

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

(DS491)

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CONTENTS i

TABLE OF REPORTS..... iv

TABLE OF ABBREVIATIONS..... ix

TABLE OF EXHIBITS xi

I. INTRODUCTION..... 1

II. BACKGROUND 4

 A. Antidumping and Countervailing Duty Proceedings in the United States 4

 B. Factual Background of the Antidumping and Countervailing Duty Proceedings on Certain Coated Paper from Indonesia 4

 C. Procedural Background of this Dispute 7

III. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF..... 8

IV. PRELIMINARY RULING REQUEST 10

V. INDONESIA’S CLAIMS UNDER THE SCM AGREEMENT ARE WITHOUT MERIT..... 12

 A. USDOC’s Rejection of In-Country Prices As Benchmarks for Indonesia’s Provision of Standing Timber for Less Than Adequate Remuneration Was Consistent With Article 14(d) Of The SCM Agreement. 13

 1. Legal Standard Under Article 14(d) Of The SCM Agreement..... 14

 2. USDOC’s Decision to Use Out-of-Country Benchmarks 17

 3. No Breach of Article 14(d) Of The SCM Agreement..... 20

 B. Indonesia Fails to Prove Any WTO Breach With Respect to USDOC’s Finding That the Log Export Ban Confers a Benefit at Less Than Adequate Remuneration. 22

 1. No Breach of Article 14(d) of the SCM Agreement..... 23

 2. Indonesia’s out-of-scope Financial Contribution Arguments Not Supported. 24

 C. In Applying Adverse Facts Available With Regard To The Debt Buy-Back, USDOC Acted Consistently With Article 12.7 Of The SCM Agreement..... 30

 1. Structure of Article 12.7 of the SCM Agreement 30

 2. No Breach of Article 12.7 35

3.	Reasonable Period of Time.....	37
4.	Reasonably Replace.....	48
D.	The United States Acted Consistently with Article 2.1 of the SCM Agreement In Making Its <i>De Facto</i> Specificity Findings.....	50
1.	Provision of Timber for Less Than Adequate Remuneration.....	52
2.	Log Export Ban.....	55
3.	Debt Buyback Program (Debt Forgiveness).....	58
4.	USDOC Identified The Relevant Jurisdiction Of The Granting Authority Pursuant To The Chapeau Of Article 2.1 Of The SCM Agreement.	60
VI.	THE USITC’S INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS	67
A.	Overview of the USITC Determination.....	68
1.	The Commission’s Affirmative Threat of Material Injury Determination.....	68
2.	Affirmance by the U.S. Court of International Trade.....	78
B.	The Commission Complied With Article 3.7 of the ADA and Article 15.7 of the SCM Agreement by Basing Its Affirmative Threat Determination on Facts, and a Clearly Foreseen and Imminent Change in Circumstances	80
1.	The Relevant Obligations under Article 3.7 of the ADA and Article 15.7 of the SCM Agreement	80
2.	The Commission’s Threat Determination Was Based on Facts and Clearly Foreseen and Imminent Changes in Circumstances, Consistent with Article 3.7 of the ADA and Article 15.7 of the SCM Agreement	82
C.	The Commission Properly Established a Causal Link Between Subject Imports and the Threat of Material Injury to the Domestic Industry, Consistent with ADA Article 3.5 and SCMA article 15.5	94
1.	The Non-Attribution Requirement.....	94
2.	The Commission’s Vulnerability Analysis Did Not Attribute Injury from Other Known Factors to Subject Imports	96
3.	The Commission’s Non-Attribution Analysis Complied with Article 3.5 of the ADA and Article 15.5 of the SCM Agreement.....	98
4.	The Indonesia Has Failed to Show that the Commission Did Not Act Consistently with ADA Article 3.5 and SCMA Article 15.5	101
D.	The Commission Complied With the Special Care Requirements Under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement.	105

VII.	The Tie Vote Provision of the U.S. Statute Is Not Inconsistent, As Such, with Article 3.8 of the ADA and Article 15.8 of the SCM Agreement.....	106
A.	The Tie Vote Provision Concerns the Internal-Decision Making Procedure of the United States, which the AD and SCM Agreements Leave to the Discretion of Individual Members	106
1.	The Tie Vote Provision Concerns the Internal Decision-Making Procedure of the United States	106
2.	The ADA and SCMA Do Not Discipline the Internal Decision-Making Procedure that a Member uses to Assess Injury or Threat.....	109
B.	“Special Care” is about the Substantive Analysis Used to Make a Threat Determination. Nothing About the Tie Vote Procedure Affects the Substantive Analysis on Which A Determination Rests.	111
1.	<i>Softwood Lumber VI</i> Shows that Special Care Concerns The Investigating Authority’s Substantive Analysis	112
2.	The Drafting History Confirms That “Special Care” Is About Substantive Analysis.....	113
3.	U.S. Law Confirms that the Commission Must Take Special Care in Determining Threat of Material Injury, and Nothing About the Tie Vote Procedure Precludes the Application of Special Care	115
C.	Indonesia’s Arguments Are Without Merit	117
VIII.	OTHER CLAIMS	123
IX.	CONCLUSION	123

TABLE OF REPORTS

SHORT FORM	FULL CITATION
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
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<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
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<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, adopted 13 February 1998
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998.

<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – Tube or Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, 2003, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, 2000, adopted 17 November 2000
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<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>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, 2005, adopted 11 April 2005
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Anti-Dumping Measures on Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice</i> , WT/DS295/R, 2005, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
<i>Mexico – Corn Syrup (21.5)(AB)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU</i>

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<i>Thailand – H-Beams (AB)</i>	<i>Appellate Body Report, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, 2001, adopted 5 April 2001</i>
<i>US – Anti-Dumping and Countervailing Duties (China) (Panel)</i>	<i>Panel Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, 2010, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R</i>
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<i>US – Cotton Yarn (AB)</i>	<i>Appellate Body Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 November 2001</i>
<i>US – Countervailing Duty Investigation on DRAMs (Panel)</i>	<i>Panel Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R</i>
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	<i>Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, 2005, adopted 20 July 2005
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<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Export Restraints as Subsidies</i> , WT/DS194/R, adopted 23 August 2001
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<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
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<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 – Oil Country Tubular Goods Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
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<i>US – Softwood Lumber V (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber V (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report WT/DS264/AB/R
<i>US – Softwood Lumber V (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Softwood Lumber VI (Panel)</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R, adopted 29 July 2002
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, adopted 21 March 2005/20 June 2008, as modified by Appellate Body Report WT/DS267/AB/R
<i>US – Wheat Gluten (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
AD	Anti-dumping
AD Agreement or ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
APP	Asian Pulp and Paper, Ltd. (China) and Asian Pulp and Paper, Ltd. (Indonesia)
APP/SMG	Asian Pulp and Paper Group
CCP	Certain coated paper
CFS	Coated free-sheet paper
CIT or USCIT	U.S. Court of International Trade
COGS	Cost-of-goods-sold
CSIS	Center for Strategic and International Studies
CVD	Countervailing duties
DSB	World Trade Organization, Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FSC	Forest Stewardship Council
FWS	First Written Submission
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of Indonesia
IBRA	Indonesia Bank Restructuring Agency
ITC or USITC or the Commission	U.S. International Trade Commission
MOF	Ministry of Forestry

Orleans	Orleans Offshore Investment Ltd.
PDB	Paper directed buy
POI	Period of investigation
PPAS	Strategic Asset Sales Program
PSDH	Forest Resource Royalty
RISI	Resource Information Systems Inc.
SCM Agreement or SCMA	Agreement on Subsidies and Countervailing Measures
SOE	State-owned enterprise
USDOC or Commerce	U.S. Department of Commerce
U.S.	United States
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

TABLE OF EXHIBITS

<u>Number</u>	<u>Exhibit</u>	<u>Abbreviation</u>
Exhibit US-1	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia</i> , Inv. Nos. 701-TA-470-471 and 731-TA-1169-1170 (Final), USITC Pub. 4192 (Nov. 2010)	
Exhibit US-2	Petitioners' Post-hearing Brief, Exhibit 1 (Unisource Affidavit)	
Exhibit US-3	Intentionally Omitted	
Exhibit US-4	Petitioners' Public Post-hearing Brief, Responses to Commissioner Questions, Commissioner Pinkert Question 3, Exhibit 1, p. 21	
Exhibit US-5	19 U.S.C. § 1516a	
Exhibit US-6	28 U.S.C. § 1581	
Exhibit US-7	<i>Gold East Paper (Jiangsu) Co., Ltd., Ningbo Zhonghua Paper Co., Ltd., Global Paper Solutions, PT Pindo Deli Pulp and Paper Mills, and Paper Max Ltd. v. United States</i> , 896 F. Supp. 2d 1242, 1281 (Ct. Int'l Trade 2012)	
Exhibit US-8	<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474, 477-78 (1951)	
Exhibit US-9	Intentionally Omitted	
Exhibit US-10	19 U.S.C. § 3512	
Exhibit US-11	Hearing Transcript, selected pages	
Exhibit US-12	19 U.S.C. § 1677	

Exhibit US-13	Asia Pulp and Paper, Ltd. (China) and Asia Pulp and Paper, Ltd. (Indonesia) (collectively “APP”) Prehearing Brief, pp. 110-64	
Exhibit US-14	APP’s Posthearing Brief, pp. 12-15	
Exhibit US-15	APP’s Final Comments, p. 20	
Exhibit US-16	19 U.S.C. § 1330	
Exhibit US-17	19 U.S.C. § 1677f	
Exhibit US-18	<i>Altx, Inc. v. United States</i> , 370 F.3d 1108 (Fed. Cir. 2004)	
Exhibit US-19	28 U.S.C. §§ 251-252	
Exhibit US-20	28 U.S.C. § 46	
Exhibit US-21	28 U.S.C. § 1295	
Exhibit US-22	28 U.S.C. § 44	
Exhibit US-23	Intentionally Omitted	
Exhibit US-24	Intentionally Omitted	
Exhibit US-25	Vote Transcript	
Exhibit US-26	Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/13, 23 August 1966	
Exhibit US-27	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, July 12 1967, L/2812	

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Exhibit US-29	South Korea, Act on the Investigation of Unfair International Trade Practices and Remedy Against Injury to Industry, Art. 32	
Exhibit US-30	Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/14, 9 December 1966	
Exhibit US-31	Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia (20 September 2010)	IDM
Exhibit US-32	Government of Indonesia's Questionnaire Response, <i>Certain Coated Paper from Indonesia</i> , 29 December 2009	
Exhibit US-33	Public Document, Government of Indonesia's Supplemental Questionnaires Response, Part 2, <i>Certain Coated Paper from Indonesia</i> , 22 February 2010	
Exhibit US-34 [BCI]	Business Proprietary Document, Government of Indonesia's Supplemental Questionnaires Response, Part 2, <i>Certain Coated Paper from Indonesia</i> , 22 February 2010.	
Exhibit US-35 [BCI]	Business Proprietary Document, Verification of the Questionnaire Response Submitted by the Government of Indonesia: Countervailing Duty Investigation of Certain Coated Paper from Indonesia, 3 August 2010	
Exhibit US-36 [BCI]	Business Proprietary Document, Verification of the Questionnaire Responses Submitted by the Asia Pulp & Paper/Sinar Mas Group: Countervailing Duty Investigation of Certain Coated Paper from Indonesia, 4 August 2010	
Exhibit US-37	Public Document, Verification of the Questionnaire Response Submitted by the Asia Pulp & Paper/Sinar Mas Group: Countervailing Duty Investigation of Certain Coated Paper from Indonesia, 4 August 2010	
Exhibit US-38	Public Document, Verification of the Questionnaire Responses Submitted by the Government of Indonesia: Countervailing Duty Investigation of Certain Coated Paper from Indonesia, 3 August 2010	

Exhibit US-39	Government of Indonesia's First Supplemental Questionnaire Response, <i>Certain Coated Paper from Indonesia</i> 16 February 2010	
Exhibit US-40	Petitioner General Factual Information Submission, <i>Certain Coated Paper from Indonesia</i> 21 June 2010	
Exhibit US-41	Countervailing Duty Investigation: <i>Certain Coated Paper from Indonesia</i> , Third Supplemental Questionnaire, 29 April 2010	
Exhibit US-42	Countervailing Duty Investigation: Fifth Supplemental Questionnaire, 11 June 2010	
Exhibit US-43	Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia, 17 October 2007	CFS IDM
Exhibit US-44	Public Document, Government of Indonesia and APP-Indonesia's Case Brief to U.S. Department of Commerce in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia, 17 August 2010	
Exhibit US-45 [BCI]	Business Proprietary Document, Government of Indonesia and APP-Indonesia's Case Brief to U.S. Department of Commerce in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia, 17 August 2010	
Exhibit US-46	Intentionally Omitted	
Exhibit US-47	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination, 75 FR 59209 (27 September 2010)	CVD Final
Exhibit US-48	Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 75 FR 10761 (9 March 2010)	CVD Prelim
Exhibit US-49	<i>Economic Adjustment and the Forestry Sector: Does Removing the Log Export Ban Matter Much?</i> Arya B. Gaduh & Kurnya Roesad, Centre for Strategic and International Studies: CSIS Working Paper Series, available at http://www.csis.or.id/papers/wpe081 February 2004	
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Exhibit US-51	Intentionally Omitted	
Exhibit US-52	Intentionally Omitted	
Exhibit US-53	Intentionally Omitted	
Exhibit US-54	19 U.S.C. § 1671a	
Exhibit US-55	19 U.S.C. § 1671b	
Exhibit US-56	19 U.S.C. § 1671d	
Exhibit US-57	19 U.S.C. § 1671e	
Exhibit US-58	19 U.S.C. § 1673a	
Exhibit US-59	19 U.S.C. § 1673b	
Exhibit US-60	19 U.S.C. § 1673d	
Exhibit US-61	19 U.S.C. § 1673e	
Exhibit US-62	Intentionally Omitted	
Exhibit US-63	Intentionally Omitted	
Exhibit US-64	Intentionally Omitted	

Exhibit US-65	<i>Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia: Initiation of Countervailing Duty Investigation</i> , 74 Fed. Reg. 53,707 (Oct. 20, 2009)	CVD Initiation
Exhibit US-66	<i>Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations</i> , 74 Fed. Reg. 53,710 (Oct. 20, 2009)	AD Initiation
Exhibit US-67	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less Than Fair Value</i> , 75 Fed. Reg. 59,223 (Sept. 27, 2010)	
Exhibit US-68	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination</i> , 75 Fed. Reg. 59,212 (Sept. 27, 2010)	
Exhibit US-69	<i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less Than Fair Value</i> , 75 Fed. Reg. 59,217 (Sept. 27, 2010)	
Exhibit US-70	<i>Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia</i> , 75 Fed. Reg. 70,289 (Nov. 17, 2010)	
Exhibit US-71	<i>Economic Adjustment and the Forestry Sector: Does Removing the Log Export Ban Matter Much?</i> Centre for Strategic and International Studies (CSIS) (February 2004)	Economic Adjustment and Forestry Sector
Exhibit US-72	<i>Competitiveness and Efficiency of the Forest Product Industry in Indonesia</i> CSIS (February 2004)	Efficiency of Forest Product Industry
Exhibit US-73	<i>Can Indonesia Gain from Log Export Barriers?</i> (December 2002)	Gain from Log Export Barriers
Exhibit US-74	Certain Coated Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 FR 60642 (9 March 2010)	CFS Final Determination

Exhibit US-75	CVD Initiation Checklist: Certain Coated Paper from Indonesia (Oct. 13, 2009)	Initiation Checklist
Exhibit US-76	Letter from Barbara Tillman, U.S. Department of Commerce to the Government of Indonesia, June 24, 2010	
Exhibit US-77	Verification Outline	
Exhibit US-78	First Supplemental Questionnaire to the Government of Indonesia, January 28, 2010	
Exhibit US-79	Intentionally Omitted	
Exhibit US-80	Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Coated Paper from Indonesia and the People's Republic of China	Application

I. INTRODUCTION

1. In the antidumping and countervailing duty proceedings at issue in this dispute, the United States Department of Commerce (“Commerce” or “USDOC”) found that Indonesia provides a series of countervailable subsidies to its domestic producers of certain coated paper (CCP), including those resulting from the provision of timber for less than adequate remuneration, Indonesia’s log export ban, and forgiveness of a major producer’s debt through a complex debt-buyback transaction. USDOC also found that imports of CPP from Indonesia were sold at less than fair value (“LTFV” or “dumped”). The U.S. International Trade Commission (“the USITC”, “the Commission” or the “ITC”) found that an industry in the United States was threatened with material injury by reason of the subject imports. These findings were well reasoned, amply supported, and fully consistent with the relevant provisions of the *WTO Agreement on Subsidies and Countervailing Measures* (“SCM Agreement” or “SCMA”) and the *WTO Agreement in the Implementation of Article VI of the General Agreement on Tariffs and Trade* (“AD Agreement” or “ADA”).

