific additional or independent arguments would be brought compared to arguments made under the specific ADA / SCM provisions.”<sup>275</sup>

157. The panel in *US – Softwood Lumber VI* explained that:

In these circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation could not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations.<sup>276</sup>

158. In that dispute, the panel observed that:

Canada's arguments indicates that the factual circumstances Canada asserts demonstrate the failure of the USITC to take the requisite "special care" are the same factual circumstances that give rise to the asserted specific violations. Canada points to examples of what it considers are aspects of the USITC determination that demonstrate a lack of special care which are the same aspects that Canada argues demonstrate violations of other provisions of Articles 3 of the AD Agreement and 15 of the SCM Agreement. Thus, it appears to us that Canada is asserting that the violations of the specific provisions cited in Canada's claims and the violations of Article 3.8 and 15.8 are co-extensive.<sup>277</sup>

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<sup>274</sup> Para. 310.

<sup>275</sup> EU Third Party Submission, para. 94.

<sup>276</sup> *US – Softwood Lumber VI (Panel)*, para. 7.34.

<sup>277</sup> *US – Softwood Lumber VI (Panel)*, para. 7.35.

159. The panel therefore concluded that:

In light of the foregoing, in the circumstances of this case we can see no basis for a finding of violation of the special care requirement with respect to any aspect of the determination which is otherwise found to be consistent with the other provisions of Articles 3 and 15 asserted by Canada. On the other hand, with respect to any aspect of the determination that is found to be inconsistent. Clearly, whatever the precise parameters of "special care" in the context of a threat determination may be, an aspect of the determination which does not satisfy the other, more specific obligations of Articles 3 and 15 cannot satisfy the special care obligation. However, to say so does not in any respect clarify the obligation set out in Articles 3.8 of the AD Agreement and 15.8 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB.<sup>278</sup>

160. The same reasoning applies fully in this dispute. Indonesia has made no independent argument that the Commission breached the special care requirements beyond Indonesia's arguments in support of its claims under other parts of ADA Article 3 and SCMA Article 15.<sup>279</sup> Accordingly, there is no basis for a finding of breach of the special care requirements with respect to any aspect of the Commission's determination which is otherwise found to be consistent with the other provisions of Articles 3 and 15. The United States has explained why the USITC's determination is fully consistent with the specific ADA and SCMA provisions that Indonesia claims they breach (ADA Articles 3.5 and 3.7 and SCMA Articles 15.5 and 15.7). But even if that were not the case, as the *US – Softwood Lumber VI* panel noted, findings under Articles 3.8 and 15.8 would provide no further guidance in implementation and therefore should not be made.

## **5 "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 58: (to both parties) What is the meaning and relevance of the terms "considered and decided" in Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement?**

### **ANSWER:**

161. As established in the U.S. First Written Submission, these terms refer to the analytical grounding of both an investigating authority's consideration of whether a domestic industry is threatened with material injury and of the authority's ultimate decision on whether such a threat exists. In particular, this phrasing brings within the coverage of the provision both the

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<sup>278</sup> *US – Softwood Lumber VI (Panel)*, para. 7.36.

<sup>279</sup> *See* Indonesia's FWS, paras. 131-32.

consideration of individual questions bearing the ultimate existence of threat of injury – such as those that Articles 3.7 and 15.7 provide that “authorities should consider” – and the substantive grounding of the ultimate decision on whether a domestic industry is threatened.

162. The meaning of individual words in Articles 3.8 and 15.8 is informed by the context of the provisions within the ADA and SCMA. As explained in the U.S. First Written Submission,<sup>280</sup> the “special care” provisions of each agreement come at the end of articles – SCMA Article 15 and ADA Article 3 – which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof to a domestic industry. This placement is informative, showing that, like the remainder of the articles, each “special care” provision concerns the substantive analysis that must be undertaken. As the U.S. First Written Submission further explained,<sup>281</sup> the drafting history confirms that the special care requirement speaks to the substantive analysis underlying the determination of threat of injury and not internal decision-making procedures that an investigating authority might have followed.