2. With respect to Commerce’s subsidy findings, Indonesia asserts that USDOC improperly rejected in-country benchmarks in the determination of benefit, improperly used facts available in connection with the debt buyback subsidy, and did not adequately explain its finding of *de facto* specificity.

3. None of these arguments has merit. With respect to USDOC’s benefit determinations, Indonesia has not shown any legal error. Contrary to Indonesia’s assertion, USDOC assessed *all* of the evidence and identified features of the market for standing timber that rendered it distorted. USDOC also properly considered record evidence of the use of the export ban to artificially suppress prices and develop downstream industries. After considering the use of various in-country prices, USDOC properly determined that market distortion and the unreliable or unrepresentative nature of some proposed data made the selection of an out-of-country benchmark necessary. With respect to USDOC’s use of facts available, USDOC properly applied the facts available on the issue of affiliation to determine that the debt buyback was made by an entity related to the issuer of the debt. The record shows that the respondents did not comply with repeated requests for information, and accordingly that USDOC was completely justified in using facts available. Finally, with respect to USDOC’s specificity determinations, the record shows that USDOC fully explained why Indonesia’s subsidies were *de facto* specific under Article 2.1 of the SCM Agreement. In sum, Indonesia has not established any inconsistency with any of these provisions.

4. With respect to the Commission’s threat of injury determination, Indonesia asserts that the Commission breached ADA Article 3.7 and SCMA Article 15.7 by speculating about the likely effects on the domestic industry of an increase in subject imports and continued price underselling by subject imports. Indonesia also alleges that the Commission breached the non-attribution requirement of ADA Article 3.5 and SCMA Article 15.5 with respect to certain considerations, and it alleges the Commission’s analysis breached the special care requirement in ADA Article 3.8 and SCMA Article 15.8 for the same reasons that, according to Indonesia, it breached the previously-mentioned ADA and SCMA provisions. Indonesia also challenges “as such” the application to threat determinations of the U.S. statutory provision providing for affirmative determinations in the event of a tie vote among the USITC’s Commissioners.

5. As this submission will explain, these arguments reflect misreading of the USITC's determination and misunderstanding of the relevant obligations of ADA Article 3 and SCMA Article 15. The ITC thoroughly and with all necessary care established a change in circumstances rendering material injury clearly foreseen and imminent, and ensured that its threat finding was in no way based on injury likely to be caused by anything other than subject imports. Indonesia's challenge to the statutory provision governing tie votes in the Commission, moreover, reflects a fundamental misunderstanding of the special care obligation in ADA Article 3.8 and SCMA Article 15.8.

6. This submission is organized as follows: After a brief discussion of relevant background in section II and a discussion of the rules related to interpretation, standard of review, and burden of proof in section III, section IV contains a request for a preliminary ruling that the arguments on the log export ban, styled as SCMA Article 14(d) and SCMA Article 2.1(c) claims, are outside of the Panel's terms of reference because they pertain, in fact, to whether the log export ban is a financial contribution under Article 1.1(a), an article not raised in Indonesia's request for the establishment of a panel. We respond to Indonesia's claims related to the challenged countervailing duty determinations in section V, and we respond to Indonesia's claims related to the challenged determination of threat of material injury in section VI. In section VII we respond to Indonesia's challenge to the U.S. statutory provision governing the outcome of certain tie votes among the Commissioners of the U.S. International Trade Commission.

7. In the preliminary ruling request (section IV) the United States explains that Indonesia's arguments on the log export ban, styled as SCMA Article 14(d) and SCMA Article 2.1(c) claims, are not truly claims under those articles. Indonesia's argument reveals that, in fact, it is instead challenging whether the log export ban constitutes a financial contribution. Section IV explains that this is a claim under Article 1.1 of the SCMA, an article not mentioned in Indonesia's Panel request, and that accordingly, Indonesia's argument on the log export ban should not be considered.

8. Section V refutes Indonesia's claims concerning Commerce's determination that Indonesia provided countervailable subsidies. Section V.A addresses Indonesia's claim that USDOC's less than adequate remuneration analysis of both the provision of standing timber and log export ban was based on an impermissible per se determination of price distortion in breach of Article 14(d) of the SCM Agreement. The United States refutes this claim, showing that USDOC considered all the evidence, properly concluded that in-country benchmarks would not accurately represent a market driven price, and adequately explained its benefit analysis.

9. Section V.B. addresses Indonesia's arguments regarding the log export ban. Section V.B explains why USDOC's analysis of the log export ban was fully consistent with SCMA Article 14(d). Though issues regarding financial contribution are outside the Panel's terms of reference in this dispute, Section V.B nonetheless goes on to explain why Indonesia's financial contribution arguments are without merit.

10. Section V.C discusses Indonesia's claim that USDOC improperly applied facts available in breach of Article 12.7 of the SCM Agreement on the issue of affiliation, resulting in a finding that the debt buyback overseen by the Indonesian government was debt forgiveness and,

therefore, countervailable. The United States refutes this claim, showing that USDOC gave Indonesia more than a reasonable period to substantiate non-affiliation with respect to the buyback. Having failed to do so, USDOC correctly weighed the evidence on affiliation and applied available facts that reasonably replaced the information Indonesia failed to provide.

11. Section V.D addresses Indonesia's specificity claims with respect to the provision of standing timber, the log export ban, and debt forgiveness. The United States refutes Indonesia's claims under Article 2.1(c) of the SCM Agreement that USDOC failed to show that the three measures constitute subsidy programs; instead USDOC correctly concluded and explained that each of the three involve a plan or scheme sufficient to constitute a program and are, therefore, de facto specific. The United States also refutes Indonesia's claim that USDOC failed to identify the jurisdiction of the granting authority within the meaning of the chapeau of Article 2.1.

12. In section VI, we address Indonesia's claims with respect to the USITC's determination of threat of material injury, showing that the determination was amply-supported, well-reasoned, and considered everything necessary under the ADA and SCMA.

13. After providing an overview of the USITC's determination in section VI.A, section VI.B refutes Indonesia's challenge under ADA Article 3.7 and SCMA Article 15.7 to the USITC's determination of threat of injury, explaining that the Commission complied with ADA Article 3.7 and SCMA Article 15.7 by basing its threat determination on facts and a clearly foreseen and imminent change in circumstances. In particular, section VI.B. explains that there was nothing speculative about the conclusion that the imminent likely substantial increase in subject import volume would adversely impact the domestic industry. It likewise explains why the Commission logically concluded on the basis of the facts that subject import underselling, coupled with this likely volume increase, would depress or suppress the domestic industry's prices.

14. Section VI.C turns to Indonesia's non-attribution arguments under ADA Article 3.5 and SCMA Article 3.5, explaining why none have merit. After explaining why the Commission's vulnerability analysis did not attribute injury from other known factors to subject imports, Section VI.C goes on to explain how the Commission established the causal link between subject imports and threat of injury, and then describes the Commission's analysis of other known factors, showing how the Commission established that subject imports posed a threat of material injury independent of these factors. Finally, section VI.C explains why Indonesia's non-attribution complaints about the Commission's analysis of certain considerations – projected demand declines, non-subject imports, and an expired tax credit used by some domestic producers – fail to account for the Commission's careful analysis of these considerations and, in some cases, misunderstand the impact of the considerations themselves, rendering Indonesia's complaints devoid of merit.

15. Section VI.D, addresses Indonesia's argument that the Commission's threat determination failed to reflect special care, as required under ADA Article 3.8 and SCMA Article 15.8. This section explains that Indonesia's arguments are entirely derivative of its meritless allegations under other provisions, and are thus equally lacking in merit. The Commission's detailed analysis fully complied with the special care requirements of ADA Article 3.8 and SCMA Article 15.8.

16. Finally, Section VII addresses Indonesia’s challenge to the application to threat determinations of 19 U.S.C. § 1677(11)(B), a U.S. statutory provision providing for an affirmative determination in the event of a tie vote among the USITC’s Commissioners. Section VII.A explains that this provision concerns the internal decision-making procedures of the United States, which the ADA and SCMA leave to the discretion of individual Members. Section VII.B shows that special care is about the substantive analysis used to make a threat determination, and that nothing about the Commission’s tie vote procedure affects the substantive analysis on which a determination rests. Section VII.C shows why the points Indonesia makes in support of its claim are incorrect, in some cases inapposite or illogical, and amount to an attempt to confer on the ADA and SCMA content that simply is not there.

II. BACKGROUND

17. In this section, the United States offers a summary of the relevant factual background of the antidumping and countervailing proceedings on certain coated paper from Indonesia, as well as the procedural background of this dispute.

A. Antidumping and Countervailing Duty Proceedings in the United States

18. USDOC and the Commission are the agencies of the United States Government responsible for making the determinations necessary to impose antidumping and countervailing duty orders. To begin an investigation, domestic industries are required to file petitions requesting relief from unfairly traded imports with both USDOC and the Commission.¹ USDOC then determines whether the petition satisfies the statutory criteria for initiation and, if so, initiates the investigation.² During an investigation, USDOC assesses whether a foreign producer has sold its products in the United States at less than fair value (*i.e.*, “dumped” prices), or whether the producer’s sales have been subsidized by a foreign government.³ The Commission determines whether the domestic industry producing a like product is materially injured or threatened with material injury by reason of the unfairly traded imports.⁴ If USDOC finds that the subject imports are dumped or subsidized and the Commission finds that the industry has been materially injured or threatened with material injury by reason of such imports, USDOC issues an order covering the imports in question.⁵

B. Factual Background of the Antidumping and Countervailing Duty Proceedings on Certain Coated Paper from Indonesia

¹ 19 U.S.C. §§ 1671a(b) (Exhibit US-54), 1673a(b) (Exhibit US-58).

² 19 U.S.C. §§ 1671a(c) (Exhibit US-54), 1673a(c) (Exhibit US-58).

³ 19 U.S.C. §§ 1671b(b) (Exhibit US-55), 1671d(a) (Exhibit US-56), 1673b(b) (Exhibit US-59), 1673d(a) (Exhibit US-60).

⁴ 19 U.S.C. §§ 1671b(a) (Exhibit US-55), 1671d(b) (Exhibit US-56), 1673b(a) (Exhibit US-59), 1673d(b) (Exhibit US-60). The Commission can also determine whether the establishment of an industry is being materially retarded by dumped or subsidized imports.

⁵ 19 U.S.C. §§ 1671e (Exhibit US-57), 1673e (Exhibit US-61).

19. On September 23, 2009, three domestic producers and a labor union filed petitions alleging that certain coated paper suitable for high-quality print graphics using sheet-fed presses (CCP) from China and Indonesia was being sold in the United States at less than fair value and being subsidized by the Governments of China and Indonesia.⁶ In response, USDOC initiated anti-dumping and countervailing duty investigations with respect to Indonesia on October 20, 2009.⁷ In the initiation notices, USDOC selected the Asia Pulp & Paper/Sinar Mas Group (“APP”) as the sole mandatory respondent, based on the fact that APP produced nearly all of the CCP made in Indonesia.⁸

20. In the countervailing duty investigation, USDOC issued its original questionnaire to APP and the Government of Indonesia (“GOI”) on November 3, 2009.⁹ APP and the GOI submitted their initial responses on December 29, 2009.¹⁰ USDOC issued supplemental questionnaires to APP and the GOI and a questionnaire regarding creditworthiness to APP prior to the preliminary determination.¹¹

21. USDOC published its affirmative preliminary countervailing duty determination on March 9, 2010, assigning a net subsidy rate of 17.48 percent to APP and all others.¹² After the preliminary determination, USDOC issued additional supplemental questionnaires to APP and the GOI.¹³ USDOC conducted verification of the questionnaire responses submitted by APP and the GOI from June 28, 2010 through July 8, 2010, and it issued verification reports on August 6, 2010.¹⁴ Subsequently, APP, the GOI, and petitioners submitted case briefs to USDOC on August 16, 2010 and rebuttal briefs on August 23, 2010.¹⁵

⁶ USITC Pub. 4192 (Exhibit US-1) at 3.

⁷ See *Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations*, 74 Fed. Reg. 53,710 (Oct. 20, 2009) (“AD Initiation”) (Exhibit US-66); *Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia: Initiation of Countervailing Duty Investigation*, 74 Fed. Reg. 53,707 (Oct. 20, 2009) (“CVD Initiation”) (Exhibit US-65).

⁸ AD Initiation at 53,714 (Exhibit US-66); CVD Initiation at 53,709 (Exhibit US-65).

⁹ *Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 Fed. Reg. 10,761 (Mar. 9, 2010) (“CVD Prelim”) (Exhibit US-48) at 10,761.

¹⁰ CVD Prelim (Exhibit US-48) at 10,761.

¹¹ CVD Prelim (Exhibit US-48) at 10,761.

¹² CVD Prelim (Exhibit US-48) at 10,773.

¹³ *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59,209 (Sept. 27, 2010) (“CVD Final”) (Exhibit US-47) at 59,209.

¹⁴ CVD Final (Exhibit US-47) at 59,209.

¹⁵ CVD Final (Exhibit US-47) at 59,209-10. USDOC did not hold a hearing because all parties withdrew their hearing requests. *Id.* at 59,209.

22. USDOC published its final affirmative countervailing duty determination on September 27, 2010, setting the net subsidy rate for APP and all others at 17.94 percent.¹⁶ In connection with its final affirmative determination, USDOC issued a comprehensive Issues and Decision Memorandum addressing at length the issues raised by the parties in their case and rebuttal briefs.¹⁷

23. In parallel with its investigation into whether imports of CCP from Indonesia were subsidized, USDOC also investigated whether they were being sold, or were likely to be sold, in the United States at less than fair value. On September 27, 2010, USDOC issued a final determination in the affirmative.¹⁸ In addition, USDOC investigated whether CCP from China was being subsidized and was being sold, or was likely to be sold, in the United States at less than fair value. On the same day, USDOC issued final determinations of subsidization and of sales at less than fair value for CCP from China¹⁹

24. While USDOC investigated subsidization and dumping, the Commission was conducting its investigation into whether subject imports from China and Indonesia caused or threatened to cause material injury to the domestic industry. The Commission received questionnaire responses from 11 integrated U.S. producers of CCP and four U.S. converters of CCP, 11 importers who accounted for the majority of imports from China and Indonesia, 35 U.S. purchasers of CCP, 10 Chinese producers, and 3 Indonesian producers.²⁰ The Commission received prehearing briefs and post-hearing briefs from petitioners and APP,²¹ and held a public hearing on September 16, 2010 at which petitioners and APP participated.²²

25. On October 22, 2010, the Commission voted on the investigation, with five commissioners finding the domestic industry was threatened with material injury by reason of subject imports from China and Indonesia and one Commissioner finding the industry was suffering present material injury by reason of subject imports.²³ The Commission published the notice of its final determination on November 17, 2010 and issued its views that month.²⁴

¹⁶ CVD Final (Exhibit US-47) at 59,211.

¹⁷ CVD Final (Exhibit US-47) at 59,211-12; IDM (Exhibit US-31)

¹⁸ *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 59,223 (Sept. 27, 2010) (Exhibit US-67).

¹⁹ *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 59,217 (Sept. 27, 2010) (Exhibit US-69); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59,212 (Sept. 27, 2010) (Exhibit US-68).

²⁰ USITC Pub. 4192 (Exhibit US-1) at 3.

²¹ USITC Pub. 4192 (Exhibit US-1) at 3; APP Prehearing Brief (Exhibit US-13); APP Posthearing Brief (Exhibit US-14).

²² *See* Hearing Transcript (Exhibit US-11).

²³ Vote Transcript (Exhibit US-25).

²⁴ *Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia*, 75 Fed. Reg. 70,289 (Nov. 17, 2010) (Exhibit US-70). *See also* USITC Pub. 4192 (Exhibit US-1).

USDOC published its affirmative antidumping and countervailing duty orders on CCP from Indonesia on the same date.²⁵

C. Procedural Background of this Dispute

26. On March 13, 2015, over four years after the imposition of the AD and CVD orders in the investigations of CCP from Indonesia, Indonesia requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), Article 17 of the ADA, and Article 30 of the SCM Agreement in relation to certain determinations by the USDOC and USITC related to antidumping and countervailing duty orders on certain coated paper from Indonesia and China, and in relation to one U.S. statutory provision: section 771(11)(B) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677(11)(B).²⁶ Indonesia’s consultations request articulates various legal claims related to these measures. The United States and Indonesia held consultations on June 25, 2015, but were unable to resolve the matter.

27. On July 9, 2015, Indonesia requested the establishment of a panel pursuant to Articles 4 and 6 of the DSU, and Article 17.4 of the AD Agreement.²⁷ On August 21, 2015, Indonesia submitted a new request for establishment of a panel pursuant to Articles 4 and 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement.²⁸ At a meeting held on September 28, 2015, the WTO Dispute Settlement Body (“DSB”) established a panel with the following terms of reference:

[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS491/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.²⁹

²⁵ *Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia: Antidumping Duty Order*, 75 Fed. Reg. 70,205 (Nov. 17, 2010) (Exhibit IND-01); *Certain Coated Paper Suitable for High-Quality Graphics Using Sheet-Fed Presses from Indonesia: Countervailing Duty Order*, 75 Fed. Reg. 70,206 (Nov. 17, 2010) (Exhibit IND-02).

²⁶ Request for Consultations by Indonesia, WT/DS491/1, circulated March 17, 2015 (“Consultations Request”).

²⁷ Request for the Establishment of a Panel by Indonesia, WT/DS491/2, circulated July 10, 2015.

²⁸ Request for the Establishment of a Panel by Indonesia, WT/DS491/3, circulated August 21, 2015 (“Panel Request”).

²⁹ Constitution of the Panel Established at the Request of Indonesia – Note by the Secretariat, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/4 (February 5, 2016).

III. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

28. Article 3.2 of the DSU provides that the dispute settlement system of the WTO “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Article 11 of the DSU provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

29. Article 17.6 of the AD Agreement provides that:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

30. Under these standards, the Panel should “review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.”³⁰ It is well-established that the Panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as “*initial trier of fact*.”³¹ Indeed, the Appellate Body has held that a panel breached Article 11 of the DSU where that panel went beyond its role as reviewer and instead substituted its own assessment of the evidence and

³⁰ *China – Broiler Products*, para. 7.4 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103.).

³¹ *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187-188 (emphasis in original)

judgment for that of the investigating authority.³² The Appellate Body, in *United States -- Tyres*, summarized as follows the role of a panel under Article 11 in a dispute involving a determination made by a domestic authority based on an administrative record:

It is well established that, in examining an investigating authority's determination, a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, a panel should examine whether the conclusions reached by the investigating authority are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations. A panel's examination of an investigating authority's conclusions must be critical, and be based on the information contained in the record and the explanations given by the authority in its published report. As the Appellate Body has explained, what is "adequate" will depend on the facts and circumstances of the particular case and the claims made.³³

31. Article 17.6 of the AD Agreement imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts.³⁴ The aim of Article 17.6 is "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."³⁵

32. Finally, it is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."³⁶ Accordingly, Indonesia, as the complaining party, bears the burden of demonstrating that the U.S. antidumping and countervailing measures within the Panel's terms of reference are inconsistent with a provision or provisions of the AD Agreement, SCM Agreement, or GATT 1994. Indonesia must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.³⁷

³² *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188-190.

³³ *United States – Tyres (AB)*, para. 123; see also *United States – Cotton Yarn (AB)*, para. 74 ("[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.").

³⁴ *Thailand – H-Beams (AB)*, para. 114.

³⁵ *Thailand – H-Beams (AB)*, para. 117.

³⁶ *US – Wool Shirts and Blouses (AB)*, p. 14; see also *China – Autos (US) (Panel)*, para. 7.6.

³⁷ *EC – Hormones (AB)*, para. 109 (citing *US – Wool Shirts and Blouses (AB)*, pp. 14-16); see also *China – Broiler Products*, para. 7.6.

IV. PRELIMINARY RULING REQUEST

33. Pursuant to paragraph 7 of the Panel’s Working Procedures, the United States requests a preliminary ruling as outlined below. This preliminary ruling request is filed concurrently with the United States’ first written submission and is incorporated in this section (Section IV).

34. Indonesia raises arguments tantamount to claims that are outside of the panel’s terms of reference, and the panel should not consider these arguments. In its first written submission, Indonesia raises an argument under the auspices of its SCM Article 2.1(c) and Article 14(d) claims, with respect to the log export ban, that in fact is a legal analysis of Article 1.1(a) of SCM Agreement. Article 1.1(a), which constitutes the “financial contribution” prong of defining a subsidy, is not one of the provisions enumerated in Indonesia’s panel request – i.e. it is not the basis of any of Indonesia’s claims.³⁸

35. Articles 6 and 7 of the DSU read in pertinent part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

...

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise: ... To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

...

Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.³⁹

36. The Appellate Body has explained that 1) “it is well settled that the terms of reference of a panel define the scope of the dispute and that the claims identified in the request for the establishment of a panel establish the panel’s terms of reference under Article 7 of the DSU”,⁴⁰ and 2) “Article 6.2 of the DSU requires that the *claims* ... must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.”⁴¹ The Appellate Body further stated in *EC – Bananas III*, “[i]f a claim is not specified in the request for the establishment of a panel, then a

³⁸ See Panel Request at 2-3.

³⁹ DSU, arts. 6.2, 7.1-7.2.

⁴⁰ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 55 (citing *EC – Bananas III (AB)*, para. 141).

⁴¹ *EC – Bananas III (AB)*, para. 143.

faulty request cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission.”⁴²

37. Indonesia argues that the log export ban is a type of export restraint that is not a subsidy. Indonesia first raises this argument with respect to its discussion of Article 14(d), which concerns the determination of a benefit at less than adequate remuneration in relation to market conditions in the country in question.⁴³ The problem is: Indonesia’s argument and its heavy reliance on the panel report from *US – Export Restraints* pertains to whether an export restraint is a financial contribution within the meaning of Article 1.1(a),⁴⁴ not, as Indonesia claims in the panel request, whether “USDOC improperly found that Indonesia conferred a benefit by banning log exports using a per se determination of price distortion based on purported government intervention [or] failed to determine the adequacy of remuneration ‘in relation to prevailing market conditions for the good . . . in question in the country of provision.’”⁴⁵ In fact, Indonesia’s discussion of SCM Article 14(d) is limited to four conclusory sentences about USDOC’s selection of the same out-of-country benchmark used for the stumpage program (which stemmed from USDOC’s finding on price distortion). While not patently characterized as such – which is unsurprising given Indonesia’s decision not to raise a SCM Article 1.1(a) claim in its panel request – the substance of the section is a financial contribution analysis.

38. Similarly, Indonesia repeats the same argument in its first written submission with respect to SCM Article 2.1(c)’s “subsidy programme” requirement as it applies to the log export ban. Once again, Indonesia makes a backdoor Article 1.1(a) argument: an export ban cannot constitute a “government-entrusted or government-directed provision of goods” (i.e. a *financial contribution*),⁴⁶ ergo, Indonesia argues, it is not a subsidy program within the meaning of Article 2.1(c).⁴⁷ Specificity (Article 2.1(c)) and financial contribution (Article 1.1(a)) are clearly two separate analytical prongs contained in two separate provisions of the SCM Agreement.⁴⁸ Pleading an Article 2.1(c) claim in Indonesia’s panel request does not satisfy the requirement to plead an Article 1.1(a) claim.

39. Separately, the United States notes its concern that claims fundamentally about whether investigating authorities’ determinations set forth “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material,”⁴⁹ are raised in WTO disputes under other disciplines of the SCM Agreement, instead of where they properly belong:

⁴² *EC – Bananas III (AB)*, para. 143 (emphasis in original).

⁴³ Indonesia First Written Submission, paras. 44-45.

⁴⁴ Indonesia also cites to panel reports from *China – GOES* and *US – Anti-Dumping and Countervailing Measures (China)*, but as noted in *infra* discussion on the log export ban, the Appellate Body’s analysis of whether export restraints can meet the financial contribution prong is much more flexible.

⁴⁵ Panel Request at 2.

⁴⁶ *US – Export Restraints*, para. 8.75.

⁴⁷ Indonesia First Written Submission, para. 79.

⁴⁸ See, e.g., *US – Export Restraints*, para. 8.40.

⁴⁹ SCM Agreement, art. 22.3.

Article 22.3.⁵⁰ While, as noted above, the Appellate Body’s interpretation of the standard of review set forth in DSU Article 11 and Article 17.6 of the AD Agreement considers that investigating authorities must give a reasoned and adequate explanation of how the evidence supported its factual findings and how those findings in turn support the determination, the level of detail *memorialized* in USDOC’s *notices* about those findings and determinations is a separate, *substantive* inquiry under Article 22 (versus a standard of review). As Article 22 is not enumerated in the panel request, the Panel should, therefore, consider such arguments outside of its terms of reference.⁵¹ These arguments include whether 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).

40. For the foregoing reasons, the United States respectfully requests that the Panel issue a preliminary ruling that Indonesia’s arguments with respect to the log export ban in connection with Articles 14(d) and 2.1(c) are outside of the Panel’s terms of reference. In addition, Indonesia requests the Panel rule that Indonesia’s arguments that USDOC did not “make findings of specificity,” in accordance with Article 2.1(c); did not “identify the relevant jurisdiction,” in accordance with the chapeau of Article 2.1; and did not “adequately explain” its decisions with respect to Article 14(d), are outside of its terms of reference.

V. INDONESIA’S CLAIMS UNDER THE SCM AGREEMENT ARE WITHOUT MERIT

41. Indonesia has asserted several claims against the United States under the SCM Agreement. Indonesia complains in its panel request that “the determinations made, and the countervailing measures imposed, by the United States are inconsistent with Articles 2, 12, and 14 of the SCM Agreement” with respect to the provision of standing timber, the log export ban and debt forgiveness (as described above). Contrary to Indonesia’s arguments, Indonesia has failed to establish any breach of U.S. obligations under the SCM Agreement. First, with respect to USDOC’s benefit determinations, Indonesia has not shown any legal error in USDOC’s less than adequate remuneration analysis under Article 14(d) with respect to the standing timber program and log export ban. While the Indonesian government’s overwhelming market share was a factor in that analysis, USDOC assessed all of the evidence and identified other features of the market for standing timber that rendered it distorted. USDOC also properly considered record evidence of the use of the export ban to artificially suppress prices and develop downstream industries. For both programs, after considering the use of various in-country prices, USDOC determined that market distortion and the unreliable or unrepresentative nature of some proposed data made the selection of an out-of-country benchmark necessary. This decision is clearly in line with both the text of Article 14, and the Appellate Body’s interpretation of that provision. Second, with respect to USDOC’s use of facts available, USDOC properly

⁵⁰ See *US – Countervailing Measures (China) (AB)*, para. 4.177 & n.730 (discussing the parties’ arguments, the panel’s distinction between Article 12.7 and Article 22, and the panel’s finding in paragraph 7.311 of the panel report that China’s argument for requiring USDOC to provide detailed account in its determination of all facts on which AFA is based to be outside its terms of reference).

⁵¹ See, for example, Indonesia’s arguments in paragraphs 33, 34 and 41 of its first written submission.

applied the facts available on the issue of affiliation to determine that Orleans’ purchase of APP/SMG’s debt was a form of debt forgiveness and, consequently, a subsidy. USDOC examined and weighed all substantiated evidence in accordance with Article 12.7 and gave a reasoned and adequate explanation. Finally, with respect to USDOC’s specificity determinations, USDOC accurately determined that all three subsidies constitute a scheme or plan that constitutes a subsidy program within the meaning of Article 2.1(c), and adequately identified the jurisdiction of the granting authority as described in the chapeau of Article 2.1. In sum, Indonesia has not carried its evidentiary burden in establishing inconsistency with any of these provisions.

A. USDOC’s Rejection of In-Country Prices As Benchmarks for Indonesia’s Provision of Standing Timber for Less Than Adequate Remuneration Was Consistent With Article 14(d) Of The SCM Agreement.

42. Indonesia argues that USDOC acted inconsistently with Article 14(d) of the SCM Agreement by rejecting in-country benchmarks to assess whether Indonesia provided standing timber for less than adequate remuneration. Indonesia contends that USDOC applied an out-of-country benchmark without making the requisite evidentiary findings that prices for standing timber from both Indonesian public and privately-owned forests were not market-determined, and by – according to Indonesia – basing this determination solely on the government’s predominant share of the domestic market for standing timber. In doing so, Indonesia alleges, USDOC made a *per se* finding of price distortion that is inconsistent with SCM Article 14(d)’s requirement that investigating authorities determine the adequacy of remuneration “in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.” Indonesia’s allegations are not supported by the record in this dispute.

43. Indonesia, relying heavily on *US – Countervailing Measures (China)*, ignores multiple key aspects of the investigating authority’s analysis. The GOI’s overwhelming market share was, justifiably, a major factor in that analysis, but USDOC assessed all of the evidence and identified other features of the market for standing timber that rendered it distorted. These included the GOI’s ownership of virtually all harvestable forest land, the presence of a log export ban, the negligible level of pulp log imports, and Indonesia’s aberrationally low prices for logs relative to the surrounding region. Tellingly, Indonesia fails to identify what other record information was relevant to the distortion analysis, but not considered by USDOC. Indeed, Indonesia and APP/SMG did not dispute that stumpage prices from Indonesian public or private forests could not provide a viable benchmark in the underlying investigation.⁵² In sum, USDOC’s finding that in-country prices were not market-driven was based on all relevant evidence and was consistent with Article 14(d).

44. Subsection 1 below discusses the relevant legal standard under Article 14(d) of the SCM Agreement; Subsection 2 describes the factors considered by USDOC in reaching its decision to use out-of-country benchmarks; and subsection 3 concludes by rebutting Indonesia’s arguments that USDOC’s benefit determinations were inconsistent with Article 14(d).

⁵² See Government of Indonesia and APP-Indonesia Case Brief at 11-42 (Aug. 16, 2010).

1. Legal Standard Under Article 14(d) Of The SCM Agreement

45. Article 14(d) of the SCM Agreement provides:

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

...

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

46. The *chapeau* of Article 14 refers to “any method” used by an investigating authority “to calculate the benefit to the recipient,” and describes the subparagraphs of Article 14 as “guidelines.” The Appellate Body has explained that “[t]he reference to ‘any’ method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”⁵³ Moreover, the Appellate Body has emphasized that the provisions of Article 14 are “guidelines,” and has stated that “the use of the term ‘guidelines’ in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as ‘rigid rules that purport to contemplate every conceivable factual circumstance’.”⁵⁴

47. The guidelines in Article 14 are to be used in calculating the “benefit” conferred pursuant to Article 1.1 of the SCM Agreement.⁵⁵ The term “benefit” as used in the SCM Agreement refers to an advantage or something that “makes the recipient ‘better off’ than it would otherwise have been, absent that [financial] contribution.”⁵⁶ To determine whether a financial contribution makes a recipient “better off,” it is necessary to look to the market: “the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’, because the trade-distorting potential of a ‘financial contribution’ can be identified by

⁵³ US – Softwood Lumber IV (AB), para. 91.

⁵⁴ US – Softwood Lumber IV (AB), para. 92.

⁵⁵ US – Countervailing Duties (AB), para. 4.44.

⁵⁶ See, e.g., Canada – Aircraft (AB), para. 157.

determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.”⁵⁷

48. The second sentence of Article 14(d) specifies that “adequacy of remuneration” must be determined “in relation to prevailing market conditions . . . in the country of provision.” Such conditions “consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.”⁵⁸ Accordingly, “the *primary* benchmark, and therefore the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm’s-length transactions in the country of provision.”⁵⁹

49. Although an investigating authority should first consider proposed in-country prices for the good in question, it should not rely on such prices if they are not market-determined as a result of governmental intervention in the market.⁶⁰ Government intervention “may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align.”⁶¹ In such circumstances, “the government’s role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.”⁶²

50. The government’s predominant role as a supplier in the market makes it “likely” that private prices for the good in question will be distorted.⁶³ Although there is no market share threshold above which an investigating authority may conclude *per se* price distortion, the more predominant a government’s role in the market, the more likely that role results in the distortion of private prices.⁶⁴ For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that China’s predominant role in the input market shows that it is “likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices.”⁶⁵ Further, the Appellate Body has explained that “[t]here may be cases

⁵⁷ *Canada – Aircraft (AB)*, para. 157.

⁵⁸ *US – Carbon Steel (India) (AB)*, para. 4.150.

⁵⁹ *US – Carbon Steel (India)(AB)*, para. 4.154 (emphasis in original); *see also US – Softwood Lumber IV (AB)*, para. 90.

⁶⁰ *US – Carbon Steel (India) (AB)*, para. 4.155.

⁶¹ *US – Carbon Steel (India) (AB)*, para. 4.155 (referring to *US – Softwood Lumber IV (AB)*, para. 90).