163. The panel’s analysis in *US – Softwood Lumber VI* is consistent with, and further confirms this understanding. That Panel found that breaches of the “special care” requirement will generally result from breaches of “the more specific provisions of the Agreements governing injury determinations”<sup>282</sup> As discussed above and in the U.S. First Written Submission, these more specific provisions address the substantive analysis that must underlie a determination but not the decision-making procedures of investigating authorities. Because investigating authorities must comply with the specific obligations under the ADA and SCMA in making threat determinations, including Articles 3.1 and 3.7 of the ADA and Articles 15.1 and 15.7 of the SCM Agreement, it is in the satisfaction of those obligations – which address substantive analysis and not decision-making procedure – that investigating authorities exercise special care under ADA Article 3.8 and SCMA article 15.8. Even if an independent breach of the special care obligation were possible, the demonstration of such a breach would require “additional or independent arguments,” which would necessarily have to relate to an investigating authority’s “establishment of whether the prerequisites for application of a measure exist” in its written determination.<sup>283</sup>

**Question 59: (to both parties)**

- a. Do you consider that the application of measures is, or could be, a separate decision from that of the fulfilment of the substantive requirements for applying such measures, or does one flow automatically from the other?**

**ANSWER:**

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<sup>280</sup> Para. 322.

<sup>281</sup> Para. 330-332.

<sup>282</sup> *US – Softwood Lumber VI (Panel)*, para. 7.34.

<sup>283</sup> *US – Softwood Lumber VI (Panel)*, para. 7.33-7.34.

164. The United States understands this question as a reference to two specific words (“application” and “decided”) in ADA Article 3.8/SCMA article 15.8: that is, “With respect to cases where injury is threatened by [dumped/subsidized imports], the *application* of [antidumping/countervailing measures] shall be considered and *decided* with special care.” How special care in deciding the application of AD/CVD measures might differ from other requirements for application of AD/CVD measures is difficult to answer in the abstract. In this dispute, however, the issue need only be addressed in the context of the specific claim raised by Indonesia.

165. The United States notes that ADA Article 3.8 and SCMA Article 15.8 reflect the fact that any application of measures necessarily exists only as an outgrowth of an appropriate establishment of the prerequisites for applying the measures. In the context of ADA Article 3.8 and SCMA Article 15.8, it is clear that “consider[ing] and decid[ing]” the “application” of measures refers to the establishment of a substantive prerequisite for the application of measures – a threat of material injury – and that accordingly, an investigating authority considers and decides the “application” of measures with special care in connection with an allegation of threat of material injury by conducting substantively appropriate analysis of whether such a threat exists.

166. The meaning of individual words in Articles 3.8 and 15.8 is informed by the context of the provisions within the ADA and SCMA and the overall subject matter of the provisions. With respect to the former, as explained in the U.S. First Written Submission,<sup>284</sup> the “special care” provisions of each agreement, come at the end of articles – SCMA Article 15 and ADA Article 3 – which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof to a domestic industry. Indeed, these articles are titled “Determination of Injury.” While the ADA and SCMA have articles regarding the imposition of duties after investigating authorities have determined the facts necessary to do so (ADA articles 9 and 10 and SCMA articles 19 and 20), and while the ADA and SCMA even have specific provisions addressing the particular considerations that apply to the imposition of duties in the threat context (ADA Article 10.4 and SCMA Article 20.4), the special care provisions do not appear in these articles. The placement of the special care provisions is informative, showing that, like the remainder of articles 3 and 15, each “special care” provision concerns the substantive analysis that must be undertaken. For this reason, the panel in *US – Softwood Lumber VI* concluded that Articles 3.8 and 15.8 apply to the establishment of whether the prerequisites for application of a measure exist,<sup>285</sup> as discussed in the U.S. First Written Submission.<sup>286</sup>

167. As the U.S. First Written Submission further explained,<sup>287</sup> the drafting history confirms this. Moreover, the subject matter of the provisions – investigations of threat of material injury – is informative. There is no logical reason why, if the prerequisite for application of a measure

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<sup>284</sup> Para. 322.

<sup>285</sup> *US – Softwood Lumber VI (Panel)*, para. 7.33-7.34.

<sup>286</sup> Paras. 327-329.

<sup>287</sup> Para. 330-332.

has been found, a decision about whether to in fact impose the measure, or the extent of the duties, would warrant more “care” in a case involving threat of material injury than a case involving present injury. However, as the drafting history discussed in the U.S. First Written Submission highlights,<sup>288</sup> there are reasons why “special care” in the ascertainment of threat of material injury – as compared with the ascertainment of present injury – might be warranted.