⁶² *US – Softwood Lumber IV (AB)*, para. 93.

⁶³ *US – Softwood Lumber IV (AB)*, para. 102; *US – Anti-Dumping and Countervailing Duties (AB)*, para. 453; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Countervailing Measures (AB)*, para. 4.51.

⁶⁴ *US – Anti-Dumping and Countervailing Duties (AB)*, para. 444.

⁶⁵ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454. *See also US – Softwood Lumber IV (AB)*, para. 100 (“Whenever the government is the predominant provider of certain goods, even if not the sole

... where the government’s role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight.”⁶⁶

51. However, an investigating authority must establish price distortion on the basis of the particular facts of the underlying countervailing duty investigation.⁶⁷ Thus, it may not refuse to consider evidence relating to factors other than government market share that may be relevant to the distortion analysis.⁶⁸ The analysis that the investigating authority undertakes “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.”⁶⁹

52. In applying the above principles, it is clear that the facts attending Indonesia’s provision of standing timber (the stumpage program) line up much more closely with the Appellate Body’s perception of the record in *US – Anti-Dumping and Countervailing Measures (China)* and *US – Softwood Lumber IV* than they do with the Appellate Body’s perception of the record in *US – Countervailing Measures (China)*. First, similar to the situation in *US – Softwood Lumber IV*, the government directly provides standing timber which is used to make coated paper. Second, the government owns virtually all of the harvestable forests in Indonesia and administratively controls the stumpage fees charged. While Indonesia emphasizes that logs are harvested from private forest land in Indonesia,⁷⁰ the record shows that only 6% of harvested timber is attributable to private forests. Even more significantly, the national government controls 99.5% of harvestable forest land in Indonesia.⁷¹ Clearly, private transactions in the relevant market are nominal. This is not a situation in which an investigating authority could be expected to find and cite to significant market determined activity or other factors that undercut the likelihood of price distortion. This is a situation in which the government is overwhelmingly predominant,⁷² and, for all intents and purposes, the sole provider of the input. Thus, Indonesia’s imposition of a putative requirement to explain “how ... market shares held by ... [the government] ... resulted in the government’s *possession and exercise* of market power, such that ... price distortion occurred [and] ... private suppliers aligned their prices with those of the government-provided goods [or] ... were *market determined*,”⁷³ is inapposite to the factual situation in this dispute.

provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods . . .”).

⁶⁶ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

⁶⁷ *US – Countervailing Measures (AB)*, para. 4.51; *US – Softwood Lumber IV (AB)*, para. 102.

⁶⁸ *US – Countervailing Measures (AB)*, para. 4.51 (referring to *US – Anti-Dumping and Countervailing Duties (AB)*, para. 446).

⁶⁹ *US – Carbon Steel India (AB)*, para. 4.157.

⁷⁰ Indonesia First Written Submission, para. 40.

⁷¹ IDM at 8 (attached as Ex. US-31) (citing CFS IDM at 18, attached as Ex. US-43).

⁷² See *US – Anti-Dumping and Countervailing Measures (China) (AB)*, para. 454.

⁷³ Indonesia First Written Submission, para. 42 (quoting *US – Countervailing Measures (China) (AB)*, para. 4.101) (emphasis added).

Rather, Indonesia’s argument is an attempt to force its square-peg analysis into the round-hole of present facts.

2. USDOC’s Decision to Use Out-of-Country Benchmarks

53. USDOC’s rejection of in-country price information was based on an analysis of the relevant facts before the agency. USDOC examined the GOI’s predominant role in the standing timber, or stumpage, market during the period of investigation, accounting for almost 94 percent of the total supply.⁷⁴ USDOC considered other relevant information submitted in the course of its investigation and identified additional grounds to support its finding of distortion of in-country prices for standing timber.

54. As developed during the investigation, and in the prior CFS investigation, Indonesia provides stumpage for an administratively set fee.⁷⁵ Timber may be harvested from plantations on government-owned land by “HTI” license holders, who pay “PDSH” fees.⁷⁶ Timber may be harvested from the natural forest by “HPH” license holders, who pay per-unit rehabilitation fees (“DR” fees) in addition to PDSH fees.⁷⁷ Furthermore, an additional fee is owed if timber is harvested from a Jambi province plantation (“PDSA” fees).⁷⁸

55. USDOC explained that Indonesia’s provision of standing timber conferred a benefit to the extent it was for less than adequate remuneration, when measured against a market benchmark for stumpage.⁷⁹ Pursuant to the national legislation and implementing regulations of the United States,⁸⁰ USDOC evaluated potential benchmarks in the following hierarchical order of preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles.⁸¹

⁷⁴ IDM at 8. (Ex. US-31).

⁷⁵ IDM at 6 (Ex. US-31); CFS IDM at 18 (Ex. US-43).

⁷⁶ IDM at 6 (Ex. US-31).

⁷⁷ IDM at 6 (Ex. US-31).

⁷⁸ IDM at 6 (Ex. US-31).

⁷⁹ IDM at 7 (Ex. US-31).

⁸⁰ In *US -- Carbon Steel (India) (AB)*, the Appellate Body upheld the Panel’s rejection of India’s “as such” challenges to the U.S. benchmark regulation, 19 C.F.R. § 351.511(a)(2)(i)–(iv), which implements U.S. statutory provisions in 19 U.S.C. § 1677(5)(E). *US -- Carbon Steel (India) (AB)*, paras. 4.129, 4.136, 4.177. The relevant statute was included as part of the Uruguay Round Agreement Act, 19 U.S.C. § 1677(5)(E), and was implemented to make U.S. law consistent with Article 14 of the SCM Agreement.

⁸¹ The hierarchy is set forth in 19 C.F.R. § 351.511(a)(2)(i)-(iii), which provides:

(2) “Adequate Remuneration” defined -

(i) *In general*. [USDOC] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price from actual transactions in the country in question. Such a price could include prices stemming from actual imports or, in certain circumstances, actual sales from competitively run government

56. The first preference in this hierarchy recognizes that “[t]he most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the country.”⁸² Thus, USDOC explained that its “preferred benchmark in the hierarchy is an observed market price for the good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import).”⁸³

57. To evaluate the viability of an in-country price, USDOC considered the GOI’s market share. Indonesia reported that in 2008, nearly all standing timber was harvested on public lands, with private forests accounting for only about 6 percent of the harvest.⁸⁴ In addition, USDOC observed that the GOI controls approximately 99.5% of the harvestable forest land in Indonesia, *i.e.*, all but 233,811 of 57 million hectares.⁸⁵ Given the GOI’s overwhelming share of the harvest of standing timber and near total control of the supply of standing timber, USDOC reasonably concluded on the record before it that prices within Indonesia were not the product of normal market supply and demand forces.⁸⁶

58. In analyzing related issues and responding to comments from interested parties, USDOC provided extensive additional analysis supplementing its finding that in-country prices were distorted. For instance, USDOC examined whether the principal fees at issue, PDSH for plantation timber, were market-driven. PDSH fees were administratively set by the GOI as a percentage of the reference price for logs.⁸⁷ The reference price is to reflect a weighted average of domestic price and export price; however, given Indonesia’s log export ban, it was determined

auctions. In choosing such transactions or sales, [USDOC] will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.

(ii) *Actual market determined prices unavailable.* If there is no useable market- determined price with which to make the comparison under paragraph (a)(2)(i) of this section, [USDOC] will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, [USDOC] will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) *World market prices unavailable.* If there is no world market price available to purchasers in the country in question, [USDOC] will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

⁸² IDM at 7-8 (Ex. US-31).

⁸³ IDM at 8 (Ex. US-31).

⁸⁴ GOI Questionnaire Resp. of 12/29/09 at 18 (attached as Ex. US-32).

⁸⁵ IDM at 8 (Ex. US-31) (citing CFS IDM at 18 (Ex. US-43)). This information was obtained from the GOI during the CFS investigation, but GOI did not update the information in this investigation and confirmed at verification that private forest land accounts for only a fraction of forest land in Indonesia. GOI Verification Rept.at 4 (Aug. 3, 2010) (BCI version) (attached as Ex. US-35).

⁸⁶ IDM at 8 (Ex. US-31).

⁸⁷ IDM at 9 (Ex. US-31).

solely with respect to the domestic price.⁸⁸ USDOC explained that the GOI had control over both supply, through its ownership of virtually all harvestable land, and demand, to the extent it had closed the market to exports, and as such its percentage-based fees did not reflect market principles.⁸⁹

59. USDOC issued Indonesia extensive questionnaires seeking information that would establish that its stumpage fees were established in accordance with market principles. Indonesia did not provide such information.⁹⁰ Indonesia indicated that the share of the overall timber harvest from private land in the two years prior to the period of investigation were likewise miniscule, 5% (2006) and 2% (2007).⁹¹ USDOC requested that Indonesia provide volume and value information for commercial log harvesting on private forest land during the period of investigation, broken down by company and species.⁹² Indonesia provided only the aggregate volume of all logs harvested on private land, stating that it did not record any value information or maintain species or type-specific volume data.⁹³

60. In fact, contrary to its claims in this dispute, Indonesia and APP/SMG never suggested in the investigation that USDOC apply a private (or government) price for standing timber in Indonesia as a benchmark. Rather, Indonesia and APP/SMG exclusively argued that USDOC should utilize certain import data as an in-country benchmark.⁹⁴ This data was collected by a retained consultant, and reflected eighteen transactions of commercial quantities of logs imported to Indonesia during the period of investigation from the Sabah province of Malaysia.⁹⁵ The respondents argued that the Malaysian seller would only sell to an Indonesian importer if the latter offered a market price.

61. USDOC declined to use this data, citing the GOI's predominant share of the harvest volume, and in addition, the negligible level of log imports into Indonesia, which were less than one percent of the timber harvested domestically.⁹⁶ Thus, USDOC concluded that the shipper

⁸⁸ IDM at 9. These PDSH fees ranged from one percent to ten percent, depending on the type of timber. GOI Verification Rept. at 8-9 (Aug. 3, 2010) (BCI version) (Ex. US-35).

⁸⁹ See IDM at 9 (Ex. US-31).

⁹⁰ See IDM at 9 (Ex. US-31).

⁹¹ GOI Supp. Questionnaire Resp. of 2/22/2010 at 13 (attached as Ex. US-34) (BCI version).

⁹² GOI Questionnaire Resp. of 12/29/2009 at 17-18.(attached as Ex. US-32).

⁹³ GOI Questionnaire Resp. of 12/29/2009 at 17-18 & Ex. 27 (Ex. US-32). Similarly, in the CFS investigation, the GOI did not provide any information on either the sale of privately-owned standing timber or stumpage fees charged by private timber companies. CFS IDM at 19, 66-72 (Ex. US-43) (discussing the benchmark information proffered by Indonesia).

⁹⁴ See GOI and APP-Indonesia Case Brief at 11-42 (Aug. 16, 2010) (attached as Ex. US-44).

⁹⁵ GOI and APP/SMG Case Brief at 11 (Aug. 7, 2010) (Ex. US-44).

⁹⁶ IDM at 31 (Ex. US-31).

from Malaysia would be forced to match the prices of the overwhelming majority of transactions affected by Indonesia’s provision of stumpage for less than adequate remuneration.⁹⁷

62. USDOC observed that, “[e]ven if it is reasonable to conclude that the foreign shipper believes that the Indonesian price is adequate, it is just as reasonable to conclude that the foreign shipper may have obtained a better price elsewhere.”⁹⁸ USDOC explained that the record data supported the latter conclusion, because it demonstrated “a significant price difference between Malaysian exports of acacia to Indonesia and Malaysian exports of acacia to other countries in the surrounding region.”⁹⁹ Indeed, once shipments to Indonesia were removed from the Sabah dataset gathered by Indonesia’s consultant, the result was nearly identical to the out-of-country benchmark USDOC ultimately utilized, *i.e.*, species-specific World Trade Atlas data reflecting log exports from Malaysia.¹⁰⁰ USDOC determined that the striking difference in the Sabah export data with and without exports to Indonesia supported its determination that the Indonesian market was distorted.¹⁰¹

3. No Breach of Article 14(d) Of The SCM Agreement

63. Indonesia’s allegations concerning USDOC’s determination bear no resemblance to the record in this dispute. According to Indonesia, USDOC considered the government’s predominant share of the market for stumpage during the period of investigation, and closed the case. But, as demonstrated above, USDOC’s decision to reject in-country prices as distorted was amply supported and reflected a thorough assessment of the record evidence.

64. USDOC’s focus on the share of stumpage provided directly from GOI lands during the period of investigation was consistent with Article 14(d). The GOI’s overwhelming 94% share made it exceedingly likely that other sellers in the market would be forced to align with its prices, as the Appellate Body has recognized.¹⁰² USDOC’s initial analysis focused on market share of stumpage in 2008, in combination with the GOI’s control of 99.5% of all timber supply, as the key factors demonstrating that the GOI possessed and exercised control over the market and distorted prices.¹⁰³

65. In this regard, the Appellate Body has said 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.”¹⁰⁴ Accordingly, depending on the information obtained in

⁹⁷ IDM at 32 (Ex. US-31).

⁹⁸ IDM at 31 (Ex. US-31).

⁹⁹ IDM at 32 (Ex. US-31).

¹⁰⁰ IDM at 40 (Ex. US-31).

¹⁰¹ IDM at 40 (Ex. US-31).

¹⁰² See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454. *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

¹⁰³ IDM at 8 (Ex. US-31).

¹⁰⁴ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

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.

66. However, USDOC did not refuse to consider other evidence, or even discount other evidence as bearing limited weight. Indeed, USDOC sought additional information through its questionnaires, and considered and addressed the respondents' arguments regarding the use of certain import data as an in-country benchmark.¹⁰⁵ USDOC thereby ensured that its rejection of in-country benchmarks was based on the particular facts of the underlying countervailing duty investigation.¹⁰⁶

67. Moreover, USDOC supplemented its analysis, finding further support for its rejection of in-country benchmarks in the extremely low share of the market for logs comprised of imports, Indonesia's ban of log exports, and export pricing data from Malaysia to the rest of the surrounding region. Contrary to Indonesia's assertions, USDOC's analysis of these factors, in addition to Indonesia's predominant market share and control of virtually all harvestable land, establish that Indonesia actually possessed and exercised near-complete control over the domestic supply of timber, and, thus, resulted in depressing and distorting domestic market prices. Accordingly, this is not a case where, as Indonesia argues with citation to the Appellate Body's findings in *US – Countervailing Measures (AB)*, USDOC failed to explain how the government or public bodies actually possessed and exerted market power to distort in-country prices by relying exclusively on their dominant market position for the given input.¹⁰⁷

68. Indonesia faults USDOC for failing to make any evidentiary findings that supported its conclusion of distortion of in-country prices. But, as demonstrated above, USDOC made several such findings. Indonesia fails to specify what record information would have detracted from USDOC's analysis, but was not analyzed. Its complaint that USDOC "merely paid lip service to the existence of private forest land in Indonesia"¹⁰⁸ is baseless, as USDOC provided extensive analysis of why none of the domestic prices for standing timber were market determined. USDOC's analysis focused specifically on import log prices, rather than stumpage rates on private forest land because Indonesia failed to provide the price information USDOC requested concerning timber harvested on private land,¹⁰⁹ and no party argued to USDOC that such information should be used as the benchmark for judging adequacy of remuneration.

69. In sum, USDOC based its rejection of in-country benchmark data "on positive evidence on the record," and adequately explained and supported its conclusion.¹¹⁰ As the Appellate Body has recognized, among the factors for determining the analysis an investigating authority must

¹⁰⁵ IDM at 28-37 (Ex. US-31).

¹⁰⁶ See *US – Countervailing Measures (AB)*, para. 4.51; *US – Softwood Lumber IV (AB)*, para. 102.

¹⁰⁷ Indonesia First Written Submission, paras. 33-34.

¹⁰⁸ Indonesia First Written Submission, para. 41.

¹⁰⁹ See GOI Questionnaire Resp. of 12/29/2009 at 17-18 & Ex. 27 (Ex. US-32).

¹¹⁰ See Art. 14 of the SCM Agreement; *US – Carbon Steel (India) (AB)*, para. 4.157.

undertake are “the nature, quantity, and quality of the information supplied by petitioners and respondents.”¹¹¹ To the extent that Indonesia alleges that USDOC should have made additional evidentiary findings, such arguments are foreclosed by its failure to build a record that would support its claims.

B. Indonesia Fails to Prove Any WTO Breach With Respect to USDOC’s Finding That the Log Export Ban Confers a Benefit at Less Than Adequate Remuneration.

70. Indonesia has failed to establish any breach of the SCM agreement with respect to USDOC’s finding that the log export ban conferred a benefit (timber inputs at less than adequate remuneration). Aside from Indonesia’s inapposite arguments regarding financial contribution, Indonesia’s only argument regarding benefit and the log export ban amounts to a restatement of its argument regarding the use of out-of-country benchmarks. In particular, Indonesia argues that USDOC’s benefit determination constitutes an “improper per se determination of price distortion based solely on the predominant market share of standing timber from public forests,” and that USDOC found a benefit by applying an out-of-country benchmark “without any analysis of Indonesian prices.” As discussed in the prior section, however, these arguments are not supported by the record, and are thus without any merit. In subsection 1 below, the United States will summarize its benefit arguments, with an emphasis on the log export ban.

71. Instead of making specific arguments regarding whether USDOC complied with SCM Agreement obligations with respect to the determination of benefit, the portions of Indonesia’s submission relating explicitly to the log export ban can be boiled down into two arguments: (1) the ban’s ostensible purpose (conservation) and scope (downstream carve-out) reveal that it is not a subsidy; and (2) export restraints as a rule cannot constitute a subsidy. As noted, however, in the *supra* Preliminary Ruling Request, nothing in the substance of these arguments has an actual connection with the obligations set out in Article 14(d).

72. Indonesia’s arguments and the authorities they cite, instead, concern the legal issues with regard to whether the ban is a *financial contribution* within the meaning of Article 1.1(a). However, given that Indonesia has not brought a claim under Article 1 of the SCM Agreement, such claims and arguments are outside the terms of reference in dispute. Thus, the United States respectfully recalls its Preliminary Ruling Request above and reiterates its view that the limited resources of the parties and the Panel should not be expended on further consideration of claims and arguments inapposite to the resolution of the numerous legal issues and claims that are properly within the terms of reference.

73. For the purpose of this initial submission, however, in subsection 2 below the United States will provide a brief response to Indonesia’s arguments regarding financial contribution and the log export ban. The United States is doing so for the information of the panel, and again reiterates that the United States views these issues as legally unconnected to Indonesia’s claims as set out in the panel request.

¹¹¹ See *US – Carbon Steel (India) (AB)*, para. 4.157.

1. No Breach of Article 14(d) of the SCM Agreement

74. USDOC was correct in its decision to determine that the benefit resulting from the log export ban to be the provision of inputs at less than adequate remuneration, measured by comparing the price APP/SMG paid for logs purchased from unaffiliated¹¹² logging companies to what they would have been expected to pay under normal market conditions.

75. Although the standing timber program and the log export ban are two different subsidies, they worked in tandem to suppress prices of wood inputs. USDOC thus selected the same benchmark data – species-specific World Trade Atlas statistics reflecting log exports from Malaysia – as an out-of-country benchmark, for the same reasons discussed above with regards to the stumpage benefit.

76. As explained above, USDOC’s analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in-country prices for logs.¹¹³ The sole in-country prices urged by the respondents were certain import data from Sabah, Malaysia into Indonesia, which were offered for both the stumpage and log export ban programs. As addressed above, USDOC explained why the use of the Sabah data and alternative benchmarks was not proper. Indonesia’s allegation that USDOC rejected in-country prices solely based on the Indonesian government’s share of timber production during the period of investigation mischaracterizes the facts.

77. In addition, during the investigation, USDOC addressed an argument from Indonesia and APP/SMG that USDOC had inappropriately “assumed the existence of distortive effects” of the log export ban. Respondents urged that the supply of logs in Indonesia was insufficient to meet demand, and thus, even without a ban, all domestic production would be consumed internally.¹¹⁴ USDOC explained that such reasoning ignored the essential fact “that without the ban domestic consumers would have to compete with foreign consumers.”¹¹⁵ Furthermore, USDOC explained that the empirical evidence on the record rebutted the respondents’ claim, and demonstrated distortion in the Indonesian market. Specifically, in the Malaysian export data available from the World Trade Atlas and as provided by the respondents’ consultant, a large disparity existed between timber prices paid from within Indonesia and the prices paid by others purchasing from Malaysia.¹¹⁶ Thus, the World Trade Atlas data that USDOC relied on was not “aberrational,” as Indonesia claims, but rather is consistent with the Malaysian export data, once imports to Indonesia are subtracted, that Indonesia provided in the underlying investigation.¹¹⁷ Accordingly,

¹¹² Logs that APP/SMG purchased from its cross-owned companies were countervailed only under the standing timber for less than adequate remuneration program. *See* IDM at 13 (Ex. US-31).

¹¹³ U.S. Department of Commerce, Preliminary Determination in Certain Coated Paper, 75 Fed. Reg. 10,761, 10,769 (Mar. 9, 2010) (Ex. IDN-05).

¹¹⁴ IDM at 27 (Ex. US-31).

¹¹⁵ IDM at 27 (Ex. US-31).

¹¹⁶ First Written Submission by the Government of the Republic of Indonesia, para. 43.

¹¹⁷ *See* IDM at 27, 40 (Ex. US-31).

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.

78. In the portion of its submission addressing the log export ban, Indonesia cites to what ostensibly were conservation goals in enacting the export ban. As noted, this appears to be an argument related to financial contribution, not benefit. In any event, this type of argument in no way supports a claim under Article 14(d) with respect to the proper determination of benefit. Under a *benefit* analysis pursuant to Article 14(d), the intent behind a government subsidy is not relevant.¹¹⁸ The mismatch between “intent” and Article 14(d), in fact, is highlighted by Indonesia’s reliance on the *US – Export Restraints* panel report in this section of its submission. The language Indonesia cites from *US – Export Restraints* pertains to Article 1.1(a).¹¹⁹ Indeed, with respect to whether an export restraint can confer a *benefit* (Indonesia’s claim, as set forth in its panel request), the panel in that dispute recognized that “[t]here is no issue in respect of benefit, *inter alia*, because the parties agree that an export restraint could confer a benefit. Thus, our analysis under SCM Article 1.1(a)(1) is limited to the question of whether an export restraint could constitute a “financial contribution” in the sense of that provision.”¹²⁰

2. Indonesia’s out-of-scope Financial Contribution Arguments Not Supported.

79. As noted, with respect to the subsidy resulting from the log export ban, Indonesia raises a number of arguments to the effect that the program was not countervailable under the SCM agreement because a financial contribution was absent. Although issues regarding financial contribution are outside the terms of reference of this dispute, the United States will summarize below why Indonesia’s financial contribution arguments are without merit.

80. First, Indonesia cites to what ostensibly were conservation goals in enacting the export ban. Second, Indonesia presents the broad-brush argument that no export restraint, regardless of the facts, could ever result in a financial contribution. In making these arguments, Indonesia appears to be making reference to the entrustment or direction element of financial contribution.

81. In particular, under Article 1.1(a)(1)(iv), a subsidy may be deemed to exist if “a government . . . entrusts or directs a private body to carry out one or more of the type of functions illustrated [above, including provision of goods and services] which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.”¹²¹

¹¹⁸ In general, the Appellate Body has been judicious in its consideration of subjective “intent” as a measure of a Member’s consistency with its obligations under covered agreements. See *EC – Large Civil Aircraft*, para. 1051.

¹¹⁹ *US – Export Restraints*, para. 8.19.

¹²⁰ *US – Export Restraints*, para. 8.21 (emphasis added).

¹²¹ SCM Agreement, art. 1.1(a)(1)(iv).

82. The ordinary definitions of entrustment and direction provide support for the notion that export restraints can constitute a financial contribution such as a government provided good or service through entrustment or direction. The ordinary meaning of “entrust” is “invest with a trust; give (a person etc.) the responsibility for a task, a valuable object, etc.”¹²² The ordinary meaning of “direct” includes “cause to move in or take a specified direction; . . . Regulate the course of; guide with advice. . . .”¹²³ The Appellate Body has stated that entrustment “occurs where a government gives responsibility to a private body”¹²⁴ and direction “refers to situations where the government exercises its authority over a private body.”¹²⁵ The Appellate Body and previous panels have also contemplated the terms entrustment and direction and found that while they do not connote an accidental action or mere byproduct of regulation, entrustment or direction need not be, and seldom is, explicit or formal.¹²⁶

83. In Subsection (a) below, the United States responds to Indonesia’s argument regarding the intent of the log export ban, and in subsection (b), the United States responds to Indonesia’s argument that an export ban can as a matter of law never amount to a financial contribution.

a. Indonesia’s Intent in Adopting the Ban

84. Without explicitly saying so, Indonesia perhaps is arguing that if the government has no intent to subsidize – here, by providing low-cost timber inputs – it cannot be said to have “directed” or “entrusted” private actors to provide on its behalf. However, Indonesia’s attempt to undermine USDOC’s finding that the log export ban is a subsidy — are not convincing. To the contrary, the totality of the evidence examined by USDOC indicated that the ban was designed to depress prices of pulpwood to provide cheap inputs for pulp and paper producers.

85. The *CFS from Indonesia* record reflected that Indonesia imposed a log export ban in 1985, which was in effect for all but three years (1998-2001) of the twenty years preceding the 2005 period of investigation.¹²⁷ The ban, reinstated in 2001 by joint decrees of the Ministry of Forestry and the Ministry of Industry and Trade, encompasses logs, pulpwood, and other forest products, and is implemented by preventing the issuance of plenary export permits that are required to export from Indonesia.¹²⁸

¹²² *The New Shorter Oxford English Dictionary* at 831 (1993).

¹²³ *The New Shorter Oxford English Dictionary* at 679 (1993).

¹²⁴ *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

¹²⁵ *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

¹²⁶ *Japan – DRAMS (Korea) (Panel)*, para 7.73; *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110-11.

¹²⁷ CFS IDM at 27 (Ex. US-43); *see also* Indonesia Questionnaire Resp. of 2/22/10 at Ex. 15 (Ex. US-34) (BCI version); Indonesia Questionnaire Resp. of 12/29/09 at 25 (Ex. US-32) (explaining that, although the GOI passed regulations to begin legalizing log exports in 2007, it had not yet exercised that authority at the time of the response).

¹²⁸ CFS IDM at 27 (US-43); *see also* Indonesia Questionnaire Resp. of 2/22/10 at Ex. 15 (Ex. US-34) (BCI version).

86. During the *CFS from Indonesia* investigation, USDOC reviewed an allegation that Indonesia’s log export ban works in conjunction with its subsidized stumpage rates to provide downstream users of logs with artificially-low priced raw materials.¹²⁹ The petitioners cited a WTO trade policy review that explained that Indonesia’s log export ban may “depress the domestic prices of logs, thereby assisting downstream processors of such products.”¹³⁰ USDOC analyzed the record evidence, which included three studies *provided by Indonesia* which were published by an independent think tank, the Centre for Strategic and International Studies (CSIS),¹³¹ and which address the purpose, as well as the impact, of the log export ban on the log and downstream forestry products industries in Indonesia.

87. The three independent studies Indonesia provided indicate that the log export ban “reduced the price of logs and chipwood, as well as the value of stumpage in Indonesia; it increased the incidence of illegal logging; it led to greater consumption of logs; and, it was specifically used to benefit the expansion of the downstream users of wood, particularly the pulp and paper industries.”¹³² The empirical evidence assessed in these studies suggested that the log export ban led to greater consumption of logs because of their lower price, and led companies to use logs inefficiently because they lacked sufficient monetary incentive to adopt resource-saving practices and technologies.¹³³ The CSIS study titled, *Can Indonesia Gain from Log Export Barriers?*, explained that Indonesia imposed log export barriers towards the end of the 1970s “to encourage the growth of downstream wood industries” and noted the existence of several other economic studies indicating “a substantial loss in government revenues through large implicit subsidies to the downstream processing industry and foregone revenues from log exports.”¹³⁴

88. Information provided at verification of Indonesia indicated how far domestic prices had fallen as a result of the ban. During the brief period in which the export ban was lifted, log export prices provided a temporary glance at how much domestic prices had fallen when the ban was in place. As USDOC notes, domestic log prices were significantly lower than Indonesian logs sold to the export market.¹³⁵ In fact, one of the studies noted above indicated domestic prices had fallen to such a degree that Indonesian pulp and paper companies had become inefficient, lacking sufficient monetary incentives to adopt resource-saving practices and technologies.¹³⁶ In spite of the mounting evidence that the ban was not achieving its stated goals,

¹²⁹ CFS IDM at 27 (Ex. US-43).

¹³⁰ CFS IDM at 27 (Ex. US-43).

¹³¹ Centre for Strategic and International Studies, *Economic Adjustment and the Forestry Sector: Does Removing the Log Export Ban Matter Much?* (February 2004) (Ex. US-71); Center for Strategic and International Studies, *Competitiveness and Efficiency of the Forest Product Industry in Indonesia* (February 2004) (Ex. US-72); Center for Strategic and International Studies, *Can Indonesia Gain from Log Export Barriers?* (December 2002); Indonesia Questionnaire Resp. of 3/6/07 at Ex. Supp-12 (attaching the three studies) (Ex. US-73).

¹³² CFS IDM at 29-30 (Ex. US-43).

¹³³ CFS IDM at 30-31 (Ex. US-43).

¹³⁴ CFS IDM at 31 (Ex. US-43) (citing *Can Indonesia Gain from Log Export Barriers?* at 1-2 (Ex. US-73)).

¹³⁵ CFS IDM at 32 (Ex. US-43).

¹³⁶ CFS IDM at 30-31 (Ex. US-43).

“[t]he GOI maintained and even re-imposed (in 2001) this log export ban in the presence of ... empirical evidence that, not only was the ban not effective in furthering the ostensible goal of protecting forest resources and preventing illegal logging, this ban was promoting the opposite by distorting and flooding the market with timber.”¹³⁷ At no time prior to its imposition or during its existence did Indonesia perform its own appraisal of whether the ban achieves its stated purpose.

89. The publication of research regarding the supposedly counterproductive impact of the log export ban did not cause Indonesia to reconsider its suitability,¹³⁸ and, to the knowledge of the United States, Indonesia has never performed its own appraisal of whether the ban achieves its stated purpose. Thus, USDOC concluded in *CFS from Indonesia* that the record as a whole supported the conclusion that the ban is “an ineffective tool for protecting the environment but an effective means for ensuring the supply of low-cost pulpwood to downstream producers of pulp and paper products.”¹³⁹

90. Consequently, USDOC assessed that “the benefits of the log export ban to the downstream consumers, as noted in the studies, cannot reasonably be considered inadvertent or a mere by-product of the ban.”¹⁴⁰ USDOC found that the totality of the evidence indicated that Indonesia’s purpose was to entrust or direct (within the meaning of Article 1.1(a)) log suppliers to provide lower cost inputs to downstream industries, which “actually led to increased deforestation and greater illegal logging.”¹⁴¹

91. In the instant investigation (concerning the 2008 calendar year), USDOC relied on its findings in *CFS from Indonesia* (concerning the 2005 calendar year). USDOC provided Indonesia an opportunity to provide any evidence of changed circumstances concerning the log export ban.¹⁴² Although Indonesia stated that it had begun the process of legalizing exports of certain forest products, Indonesia confirmed that this change had not taken effect prior to or during the period of investigation.¹⁴³ Accordingly, even if that change would ultimately impact prices for pulp inputs, it was irrelevant to the period of investigation.¹⁴⁴ In sum, based on the record before it, USDOC had no reason to reevaluate its prior decision that Indonesia entrusted or directed forestry/harvesting companies to provide artificially low-priced inputs to domestic pulp and paper companies.

¹³⁷ CFS IDM at 32 (Ex. US-43).

¹³⁸ CFS IDM at 32 (Ex. US-43).

¹³⁹ CFS IDM at 30 (Ex. US-43).

¹⁴⁰ CFS IDM at 32 (Ex. US-43).

¹⁴¹ CFS IDM at 32 (Ex. US-43).

¹⁴² IDM at 12-13 (Ex. US-31).

¹⁴³ See GOI Questionnaire Resp. of 12/29/09 at 25 & Ex. 8 (Ex. US-32); GOI First Supp. Questionnaire Resp., Part I of 2/16/10, at 7-8 (attached as Ex. US-39); IDM at 13, 28 (Ex. US-31); GOI Verification Rept. (Aug. 3, 2010) at 13 (Ex. US-35) (BCI version).

¹⁴⁴ IDM at 28 (Ex. US-31).

b. Proposed Exclusion of Export restraints from Subsidy Disciplines

92. In its first written submission, Indonesia also argues that even if the effect of the ban was an increase in domestic supply, driving down prices, export restraints such as the log ban cannot result in a financial contribution and thus cannot amount to subsidies under the SCM Agreement. Such a *per se* rule cannot be found in the text of the SCM Agreement, nor otherwise is it supportable.