168. ADA Article 9 and SCMA Article 19 further illustrate that Articles 3.8 and 15.8 refer to substantive analysis. Articles 9 and 19 provide that: “whether or not to impose a [antidumping/countervailing] duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the [antidumping/countervailing] duty to be imposed shall be the full [margin of dumping/amount of the subsidy] or less, are decisions to be made by the authorities.” They further provide that it is “desirable” – but not required – for the imposition to be permissive. On this point, Articles 9 and 19 do not distinguish in any way between cases involving present injury and those involving threat. However, an interpretation of “application” in Articles 3.8 and 15.8 as referring to a decision on whether to impose measures following a determination that the prerequisites for application have been met would appear to prevent the automatic application of measures in cases involving threat of injury – contrary to the clear statement in Articles 9 and 19 that discretion is merely desirable.

169. In any event, Indonesia’s claim in this dispute is that the tie vote rule breaches the special care provisions of Articles 3.8 and 15.8. As the United States has explained, it is clear that the special care provisions do not address investigating authorities’ decision-making procedures, such as the tie vote rule. Accordingly, Indonesia’s claim can be rejected without analysis of what scope 3.8 and 15.8 might have in the abstract.

**b. Do you consider that the Anti-Dumping and the SCM Agreements treat them as separate decisions?**

**ANSWER:**

170. As noted, this dispute involves the application of ADA Article 3.8 and SCMA Article 15.8 to Indonesia’s specific claims, and does not involve speculative applications of these or other ADA or SCMA provisions to other possible situations. As discussed above any application of measures must necessarily result from fulfilment of substantive requirements, a reality reflected by Articles 3.8 and 15.8 and their placement within the ADA and SCMA. Indeed, as also discussed above, for a number of reasons, it is clear that an investigating authority considers and decides the application of measures with special care in the context of a determination of threat of material injury, for purposes of Articles 3.8 and 15.8, through substantively appropriate (“care[ful]”) analysis and fact-finding with respect to the question of whether threat of material injury exists. However, the crucial point for purposes of the present dispute is that the special care provisions do not apply to the decision-making procedures used by investigating authorities, as explained in detail in the U.S. first written submission. Accordingly, Indonesia’s claim can be rejected without analysis of what scope 3.8 and 15.8 might have in the abstract.

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<sup>288</sup> Paras 330-331.

- c. Does the "special care" obligation under Articles 3.8 and 15.8 concern or apply to:**
- i. the substantive requirements in threat of injury cases;**
  - ii. procedural aspects of investigating authorities' decision-making in threat of injury cases (including, arguably, the voting system); and/or**
  - iii. the application of duties once the substantive requirements under the Agreements have been met, as the text of the provisions would appear to suggest?**

**Please answer by explaining your interpretation of the provisions, applying the principles set out under the Vienna Convention on the Law of Treaties.**

**ANSWER:**

171. As discussed above and in the U.S. First Written Submission, the special care obligation applies to the substantive requirements for a determination of threat of injury, but does not apply to an investigating authority's decision-making procedure or to the imposition of duties once the substantive requirements under the agreements have been met – although whether 3.8/15.8 applies in the latter situation (romanette iii) is a question that the panel need not reach in the present dispute.

172. The placement of the special care provisions within the ADA and SCMA, as well as the text of other portions of those agreements, make this clear. Specifically, the "special care" language occurs in the last paragraph of AD Agreement Article 3 and SCM Agreement Article 15. In turn, respective Articles 3 and 15 are devoted particularly and exclusively to – and even titled – "*Determination of Injury*." The "special care" provisions of each agreement thus come at the end of articles – SCMA Article 15 and ADA Article 3 – which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof to a domestic industry. In particular, the special care provisions immediately follow Articles 3.7 and 15.7, which contain the obligations that investigating authorities must not base a threat of injury finding on mere allegation, conjecture or remote possibility, that the change in circumstances must be "clearly foreseen and imminent" and that the authority should consider the factors listed in Articles 3.7 and 15.7. This placement shows that, like the remainder of articles 3 and 15, each "special care" provision concerns the substantive analysis that must be undertaken.

173. Consistent with the fact that the AD and SCM Agreements do not impose obligations with respect to decision-making procedure, nothing in the ADA or SCMA requires investigating authorities to make affirmative threat determinations by majority vote, or to treat tie votes in any particular way. Indeed, nothing requires more than a single individual to comprise the decision-making authority – let alone speaks to how the views of a multi-member body must be aggregated. Because the agreements do not prescribe the internal decision-making process for making threat determinations, the process of determining the outcome where members of a multi-member body disagree "is entirely up to WTO Members in the exercise of their sovereignty," as the Appellate Body explained in *U.S. – Line Pipe*.<sup>289</sup>

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<sup>289</sup> *US – Line Pipe (AB)*, para. 158.