93. Indonesia attempts to support this legal position by relying on the panel report in *US – Export Restraints*, and to a lesser extent on the panel reports in the *China – GOES* and *US – Countervailing Measures (China)*. These reports, however, do not support the existence of any such *per se* rule. The *US – Export Restraints* panel had found that the U.S. measure did not require the imposition of countervailing duties, and thus rejected Canada’s claim on that basis. The panel went on to find, as a *hypothetical* matter, that a certain type of measure with a very tight, prescribed definition would not constitute a subsidy. . In particular, the panel found that a certain type of measure, “defined in this dispute” by Canada as “a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports,” cannot constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement.¹⁴⁵ Contrary to Indonesia’s arguments, that panel report did not examine any concrete countervailing duty measure, and instead issued a ruling about a hypothetical countervailing duty imposed on one specific type of restraint. The panel did not propose or attempt to support any *per se* rule.

94. Likewise, Indonesia’s reliance on the panel reports in *China – GOES* and *US – Countervailing Measures* is misplaced. The *China – GOES* panel found that “when the action of a private party is a *mere side-effect* resulting from a government measure, this does not come within the meaning of entrustment or direction under Article 1.1(a)(1)(iv).”¹⁴⁶ Whether or not action by a private party, however, is a “mere side effect,” which must be determined on a case-by-case basis. Thus, *China-GOES* is flatly inconsistent with Indonesia’s suggestion of a *per se* rule. The panel in *US – Countervailing Measures* expressly limited its analysis to the facts of USDOC’s initiation on the two export restraint programs before it, which only circumscribed the “conditions of export” of the relevant inputs, magnesia and coke.¹⁴⁷ That panel “[did] not exclude the possibility that initiation of a countervailing duty investigation with respect to measures involving export restraints might be justified under other factual scenarios.”¹⁴⁸ Again,

¹⁴⁵ *US – Export Restraints*, para. 8.17.

¹⁴⁶ *China – GOES (Panel)*, para. 7.91 (emphasis added).

¹⁴⁷ *US – Countervailing Measures (AB)*, para. 7.401.

¹⁴⁸ *US – Countervailing Measures (AB)*, para. 7.404; see also para. 7.391 (referring to a possible finding of entrustment or direction based on contextual evidence that export restraints are part of broader governmental policies to promote higher value goods producing industries).

this panel report contemplates that an export restraint may amount to a subsidy – depending on the facts – and again refutes Indonesia’s position.

95. The United States further notes that the Appellate Body recognized in *US – DRAMS* that while policy pronouncements and the exercise of plenary regulatory powers are not sufficient to establish that the government has entrusted or directed private parties to carry out an activity that would qualify as a subsidy were it performed by the government directly, a government action that is backed up by some form of threat or inducement can meet the financial contribution criterion.¹⁴⁹ In that case, the Appellate Body also declined to constrain, lexically, the terms “entrust” and “direct” to require a “delegation” and a “command,” respectively, which would have been in keeping with the *US – Export Restraints* panel’s narrower reading of those terms.

96. The log export ban at issue is not a mere policy pronouncement or encouragement to take a particular action, as it is enforced under threat of law, including criminal sanctions. Ministry of Forestry officials reported having imposed criminal sanctions on companies attempting to violate the ban.¹⁵⁰ Nor is it a mere byproduct of government regulation. As the USDOC explained, “the [government] maintained and even re-imposed (in 2001) the log export ban in the presence of mounting empirical evidence that, not only was the ban not effective in furthering the ostensible goal of protecting forest resources and preventing illegal logging, this ban was promoting the opposite by distorting and flooding the market with timber.”¹⁵¹

97. USDOC also explained that a complete ban is the most extreme type of export restraint: “quantitative export restrictions ... curtail but still allow for some amount of exports, export duties, or various types of administrative or bureaucratic requirements (e.g., certification requirements) ... [which] may allow for alternative sales outlets that are not available under an export ban which eliminates all such alternative sales outlets and would likely have a significant impact on the market dynamics of the product in question.”¹⁵² The investigation found that the log export ban “stands out in terms of the scope and extent of its likely impact on the market for the product and players involved.”¹⁵³ While it is true that Indonesia narrowed the scope of the log export ban to exclude some downstream products (wood chips, for example) under a new regulation, that regulation was not implemented during the period of investigation, and in any event, would not apply to logs within the scope of the USDOC’s proceeding. The log export ban is also exceptional in its temporal duration, having foreclosed log suppliers’ access to foreign markets for 17 of the 20 years preceding the period of investigation.¹⁵⁴

¹⁴⁹ See *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 116, 118.

¹⁵⁰ CFS IDM at 29, n.2 (Ex. US-43).

¹⁵¹ CFS IDM at 32 (Ex. US.43).

¹⁵² CFS IDM at 29 (Ex. US-43).

¹⁵³ CFS IDM at 29 (Ex. US.-43).

¹⁵⁴ CFS IDM at 29 (Ex. US-43).

98. For all of the above reasons, USDOC was correct in determining the export ban constitutes a countervailable subsidy.

C. In Applying Adverse Facts Available With Regard To The Debt Buy-Back, USDOC Acted Consistently With Article 12.7 Of The SCM Agreement.

99. Indonesia claims that USDOC acted inconsistently with Article 12.7 of the SCM Agreement when it resorted to adverse facts available in the coated paper investigation with regard to one aspect of the debt buy-back.¹⁵⁵ Specifically, Indonesia challenges USDOC’s adverse facts available finding that company respondent Asian Pulp and Paper Group (APP/SMG) was “affiliated” with Orleans Offshore Investment Ltd. (Orleans), a company that purchased APP/SMG’s debt through the Indonesia Bank Restructuring Agency (IBRA).¹⁵⁶ Indonesia also faults USDOC for setting up “a constantly moving target” on the question of affiliation, and cites to several documents it contends undermine USDOC’s affiliation finding.¹⁵⁷ Finally, Indonesia argues that USDOC did not “reasonably replace” the missing information through its facts available selection.¹⁵⁸

100. As discussed below, Indonesia’s arguments are not supported by Article 12.7, properly interpreted, and are disassociated from the facts of the coated paper investigation. The United States first presents an overview of the proper interpretation of Article 12.7 in subsection A. In subsection B, the United States explains why USDOC appropriately resorted to adverse facts available with regard to affiliation between APP/SMG and Orleans. The United States then addresses Indonesia’s arguments pertaining to USDOC’s adverse facts available determination and its selection of the facts available in subsections C and D, respectively.

1. Structure of Article 12.7 of the SCM Agreement

101. Article 12.7 of the SCM Agreement provides that:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

102. Article 12.7 “permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization . . . and injury.”¹⁵⁹

¹⁵⁵ See Indonesia First Written Submission, para. 46.

¹⁵⁶ See Indonesia First Written Submission, para. 50.

¹⁵⁷ Indonesia First Written Submission, paras. 50, 61.

¹⁵⁸ Indonesia First Written Submission, paras. 66-71.

¹⁵⁹ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

Overall, Article 12.7 “is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”¹⁶⁰

103. Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement.¹⁶¹ The Appellate Body has explained that “it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of “facts available” in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”¹⁶²

104. Thus, Article 12.7 of the SCM Agreement should be interpreted in light of the context provided by Article 6.8 of the AD Agreement and accompanying Annex II.¹⁶³ Article 6.8 of the AD Agreement states that:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

105. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within “a reasonable period.” “[I]f information is, in fact, supplied ‘within a reasonable period,’ the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party.”¹⁶⁴ In considering the term “reasonable period,” the Appellate Body explained that:

106. Simultaneously, the SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. Although it

¹⁶⁰ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (Article 12.7 ensures that “the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties”).

¹⁶¹ *See, e.g., Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

¹⁶² *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295.

¹⁶³ *See Indonesia First Written Submission*, para. 52.

¹⁶⁴ *US – Hot-Rolled Steel (AB)*, para. 77 (emphasis in original).

¹⁶⁵ *US – Hot-Rolled Steel (AB)*, para. 84.

does not explicitly use the word “deadlines,” the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits.

107. Article 12.1.1 reads almost verbatim to 6.1.1 of the AD Agreement reads. With regard to the latter provision, the Appellate Body has “recognize[d] that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses,” and has emphasized that:

Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement* . . . “in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.”¹⁶⁶

These principles apply equally to Article 12.7 of the SCM Agreement, read in light of Article 12.1.1.¹⁶⁷

108. In resorting to “facts available” under Article 12.7 of the SCM Agreement, the missing information must be “necessary.” “[T]he use of the term ‘necessary’ to qualify the term ‘information’ carries significance,” because “[i]t is meant to ensure that Article 12.7 is not directed at mitigating the absence of ‘any’ or ‘unnecessary’ information, but rather is concerned with overcoming the absence of information required to complete a determination.”¹⁶⁸ If such “necessary” information is absent, “the process of identifying the ‘facts available’ should be limited to identifying replacements for the ‘necessary information’ that is missing from the record.”¹⁶⁹

109. When an investigating authority is permitted to rely on “facts available,” its discretion to select the information upon which to rely is not unfettered. “[T] here has to be a connection between the ‘necessary information’ that is missing and the particular ‘facts available’ on which a determination under Article 12.7 is based;” that is, “an investigating authority must use those ‘facts available’ that ‘*reasonably replace* the information that an interested party failed to provide’, with a view to arriving at an accurate determination.”¹⁷⁰

¹⁶⁶ *US – Hot-Rolled Steel (AB)*, para. 73 (quoting *US – Hot-Rolled Steel (Panel)*, para. 7.54).

¹⁶⁷ *See Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295 (explaining that it would be “anomalous” if Article 12.7 of the SCM Agreement were to be interpreted “markedly different[ly]” from Article 6.8 of the AD Agreement).

¹⁶⁸ *US – Carbon Steel (India) (AB)*, para. 4.416.

¹⁶⁹ *US – Carbon Steel (India) (AB)*, para. 4.416.

¹⁷⁰ *US – Carbon Steel (India) (AB)*, para. 4.416 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 293–294) (emphasis added by Appellate Body); *see also US – Countervailing Measures (China) (AB)*, para. 4.178.

110. Moreover, “all substantiated facts on the record must be taken into account” in this analysis, because “[i]t would frustrate the function of Article 12.7 . . . if certain substantiated facts were arbitrarily excluded from consideration.”¹⁷¹ Article 12.7:

does not provide “a licence to rely on only part of the evidence provided”, and that an investigating authority should “take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party”.¹⁷²

111. In other words, the “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”¹⁷³ Thus, an Article 12.7 determination “cannot be made on the basis of non-factual assumptions or speculation.”¹⁷⁴ In addition, “the explanation and analysis provided in a published report must be sufficient to allow a panel to assess whether the ‘facts available’ employed by the investigating authority are reasonable replacements for the missing ‘necessary information’.”¹⁷⁵

112. In any event, the extent to which the investigating authority must evaluate the possible “facts available,” and the form that evaluation may take, “depend[s] on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation.”¹⁷⁶

113. Finally, an interested party or Member’s lack of cooperation is relevant to the investigating authority’s selection of particular “facts available” under Article 12.7.

114. Article 6.8 of the AD Agreement is augmented by Annex II. Paragraph 5 of Annex II is relevant to interpreting Article 12.7 of the SCM Agreement.¹⁷⁷ Paragraph 5 of Annex II states that:

¹⁷¹ *US – Carbon Steel (India) (AB)*, para. 4.419 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294).

¹⁷² *US – Carbon Steel (India) (AB)*, para. 4.419 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294).

¹⁷³ *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

¹⁷⁴ *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); see also *US – Carbon Steel (India) (AB)*, para. 4.428.

¹⁷⁵ *US – Carbon Steel (India) (AB)*, para. 4.421.

¹⁷⁶ *US – Carbon Steel (India) (AB)*, para. 4.421; see also *US – Countervailing Duties (China) (AB)*, para. 4.179 (citing *US – Carbon Steel (India) (AB)*, para. 4.421) (“the nature and extent of the explanation and analysis required will necessarily vary from determination to determination”).

¹⁷⁷ See *Indonesia First Written Submission*, para. 52.

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

115. Indeed, Annex II as a whole is relevant to interpreting Article 12.7 of the SCM Agreement, especially the final sentence of paragraph 7 of Annex II which states:

116. The Appellate Body has cited to Annex II, paragraph 7 of the AD Agreement as “relevant,” “[a]dditional context” for interpreting Article 12.7 of the SCM Agreement, even though Annex II “does not form part of the SCM Agreement.”¹⁷⁸ Specifically, Annex II of the AD Agreement, at paragraph 7:

acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party. It describes what could occur as a result of a non-cooperating party’s failure to supply or otherwise withhold relevant information and the investigating authority’s use of the “facts available” on the record. The juxtaposition between the “result” and the “situation” of non-cooperation in this clause confirms our understanding that the non-cooperation of a party is not itself the “basis” for replacing the necessary information”. Rather, non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact. Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority’s use of “facts available” under Article 12.7 of the SCM Agreement.¹⁷⁹

117. The Appellate Body continued:

In this regard, we note that paragraph 1 of Annex II makes a connection between the "awareness" of an interested party, and the ability for an investigating authority to have recourse to the "facts available". This suggests that the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination and in explaining the selection of facts. Having said that, where there are several "facts available" from which to choose, an investigating authority must nevertheless evaluate and reason which of the "facts available" reasonably replace the missing "necessary information", with a view to arriving at an accurate determination.¹⁸⁰

¹⁷⁸ *US – Carbon Steel (India) (AB)*, paras. 4.423, 4.425; *see also id.* at para. 4.432 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291).

¹⁷⁹ *US – Carbon Steel (India) (AB)*, para. 4.426.

¹⁸⁰ *US – Carbon Steel (India) (AB)*, para. 4.426.

118. In other words, a selection of “facts available” that leads to “a less favourable result” is permissible under Article 12.7 of the SCM Agreement, and the interested party’s or Member’s “knowledge . . . of the consequences of failing to provide information” is highly relevant to whether to employ such an adverse inference.¹⁸¹

2. No Breach of Article 12.7

119. The GOI failed on two occasions to provide necessary information regarding the debt buy-back, which would have aided USDOC’s determination of whether APP/SMG and Orleans were affiliated. To fill in record gaps, USDOC applied facts available and, to evade rewarding the GOI for its failure to cooperate, USDOC also applied an adverse inference in finding APP/SMG and Orleans affiliated.

120. In the aftermath of the late 1990s financial crisis, the GOI “took ownership of various banks, including the non-performing assets of many banks.”¹⁸² In 1998, the GOI created the IBRA, which “managed several programs to dispose of distressed debt,” including the Strategic Asset Sales Program (PPAS) in 2003 “to sell the GOI owned assets that involved mixed packages of loans and equity, that involved particularly large debt amounts, or that involved particularly significant social issues.”¹⁸³ “By virtue of the size of the APP debts at issues [sic] and the number of employees at risk in the various APP enterprises, APP debt was handled through the PPAS.”¹⁸⁴ Meanwhile, Indonesian Regulation SK-79BPPN/0101 was “a specific regulation by IBRA that prohibited the sale of debt to entities affiliated with the original debtor.”¹⁸⁵ Orleans purchased APP/SMG’s debt through the PPAS.¹⁸⁶

121. The domestic petitioners alleged that the GOI provided countervailable debt forgiveness when it sold approximately \$880 million worth of APP/SMG debt for \$214 million to Orleans, and petitioners also alleged that those two companies were affiliated.¹⁸⁷ Based on petitioners’ allegations that these two companies were affiliated, and based on their claim that Indonesian law prohibited the IBRA from selling assets under its control back to the original owner, or to a company affiliated with the original owner, petitioners alleged that the debt buy-back program as it pertained to APP/SMG constituted a financial contribution in the form of debt forgiveness.¹⁸⁸ Petitioners also alleged that because the GOI maintained a general prohibition against a company or its affiliates from buying back such debts, the debt buy-back program was specific to

¹⁸¹ See *US – Carbon Steel (India) (AB)*, para. 4.426.

¹⁸² GOI First Supp. Questionnaire Resp., Part II of 2/22/10, at 25 & Ex. 21 (Ex. US-35) (BCI version).

¹⁸³ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 25-26 & Exhibit 21 (Exhibit US-34) (BCI version); see also Indonesia First Written Submission, para. 47.

¹⁸⁴ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 26 (Exhibit US-34 (BCI)).

¹⁸⁵ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 27 (Exhibit US-34 (BCI)).

¹⁸⁶ Indonesia First Written Submission, para. 49; see also GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 26, 29 & Exhibit 21 (Exhibit US-34 (BCI)).

¹⁸⁷ CFS IDM, at 40-45 (Exhibit US-43)).

¹⁸⁸ citing CFS IDM, at 40-45 (Exhibit US-43)).

APP/SMG.¹⁸⁹ USDOC initiated a countervailing duty investigation, which included an inquiry into the debt buy-back program.¹⁹⁰

122. Much of petitioners' allegations derived from USDOC's previous investigation of this debt buy-back in the coated free sheet paper (CFS) countervailing duty investigation.¹⁹¹ USDOC's CFS investigation is not the subject of this dispute.¹⁹² However, there, USDOC applied adverse facts available in finding APP/SMG and Orleans were affiliated because the GOI failed to provide critical information.¹⁹³

123. Specifically, in that prior investigation, the GOI failed to provide several key documents that Orleans would have been required to submit to the IBRA as part of its bid package, which purportedly would have identified Orleans' ownership. Based on USDOC's finding that these two companies were affiliated, and because it was illegal under Indonesian law for original debt holders to buy back their own debt through affiliated parties, USDOC found that the debt buy-back constituted a financial contribution to APP/SMG in the form of debt forgiveness, and it provided a benefit to APP/SMG in the amount that its "overall debt obligation was reduced by the difference between the amount of the . . . debt held by IBRA and the amount . . . paid for this debt."¹⁹⁴ Furthermore, USDOC found that, because "a company repurchased its own debt from the GOI at a steep discount when such a transaction was prohibited," "this financial contribution and benefit are specific to a company."¹⁹⁵

124. Indeed, to support petitioners' affiliation allegation in the application pertaining to the coated paper investigation in dispute, petitioners included as an exhibit a post-preliminary analysis by USDOC from that prior CFS investigation.¹⁹⁶ There, and in support of its affiliation finding as adverse facts available, USDOC had explained that "during verification, the Department met with an independent expert knowledgeable about the debt and the banking crisis in Indonesia," and that "[i]n the expert's opinion, it was likely that Orleans was related to SMG/APP of the Widjaja family," because "it [was] not uncommon for hedge funds to set up special purpose vehicles (SPVs) for the purpose of participating in one particular deal and that these SPVs could easily be established in a way that would make their ultimate ownership

¹⁸⁹ citing CFS IDM, at 45 (Exhibit US-43)).

¹⁹⁰ See CVD Initiation Checklist: Certain Coated Paper from Indonesia (Oct. 13, 2009), at 12 (Exhibit US-75) ("Initiation Checklist) (finding that "[p]etitioners have made a proper allegation based on reasonably available information"); see also *Certain Coated Paper From Indonesia: Initiation of Countervailing Duty Investigation*, 75 Fed. Reg. 53,707, 53,709 (Dep't of USDOC Oct. 20, 2009) (Exhibit IDN-04) (Coated Paper Initiation FR Notice).

¹⁹¹ See *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60,642 (USDOC Oct. 25, 2007) (Exhibit US-74) (CFS Final Determination), and CFS IDM, at 40-46 (Exhibit US-43).

¹⁹² See Indonesia Panel Request; see also Indonesia First Written Submission.

¹⁹³ CFS IDM, at 44-45 (Exhibit US-43).

¹⁹⁴ CFS IDM, at 45 (Exhibit US-43).

¹⁹⁵ CFS IDM, at 45 (Exhibit US-43).

¹⁹⁶ See Application, at 13-14 & Exhibit V-14 (Exhibit US-80).

unknowable.”¹⁹⁷ In that post-preliminary analysis, USDOC also identified record evidence, including a World Bank report indicating that “some IBRA sales allegedly allowed debtors to buy back their loans at a steep discount through third parties, against its rules, raising further concerns about transparency,” and other documents indicating that “lawsuits had been filed against SMG/APP, of which some court records include[d] speculation that the Widjaja family (owners of SMG/APP) was buying up its own debt through third parties.”¹⁹⁸

3. Reasonable Period of Time

125. As discussed above, petitioners in their application alleged that the IBRA sold APP/SMG’s debt back to a company affiliated with APP/SMG, and relied on USDOC’s determination in the CFS investigation that APP/SMG and Orleans were affiliated. As Indonesia rightly recognizes, USDOC’s questions to, and document requests from, the GOI with regard to the alleged affiliation were extensive in the coated paper investigation.¹⁹⁹

126. Initially, and noting its findings in the CFS investigation, USDOC asked the GOI whether it possessed “any new information or evidence of changed circumstances with respect to the GOI’s administration of this program since December 2005 (the end of the POI) in” the CFS investigation.²⁰⁰ The GOI responded that it disagreed with those prior findings and that it was “continuing to review archived documents regarding these allegations and [would] provide any new information that may develop.”²⁰¹

127. USDOC subsequently requested that, if the GOI disagreed with USDOC’s prior CFS determination that Orleans was affiliated with APP/SMG, then the GOI must “provide documentation demonstrating that Orleans had no affiliation with APP/SMG or any of APP/SMG’s other affiliated companies, or with any owners, family members or legal representatives of APP/SMG.”²⁰² USDOC also requested that the GOI “discuss the procedures implemented by IBRA to comply with its prohibition” “on selling debt to affiliates of the debtor,” and to detail the steps the IBRA took “to establish that Orleans Investment was not affiliated with APP/SMG or any of its owners, commissioners, directors, or members of the Widjaja family.”²⁰³ In addition, USDOC asked the GOI to provide Orleans’ registration and bid

¹⁹⁷ See Application, at 13-14 & Exhibit V-14 (Exhibit US-80).

¹⁹⁸ See Application, at 13-14 & Exhibit V-14 (Exhibit US-80).

¹⁹⁹ See Indonesia First Written Submission, paras. 54-58.

²⁰⁰ *Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 Fed. Reg. 10,761, 10,772 (Dep’t of USDOC Mar. 9, 2010) (Exhibit IDN-05) (Coated Paper Preliminary Determination); see also GOI Initial Questionnaire Response (Dec. 29, 2009), at 29-30 (Exhibit US-32).

²⁰¹ Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,772 (Exhibit IDN-05); GOI Initial Questionnaire Response (Dec. 29, 2009), at 29-30 (Exhibit US-32); see also Indonesia First Written Submission, para. 54.

²⁰² See USDOC First Supplemental Questionnaire to GOI (Jan. 29, 2010), at 8 (public version) (Exhibit US-78); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,772 (Exhibit IDN-05).

²⁰³ See USDOC First Supplemental Questionnaire to GOI (Jan. 29, 2010), at 9 (public version) (Exhibit US-78). The Widjaja family owns and operates, directly or indirectly, the APP companies, including APP/SMG and

package, including Orleans’ articles of association, and documentation regarding IBRA’s internal procedures for reviewing and evaluating bids in general, and specifically under the PPAS.²⁰⁴

128. The GOI provided the documents pertaining to the Orleans transaction, which “could not be located during the previous investigation” as well as several other documents it deemed relevant to USDOC’s inquiry.²⁰⁵ However, the GOI explained that the articles of association, as with the other documents submitted, did not disclose, or contain any information about, Orleans’ ownership.²⁰⁶ Furthermore, the GOI explained that the officials who informed USDOC during the CFS verification that the debt purchaser would be required, through the documents submitted, to establish that it was not affiliated with the company whose debt it was purchasing, did not have full knowledge about all possible types of purchasers.²⁰⁷ The GOI also stated that the law of the British Virgin Islands, where Orleans was incorporated, “apparently” did not require an entity’s articles of association to identify shareholders and that the requested documents “simply do not identify the ultimate shareholders of Orleans.”²⁰⁸

129. In that same questionnaire response, the GOI explained how the PPAS bidding process functioned, including that “[t]he mechanisms implemented by IBRA – the required certificate of compliance, the buyers specific representation of non-affiliation in the asset sale and purchase agreement, and the opinion letter by outside counsel – all represent the procedures implemented by IBRA to ensure the prohibition against sale of debt to the original debtor was not happening.”²⁰⁹ With regard to affiliation between the debtor and the purchaser, the GOI explained that “IBRA had the legal authority to undertake further due diligence,” but “given the circumstances of the times . . . IBRA relied upon the [sic] contractual obligations in the asset sale

several other paper and forestry companies. As discussed above, petitioners alleged that APP/SMG and Orleans were affiliated in the application.

²⁰⁴ See USDOC First Supplemental Questionnaire to GOI (Jan. 29, 2010), at 9-10 (public version) (Exhibit USA-78).

²⁰⁵ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 32-36 (Exhibit US-34 (BCI)); see also *id.* at Exhibit 24 (APP Strategic Asset Sale Program Terms of Reference); Exhibit 25 (Orleans’ Articles of Association), Exhibit 26 (Orleans’ Certificate of Incorporation), Exhibit 27 (Authorization and Power of Attorney), Exhibits 28 & 35 (Orleans’ Letter of Compliance), Exhibit 29 (Orleans’ Statement Letter), Exhibit 34 (Outside Counsel Opinion Letter confirming Orleans’ compliance with necessary conditions to purchase debt at issue). The GOI also provided documents relating to two other bidders for the APP/SMG debt. See GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 36-36 and Exhibits 36-38 (Exhibit US-34 (BCI)).

²⁰⁶ Coated Paper Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit IDN-05) (citing GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 34 (Exhibit US-34 (BCI))).

²⁰⁷ Coated Paper Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit IDN-05) (citing GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 34 (Exhibit US-34 (BCI))) (“We note that the officials with whom the Department spoke during the verification of the prior investigation had not been involved in the specific Orleans transactions, and were probably giving explanations based on their experience with other transactions in which the articles of association did in fact identify the owners”).

²⁰⁸ See GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 34 (Exhibit US-34 (BCI)).

²⁰⁹ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 27-31 (Exhibit US-34 (BCI)); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,772 (Exhibit IDN-05).

and purchase agreement and the enforceability of those obligations, and did not undertake any further due diligence.”²¹⁰

130. USDOC highlighted the importance of identifying Orleans’ shareholders in its preliminary determination: “[t]he identification of Orleans’ shareholders is pivotal to the Department’s ability to analyze the alleged affiliation between APP/SMG and Orleans,” and that Orleans’ articles of association, “which we understood would reveal Orleans’ shareholders, but which, in fact, do not contain ownership information, do not constitute sufficient new factual information to warrant changing our prior determination.”²¹¹ Absent such information, USDOC identified “other information on the record” supporting affiliation between APP/SMG and Orleans, namely, documentation from the CFS investigation.²¹² USDOC additionally determined that the GOI’s provided documents were “not sufficient to overcome our prior determination” in the CFS investigation that “in 2003 IBRA sold APP/SMG’s own debt back to it at a significant discount.” USDOC also found that these documents “raise additional questions about how IBRA handled the APP/SMG sale.”²¹³

131. Therefore, USDOC preliminarily determined that “the GOI’s sale of APP/SMG’s debt to an affiliate constituted a financial contribution, in the form of debt forgiveness.”²¹⁴ USDOC preliminarily found the debt buy-back program to be “company-specific” because Orleans was affiliated with APP/SMG and because the GOI maintained a general prohibition against a company, including its affiliates, buying back its own debt.”²¹⁵

132. But USDOC did not terminate its inquiry on the affiliation question at the preliminary determination. Given the continued absence of record information revealing Orleans’ ownership, USDOC “altered [its] 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.”²¹⁶ Thus, the investigating authority sought more information “concerning the IBRA’s operations in general, specifically what types

²¹⁰ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 31-32 (Exhibit US-34 (BCI)).

²¹¹ Coated Paper Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit IDN-05).

²¹² Coated Paper Preliminary Determination, 70 Fed. Reg. at 10,772 (Exhibit IDN-05) (citing APP/SMG First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 52 (documenting USDOC’s meeting with independent expert “knowledgeable about the debt and banking crisis in Indonesia”)).

²¹³ See Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,773 (Exhibit IDN-05).

²¹⁴ See Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,773 (Exhibit IDN-05).

²¹⁵ Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,773 (Exhibit IDN-05). USDOC also explained in the preliminary determination that “because a special program was created, with special rules and obligations, to handle the debt sales of five large and significant obligors, including APP/SMG, we also find that this sale was limited to a group of enterprises.” *Id.* As described further below in section #, USDOC did not rely on *de jure* specificity regarding this program in the final determination.

²¹⁶ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10) (citing GOI Third Supplemental Questionnaire Response, at 6-9 (May 27, 2010) (Exhibit IDN-15 (BCI))).

of guidelines and policies officials administering its programs were instructed to follow, focusing on the standards maintained for the PPAS program.”²¹⁷

133. In other words, USDOC sought information to confirm the GOI’s claims that it would not sell the debt to an affiliated buyer and that it pursued this legal requirement with a level of diligence typical of other IBRA transactions. USDOC’s subsequent questions concerning the diligence of IBRA’s process were designed to confirm the constancy and veracity of the GOI’s assertion that it could not identify Orleans’ shareholders and, as explained in a later letter from USDOC to the GOI, “that information on the bidders’ ownership structure was not required to be submitted to IBRA.”²¹⁸

134. Significant to Indonesia’s Article 12.7 claim, USDOC requested information concerning other debt sales conducted under the PPAS and any guidance provided to IBRA officials when evaluating the bidders.²¹⁹ USDOC highlighted that “failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available.”²²⁰

135. In response, the GOI articulated that the “IBRA did not have any written internal due diligence guidelines for evaluating the documentation and other information submitted by potential bidders,” but that “IBRA staff used the same basic approach to due diligence for all of the PPAS sales.”²²¹ However, with regard to USDOC’s document request pertaining to other PPAS debt sales, the GOI explained:

These documents are not available at this time. Since those documents are unrelated to the APP/SMG transaction at issue in this investigation, and since those other transactions are not at issue in this investigation, the GOI is not sure of the relevance of these documents.

That being said, we note that the letter of compliance, the sale and purchase agreement, and the letter from outside counsel followed standard forms and would be substantially similar to those documents used in the APP/SMG transaction. The articles of association and certification of incorporation for each of the three winning bidders would be unique to each bidder. But these

²¹⁷ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10); *see also* Third Supplemental Questionnaire to the GOI (Apr. 29, 2010) (public version) (Exhibit US-41).

²¹⁸ *See* USDOC Debt Buy-Back Verification Cancellation Letter (June 24, 2010) (Exhibit US-76).

²¹⁹ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10); *see also* Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at 3 (public version) (Exhibit US-41) (requesting certain documents “[f]or each sale under the PPAS”).

²²⁰ Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at cover letter (public version) (Exhibit US-41).

²²¹ GOI Third Supplemental Questionnaire Response (May 27, 2010), at 6-7 (Exhibit IDN-15 (BCI)); *see also* Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10).

three winner bidders . . . were all either offshore companies, or had at least one member that was an offshore company.²²²

136. Contrary to Indonesia’s assertion now, the GOI did not fully respond to this questionnaire.²²³ The GOI’s statement did not allow USDOC to confirm the extent to which IBRA staff had endeavored in other transactions to ensure debtors were not allowed to buy back their own debt or to determine the owners of debt purchasers. This information was “necessary” within the meaning of Article 12.7 of the SCM Agreement because, without such PPAS transaction documents, USDOC could not determine whether claims that such efforts (beyond the requirement of certified statements) were not taken in the APG/SMG transaction were plausible or whether the lack of such an effort was typical. Moreover, even if such issues were not pursued diligently in other transactions, the requested documents may have indicated further diligence was unnecessary in the other PPAS debt sales. For example, the bidders in the other transactions might have provided ownership information.

137. Noting that the GOI’s answer was non-responsive, USDOC provided the GOI with a final opportunity to remedy its evidentiary failure.²²⁴ USDOC explained that although the GOI believed that these documents were irrelevant to the investigation, the GOI was still responsible for providing them. USDOC also reiterated that should the GOI continue to fail to submit the requested information, it may resort to relying on the facts available.²²⁵

138. In response, the GOI explained:

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.²²⁶

139. Despite two requests, the GOI failed to provide necessary information within a reasonable period of time that would have assisted USDOC in evaluating whether the “IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders are not affiliated with the debtor companies.”²²⁷ As USDOC explained in its final determination:

²²² GOI Third Supplemental Questionnaire Response (May 27, 2010), at 15-16 (Exhibit IDN-15 (BCI)).

²²³ See Indonesia First Written Submission, para. 56.

²²⁴ See Fifth Supplemental Questionnaire to the GOI (June 11, 2010) (Exhibit US-42).

²²⁵ Fifth Supplemental Questionnaire to the GOI (June 11, 2010), at cover letter (public version) (Exhibit US-42).

²²⁶ GOI Fifth Supplemental Questionnaire Response (June 22, 2010), at 7 (Exhibit IDN-16 (BCI)). The GOI also stated that “IBRA structured its programs so as to rely upon legal requirements, the obligations reflected in the sales transaction documents, and the documents submitted by the bidders. The GOI is not aware of any further due diligence that may have been conducted with regard the [sic] various PPAS transactions.” GOI Fifth Supplemental Questionnaire Response (June 22, 2010, at 4, 5 (Exhibit IDN-16 (BCI)).