174. This is confirmed by the fact that, where the ADA and SCMA do discuss procedural matters – in connection with things other than decision-making – they are explicit. For instance, the ADA provides that “after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.”<sup>290</sup> Both the ADA and SCMA require that all interested parties “shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant.”<sup>291</sup> Had the drafters of the ADA and SCMA wanted to prescribe either the number of individuals who must participate in an injury determination or the way that the opinions of a multi-member body would be aggregated to ascertain the body’s determination, they would have been similarly explicit. They certainly would have been explicit had they intended to impose such obligations only with respect to one kind of injury determination – i.e., a determination of threat of material injury but not a determination of material injury or retardation.

175. As discussed in further detail in the U.S. First Written Submission,<sup>292</sup> moreover, the drafting history confirms the conclusion apparent from consideration of the ADA and SMCA: that the special care provisions concern the substantive analysis underlying a threat determination and not an investigating authority’s decision-making procedure. The “special care” language evolved from text about the forecasted level of effect of dumping on domestic industry, demonstrating that the concept of special care relates to the substantive standards used to assess whether a threat of injury exists. The ADA and SCMA “special care” language is simply a shorter version of an originally-more-detailed discipline that has always been about the substance of determinations.

**Question 64: (to the United States) Please react to Canada's arguments that:**

- a. The tie vote provision is inconsistent with the "objective examination" requirement under Articles 3.1 and 15.1 because it legally obliges the USITC to resolve tie votes in favour of an affirmative determination of injury, sets two different standards for petitioners and respondents, and effectively results in the vote of one of the Commissioners in favour of a negative determination being disregarded, thereby establishing a structural bias which favours petitioners and prejudices respondents.**
- b. A legal requirement that precludes an "objective examination" is also inconsistent with the obligation to exercise special care.**

**In your answer, please take into consideration Canada's indication during the third-party session that it is not proposing that the Panel should find a violation of these provisions but rather that Articles 17.6 of the Anti-Dumping Agreement and 3.1 of the Anti-Dumping**

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<sup>290</sup> ADA, Art. 5.5.

<sup>291</sup> ADA, Art. 6.1, SCMA, Art. 12.1.

<sup>292</sup> Paras. 330-332.

**Agreement and 15.1 of the SCM Agreement are relevant to the interpretation of Articles 3.8 and 15.8.**

**ANSWER:**

176. As an initial matter, the United States would recall that Indonesia's panel request asserts no claims under AD Agreement Article 3.1 or SCM Agreement Article 15.1. Those provisions are thus outside the Panel's terms of reference, and Indonesia's First Written Submission made no argument concerning the "objective examination" provisions. Accordingly, the Panel may not accept Canada's invitation to opine on claims outside its terms of reference or to find a consequential breach of the AD or SCM Agreement "special care" provisions on the basis of such non-claims.

177. While Canada is not proposing that the panel make a recommendation to the DSB with respect to Articles 3.1 and 15.1, Canada *is* proposing that the Panel find a breach of these provisions. Indeed, Canada's third party submission explicitly argues that the tie vote provision breaches Articles 3.1 and 15.1. Canada's allegation of a breach of the special care requirement is consequential: Canada argues that "a legal requirement that precludes an "objective examination" is also manifestly inconsistent with the obligation to exercise "special care" in the context of threat of injury determinations."<sup>293</sup> It further asserts that "[s]ince the exercise of "special care" presupposes that an investigating authority has already exercised the level of care required when making all determinations of injury, a failure to conduct an 'objective examination' in a threat of injury determination also necessarily entails a failure to exercise special care'."<sup>294</sup> Indonesia, by contrast, did not assert that the tie vote provision breaches Articles 3.8 and 15.8 as a consequence of breach of other ADA or SCMA provisions. The claim that Canada seeks to have the panel resolve is thus fundamentally different from the one raised by Indonesia, and outside the panel's terms of reference.

178. Canada's argument additionally goes to issues outside the panel's terms of reference because Canada challenges the application of the tie vote rule in all determinations of injury – whether the determination is one of present injury, threat of material injury, or material retardation – whereas Indonesia's panel request challenges only the application of the tie vote rule in cases involving investigations into threat of material injury. Indeed, Canada's position is that the tie vote rule breaches Articles 3.1 and 15.1 with respect to all determinations, and that a breach of the special care provisions exists in the threat context because, according to Canada, the rule is WTO inconsistent with respect to all determinations. Canada's claim that the tie vote rule is WTO inconsistent as applied outside the context of threat determinations thus represents an additional way that Canada's submission reaches outside the scope of the dispute between the parties and seeks to have the panel address a matter not raised in the panel request. This further demonstrates that the panel cannot take up Canada's allegation.

179. Moreover, even if *Indonesia* – and not Canada – had raised a consequential special care claim in its panel request and first written submission, it would be a claim that the panel should

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<sup>293</sup> Canada's Third Party Submission, para. 47.

<sup>294</sup> Canada's Third Party Submission, para. 48.

not address. As discussed above, the panel in *US – Softwood Lumber VI* correctly concluded that where a member alleges a breach of the special care requirement solely as a consequence of a breach of another provision of the ADA or SCMA, a panel should refrain from making findings under the special care provisions. This underscores the impropriety of Canada's attempt here to raise what is in reality a new claim by alleging a consequential breach of Articles 3.8 and 15.8 on the basis of an alleged breach of provisions not mentioned in the panel request.

180. Finally and in any event, there is nothing about the tie vote provision that is inconsistent with the “objective examination” requirement in Articles 3.1 and 15.1. Like the remainder of Articles 3 and 15, this requirement does not serve as a discipline on decision-making procedure, which, as the Appellate Body made clear in *US – Line Pipe*, is a matter “entirely up to WTO Members in the exercise of their sovereignty.”<sup>295</sup> Rather, Articles 3.1 and 15.1 serve to require that investigating authorities conduct objective investigations and base their injury determinations on positive evidence. The “objectivity” (and positive evidence) required by Articles 3.1 and 15.1 therefore speak to the conduct of the investigation and evidentiary nature of the determination, and not to the procedural manner in which a Member chooses to tally votes.

181. Indeed, Canada appears to ignore this key aspect of the Appellate Body's analysis in *US – Hot-Rolled Steel*. The Appellate Body explained that:

While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be *investigated* in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, *in the investigation*. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.<sup>296</sup>

182. Canada is further incorrect in alleging that the tie vote rule results in the “disregard[ing] of any votes or in any “structural bias.” The rule certainly causes no special “disregard[ing]” for any vote when applied in the threat context. The rule is simply a means of resolving a situation that could – but is by no means certain to – occur anytime a decision is taken by an even number of people: a tie vote. Under the rule, all votes are counted, and in the unique circumstance of a tie vote, the rule determines the official result. Indeed, any tie-breaking rule affects an equivalent disadvantage on the side that does not prevail notwithstanding the existence of an even number of votes. This is simply a function of the need to break ties in a situation where an even number of individuals must make a decision.

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<sup>295</sup> *US – Line Pipe (AB)*, para. 158.

<sup>296</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 193 (emphasis added).

183. Under the U.S. system, moreover, Commissioners dissenting from a determination – whether positive or negative – provide a complete set of views in which they set out their factual findings, reasoning and conclusions.<sup>297</sup> The dissenting views are included in the public version of the Commission's investigative publication, and if a party seeks review of the Commission's determination in U.S. court, the views of dissenting Commissioners are provided to the court along with the views of the Commissioners who support the determination.<sup>298</sup> A reviewing domestic court thus can examine the official analysis and dissenting views, and is fully aware of how each viewed the relevant facts and their implications for the ultimate question of whether injury has been established.

184. As the United States highlighted during the first meeting of the panel, the U.S. arrangement for addressing tie votes among the USITC's independent Commissioners with fixed terms is certainly no less "equitable" than an arrangement in which a decision on the existence of threat of injury is entrusted to a single individual who comprises part of a Member's political branches of government. Such an individual may enter determinations of threat of material injury notwithstanding the overwhelming disagreement of those advising him, or those who participated in the investigation. This highlights that acceptance of Canada's argument implies an ability to challenge the basic structure of investigating authorities. *US – Line Pipe*, however, properly makes clear that this would not be an appropriate subject for dispute settlement, and that for purposes of dispute settlement, the question is "whether the determination, however it is decided domestically, meets the requirements" of the relevant WTO Agreement.<sup>299</sup>

**Question 66: (to the United States) Please react to Canada's argument that accepting the United States' position would lead to the unreasonable conclusion that the US statute could be revised to mandate an affirmative injury determination if a single one of the USITC Commissioners voted in favour of such a determination. (Canada's third-party submission, para. 46)**

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<sup>297</sup> See 19 U.S.C. 1671d(d) (Exhibit US-96) & 1673d(d) (Exhibit US-97) (both providing that "[w]henver . . . the Commission makes a determination under this section [providing for final determinations in countervailing and antidumping duty investigations], it shall notify the petitioner, other parties to the investigation, and the other agency [i.e., Commerce] of its determination and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register."). The Commission's longstanding practice is that each Commissioner issues his or her own determinations and written views, joining the written views of other Commissioners in the majority or in dissent to the extent they deem appropriate. Accordingly, the Commission's determinations include the majority views along with any dissenting or separate views issued by individual Commissioners or groups of Commissioners. For example, the Commission's determinations for Coated Paper include both the views of the Commission (i.e., the majority views) and the separate views of Commissioner Charlotte R. Lane, who made an affirmative present material injury determination. See USITC Pub. 4192 (Exhibit US-1) at 1-39 (majority views), 41-47 (Commissioner Lane's separate views).

<sup>298</sup> See U.S. Court of International Trade Rule 73.2 (Exhibit US-98) (providing that in a judicial appeal of an antidumping and/or countervailing duty determination, the Commission must file with the court "a copy of the determination and the facts and conclusions of law on which such determination was based") ; Federal Rule of Appellate Procedure 10(a)(1) (Exhibit US-99) (providing that "The Record On Appeal" includes "the original papers and exhibits filed in the district court," which would include a copy of the Commission's determination in appeals from the U.S. Court of International Trade involving such determinations).

<sup>299</sup> *US – Line Pipe (AB)*, para. 158.

**ANSWER:**

185. As an initial matter, the United States notes that this hypothetical does not reflect the terms of the statute that is at issue here, and especially not the application of that statute to threat of material injury determinations. As discussed, the U.S. statute simply establishes a reasonable solution for the infrequent circumstance in which there is an even split in the Commissioners’ votes.

186. Turning to the issues that *are* before the Panel, the United States recalls that the number of members of a multi-member investigating authority whose votes are necessary for an affirmative injury determination has no bearing on the consistency of the underlying statute with the ADA and SCMA special care provisions. As discussed in response to other questions, ADA Article 3.8 and SCMA Article 15.8 do not discipline the decision-making process of an investigating authority, but instead require that special care be reflected in the analysis underpinning an authority’s finding of threat of material injury.

187. In fact, as noted in response to question 64, many Members maintain investigating authority structures under which the ostensibly “unreasonable” situation identified by Canada may occur with regularity, disguised from public view. Where the ultimate decision-maker is a single political official, that official may face pressure to assist the domestic industry, and may make affirmative determinations that most advisors, investigators, or top officials of the investigating authority had determined not to be warranted. There would be no way of knowing the breakdown of views among those advisors, investigators, or top officials. Canada’s argument suggests that in threat-of-injury situations, Members with unitary, politically-responsible decision-makers may regularly breach the ADA or SCMA by ignoring majorities within the investigating authority who dispute the existence of threat of material injury. It is Canada’s argument, and not the U.S. argument, that leads to an unreasonable conclusion.

188. *US – Line Pipe* makes clear that for purposes of dispute settlement, the question is “whether the determination, however it is decided domestically, meets the requirements” of the relevant WTO Agreement.<sup>300</sup> In other words, regardless of the investigating authority’s decision-making process, the analysis of the determination must comport with WTO disciplines. The drafters of the ADA and SCMA properly decided that the determination’s comportment with these disciplines would serve as the means of ensuring fairness and accuracy. This makes sense. The approach embodied in the ADA and SCMA recognizes that the factual correctness of an outcome is not necessarily a function of the number of individuals who have endorsed that outcome. Indeed, there may be situations where a minority’s analysis is more correct than that of the majority, and this is true regardless of whether the minority considers that injury or threat of injury has or has not been established. Looking to the substantive analysis ensures that trade remedies have an appropriate substantive underpinning, regardless of the number of members of a multi-member investigating authority that endorsed the determination.

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<sup>300</sup> *US – Line Pipe (AB)*, para. 158.