²²⁷ Coated Paper Final Determination I&D Memo, at 52-53 (Exhibit IDN-10).

there is a hole in the record pertaining to IBRA’s procedures during the strategic asset sales. The GOI has provided information pertaining to the Orleans transaction, but there is little indication on the record that this transaction was handled according to normal IBRA procedures, especially as pertains to the *bona fides* of bidders. Without information pertaining to other transactions, we cannot “test” the GOI’s claims that Orleans and APP/SMG were not affiliated.²²⁸

140. Consequently, necessary information pertaining to a subsidization determination was missing from the record within the meaning of Article 12.7. Furthermore, USDOC found that this “hole in the record” was based on the “GOI’s failure to provide this information by the required deadlines” on two occasions.²²⁹ The Appellate Body has recognized the importance of investigating authorities being able to set deadlines for the submission of information.²³⁰ Here, the GOI had ample opportunity to provide the requested information, namely, within USDOC’s deadlines, for which the GOI could have requested an extension.²³¹ But the GOI failed to provide this information. Given that necessary information was absent from the record, which was based on the GOI’s own failure to provide it, USDOC appropriately resorted to Article 12.7 “to fill in gaps.”²³²

141. Finally, in selecting from the facts available, USDOC determined that an adverse inference was warranted because “the GOI failed to cooperate by not acting to the best of its ability” considering it “had seven weeks notice that the Department required the specific information,” and still failed to provide it.²³³ USDOC’s affiliation finding, based on adverse inferences,²³⁴ aligns with the Appellate Body’s recognition that “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact.”²³⁵ Even though the selected facts available created a less favorable result

²²⁸ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10). “*Bona fides*” of the bidder simply meant that the bidder was not affiliated with the debtor and was thus eligible to bid. Occasionally, instead of referring to the *bona fides* of the bidder, the record referred to whether the bidder had a “conflict of interest,” *i.e.*, whether the bidder and debtor were related. *See, e.g.*, GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 30 (Exhibit US-34 (BCI)) (explaining that bidders, including Orleans, were required to submit, among other documents, a “statement of no conflict of interests”).

²²⁹ *See* Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

²³⁰ *See US – Hot-Rolled Steel (AB)*, para. 73.

²³¹ *See* Fifth Supplemental Questionnaire to the GOI (June 11, 2010) (Exhibit US-42) (“if you find there is insufficient time to provide a complete response to a questionnaire, you must . . . file a written request for an extension before the questionnaire’s current due date”).

²³² *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

²³³ *See* Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10).

²³⁴ Coated Paper Final Determination I&D Memo, at 20, 54-55 (Exhibit IDN-10).

²³⁵ *See US – Carbon Steel (India) (AB)*, para. 4.426 (explaining that “Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority’s use of ‘facts available’ under Article 12.7 of the SCM Agreement”).

for the GOI, USDOC acted consistently with Article 12.7.²³⁶ USDOC also continued to find that the debt buy-back constituted a financial contribution in the form of debt forgiveness and it was company-specific to APP/SMG.²³⁷

142. Indonesia claims that USDOC acted inconsistently with Article 12.7 in finding APP/SMG and Orleans affiliated, which informed its determination that the debt buy-back program constituted a countervailable subsidy. Indonesia’s arguments are not supported by the investigation record.

143. Indonesia principally argues that USDOC ignored record evidence that demonstrated the companies’ non-affiliation.²³⁸ Specifically, Indonesia avers that “what was on the record were all of the records concerning Orleans’ purchase of the APP/SMG debt that [USDOC] requested,” and “[n]one of those records suggested an affiliation between Orleans and APP/SMG.”²³⁹ Indonesia also accuses USDOC of, “in essence,” finding these documents “irrelevant to the question of whether the GOI acted to the best of its ability.”²⁴⁰

144. Indonesia’s arguments ignore USDOC’s analysis. USDOC did not find the Orleans documents “irrelevant,” but sought them based on a representation that those documents would show Orleans’ ownership structure.²⁴¹ As Indonesia acknowledges, USDOC applied adverse facts available in the CFS investigation because it failed to provide USDOC with Orleans’ registration and bid package “which [USDOC] learned at verification would have included Orleans’ articles of association showing Orleans’ shareholders”²⁴² This prior understanding informed USDOC’s initial requests for the Orleans documents in its investigation of the identical program in the coated paper investigation.²⁴³ Again, upon receipt, Orleans’ articles of association “contained no ownership information.”²⁴⁴

²³⁶ See *US – Carbon Steel (India) (AB)*, para. 4.426.

²³⁷ Coated Paper Final Determination I&D Memo, at 20 (Exhibit IDN-10).

²³⁸ See Indonesia First Written Submission, paras. 60-61.

²³⁹ Indonesia First Written Submission, para. 61.

²⁴⁰ Indonesia First Written Submission, para. 61.

²⁴¹ See Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10).

²⁴² See Indonesia First Written Submission, para. 63 (quoting CFS IDM, at 41 (Exhibit US-43)) (emphasis added by Indonesia).

²⁴³ See Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10) (“The articles of association, which the Department was led to believe would reveal Orleans’ shareholders, contained no ownership information. Although the GOI subsequently discounted statements made during the CFS verification by former IBRA officials that ownership information would be part of a purchaser’s file, those officials were discussing overall IBRA procedures with which they were familiar”) (citation omitted); see also Coated Paper Preliminary Determination, 75 Fed. Reg. at 10, 772 (Exhibit IDN-05) (same).

²⁴⁴ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,772 (Exhibit IDN-05).

145. Contrary to Indonesia’s arguments now, USDOC did not create “a constantly moving target” of evidentiary requests.²⁴⁵ To the extent there was any “moving target,” it was based on the GOI’s own representations to USDOC between the CFS and coated paper investigations.

146. Following receipt of documents that did not shed light on the affiliation question, USDOC “altered [its] 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.”²⁴⁶ In doing so, USDOC sought to “gather more information concerning IBRA’s operations in general, specifically what types of guidelines and policies officials administering its programs were instructed to follow, focusing on the standards maintained for the PPAS program.”²⁴⁷ When USDOC specifically sought documents pertaining to other PPAS transactions, which the investigating authority could “compare with the information [it] had for the Orleans transaction,”²⁴⁸ the GOI twice failed to provide that necessary information.²⁴⁹

147. It is in this context that “necessary information [was] not available on the record and that the GOI failed to provide requested information by the required deadlines . . . [and] that the GOI failed to cooperate by not acting to the best of its ability in responding.”²⁵⁰ USDOC explained exactly what facts were absent:

necessary information pertaining to IBRA’s PPAS program is not available on the record . . . This information pertains to the GOI’s claims that IBRA does not inquire into the ownership of bidders under this program and accepts various affirmations that the bidders are not affiliated with the debtor companies.²⁵¹

148. Indonesia contends that the missing information was not “necessary” because it was not “related to the APP/SMG sale.”²⁵² USDOC stressed that “[t]his information is necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not

²⁴⁵ Indonesia First Written Submission, paras. 50, 62.

²⁴⁶ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10).

²⁴⁷ Coated Paper Final Determination I&D Memo, at 19 (Exhibit IDN-10).

²⁴⁸ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

²⁴⁹ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10); GOI Third Supplemental Questionnaire Response, at 15-16 (May 27, 2010) (Exhibit IDN-15 (BCI)) (“These documents are not available at this time. Since those documents are unrelated to the APP/SMG transaction at issue in this investigation, and since those other transactions are not at issue in this investigation, the GOI is not sure of the relevance of these documents”); GOI Fifth Supplemental Questionnaire Response, at 7 (June 22, 2010) (Exhibit IDN-16 (BCI)) (“Regarding Question 22(c), these document 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”).

²⁵⁰ Indonesia First Written Submission, para. 60 (quoting Coated Paper Final Determination I&D Memo, at 5 (Exhibit IDN-10)).

²⁵¹ Coated Paper Final Determination I&D Memo, at 52-53 (Exhibit IDN-10).

²⁵² See Indonesia First Written Submission, para. 64.

inquiring further into the ownership of Orleans or any relationship between the entities.”²⁵³ Although “[t]he GOI has provided information pertaining to the Orleans transaction, . . . there is little indication on the record that this transaction was handled according to normal IBRA procedures, especially as pertains to the *bona fides* of bidders,” such that without this information, USDOC could not “‘test’ the GOI’s claims that Orleans and APP/SMG were not affiliated.”²⁵⁴

149. USDOC also explained that because the GOI “fail[ed] to provide this information by the required deadlines,” “there is a hole in the record pertaining to the IBRA’s procedures during the strategic asset sales.”²⁵⁵ Resorting to facts available where an interested party or Member has failed to “provide, necessary information within a reasonable period” is explicitly envisaged by Article 12.7.²⁵⁶ As discussed above, the Appellate Body has recognized the importance of investigating authority-imposed deadlines on interested parties and Members.²⁵⁷

150. Although the GOI provided all records pertaining to the Orleans transaction, USDOC rightly found that the GOI failed to cooperate to the best of its ability such that adverse inferences were warranted.²⁵⁸ The GOI had ample notice of the information USDOC required and that affiliation was an issue in this investigation.²⁵⁹ Article 12.7 permits an investigating authority to select “facts available” that lead to “a less favourable result,” and the interested party’s or Member’s “knowledge . . . of the consequences of failing to provide information” is highly relevant to whether to employ an adverse inference.²⁶⁰ Here, the GOI twice failed to provide documentary information within a reasonable time, *i.e.*, within USDOC’s deadlines in

²⁵³ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

²⁵⁴ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

²⁵⁵ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

²⁵⁶ Although Indonesia contends that the GOI did not “‘refuse access to’ information it had in its possession,” or “‘significantly impede the investigation,’” USDOC did not rely on these justifications for resorting to Article 12.7 of the SCM Agreement in the coated paper investigation. *See* Indonesia First Written Submission, para. 65. USDOC instead explained that “necessary information pertaining to other PPAS transactions that were similar to the Orleans transaction is not on the record,” and that “[t]he GOI failed to provide, by the required deadlines, information and documents from the application packages of the winning bidders in those other transactions.” Coated Paper Final Determination I&D Memo, at 5 (Exhibit IDN-10).

²⁵⁷ *US – Hot-Rolled Steel (AB)*, para. 73 (quoting *US – Hot-Rolled Steel (Panel)*, para. 7.54) (“Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement* . . . ‘in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.’”).

²⁵⁸ *See* Indonesia First Written Submission, paras. 61, 64.

²⁵⁹ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10).

²⁶⁰ *See US – Carbon Steel (India) (AB)*, para. 4.426.

the third and fifth supplemental questionnaires, and it was on notice of the consequences.²⁶¹ USDOC’s use of an adverse inference complied with Article 12.7.

151. In addition, Indonesia argues that it was difficult to provide the documents pertaining to other sales through the IBRA’s PPAS program.²⁶² Indonesia specifically contends that the IBRA was a “temporary agency . . . that ceased to exist in 2004.”²⁶³ Indonesia also casts fault on USDOC for asking for the documents later in the investigation.²⁶⁴

152. Difficulties in gathering necessary information may be relevant to a decision to resort to Article 12.7. “[D]ifficulties,” for example those based on “resource constraints,” could “relate, *inter alia*, to the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond.”²⁶⁵ However, “[w]hether and how such procedural circumstances should be taken into account by an investigating authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation.”²⁶⁶

153. Here, Indonesia’s claimed difficulty in providing the requested documents, and its claims that USDOC was unreasonable,²⁶⁷ are belied by the facts. The GOI had adequate time to submit the information, had multiple opportunities to do so, and did not cite confidentiality concerns as a reason for its failure.

154. The GOI was “not asked to provide the missing information on short notice.”²⁶⁸ In fact, USDOC first requested the information in its third supplemental questionnaire to the GOI dated April 29, 2010.²⁶⁹ When the GOI responded on May 27, 2010 and stated that it was still locating

²⁶¹ Third Supplemental Questionnaire to the GOI (Apr. 29, 2010), at cover letter (public version) (Exhibit US-41); Fifth Supplemental Questionnaire to the GOI (June 11, 2010), at cover letter (public version) (Exhibit US-42).

²⁶² See Indonesia First Written Submission, paras. 57, 59, 61, 62.

²⁶³ Indonesia First Written Submission, para. 59; see also *id.* at para. 62 (“These were records from an agency that ceased to exist five years before [USDOC] issued its questionnaire”).

²⁶⁴ See Indonesia First Written Submission, para. 58 (referring to a “new demand for documents that [USDOC] knew about from the beginning of the investigation . . .”).

²⁶⁵ *US – Carbon Steel (India) (AB)*, para. 4.422.

²⁶⁶ *US – Carbon Steel (India) (AB)*, para. 4.422.

²⁶⁷ See Indonesia First Written Submission, para. 65 (referencing principle of good faith which “restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable”) (citations omitted).

²⁶⁸ Coated Paper Final Determination I&D Memo, at 54, 56 (Exhibit IDN-10).

²⁶⁹ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); GOI Third Supplemental Questionnaire Response (May 27, 2010), at 15-16 (Exhibit IDN-15 (BCI)) (requesting, in Question 22(c): “For each sale under the PPAS, please provide the: winning bidder’s articles of association; winning bidder’s certificate of incorporation; winning bidder’s Statement Letter confirming it would comply with the rules of the bid/sale process; the Asset Sale and Purchase Agreement that includes a representation that the bidder is not affiliated with the

the documents,²⁷⁰ USDOC issued the fifth supplemental questionnaire dated June 11, 2010 again seeking the same information.²⁷¹ USDOC specifically noted that it was not satisfactory to respond to a questionnaire with a promise to continue trying to locate responsive documents.²⁷² That questionnaire also stated that if the GOI needed more time, it should request an extension to the deadline.²⁷³ Moreover, USDOC advised that “failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available.”²⁷⁴ The GOI responded to that questionnaire on June 22, 2010, and again stated that it was still searching for the requested documents.²⁷⁵

155. The GOI had *seven weeks*’ notice that USDOC required these documents.²⁷⁶ This timeline exceeds the 37 days under the “general rule” in Article 12.1.1 of the SCM Agreement for replying to a full initial subsidy questionnaire.²⁷⁷ More broadly, “[t]he GOI was aware as of the initiation of this [coated paper] investigation in October 2009 that the affiliation of APP/SMG and Orleans would be an issue.”²⁷⁸ The “difficulty” Indonesia now relies upon lacks factual foundation.

156. Indonesia faults USDOC for canceling a portion of the on-the-spot verification pertaining to the debt buy-back program.²⁷⁹ However, verification took place from June 28, 2010, through

company whose debt it plans on buying; the letter from outside counsel that confirmed the purchaser’s compliance with the conditions of the debt purchase”).

²⁷⁰ GOI Third Supplemental Questionnaire Response (May 27, 2010), at 15-16 (Exhibit IDN-15 (BCI)).

²⁷¹ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); GOI Fifth Supplemental Questionnaire Response (June 22, 2010), at 7 (Exhibit IDN-16 (BCI)).

²⁷² Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); GOI Fifth Supplemental Questionnaire (June 11, 2010), at cover letter (Exhibit US-42) (“While you may consider this line of inquiry to be irrelevant and to involve information that is possibly archived or otherwise not readily available, and while you may believe that your response constitutes an earnest attempt to provide all relevant information, you must submit the documents requested in these questions by June 18, 2010”).

²⁷³ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); GOI Fifth Supplemental Questionnaire (June 11, 2010), at cover letter (Exhibit US-42).

²⁷⁴ GOI Fifth Supplemental Questionnaire (June 11, 2010), at cover letter (Exhibit US-42).

²⁷⁵ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); GOI Fifth Supplemental Questionnaire Response (June 22, 2010), at 7 (Exhibit IDN-16 (BCI)).

²⁷⁶ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10).

²⁷⁷ Article 12.1.1 of the SCM Agreement, footnote 40.

²⁷⁸ Coated Paper Final Determination I&D Memo, at 54 (Exhibit IDN-10); *see also* Initiation Checklist, at 12 (Exhibit US-75) (initiating investigation on “Debt Forgiveness through APP/SMG’s Buyback of its Own Debt from the Indonesian Government”). The United States adds that USDOC applied adverse facts available to the GOI in the CFS investigation on this very aspect of the debt buy-back program analysis. *See* CFS Final Determination I&D Memo at 17, 42-44, 106-110 (Exhibit US-75). That USDOC applied adverse facts available in the CFS investigation constitutes further support that APP/SMG’s and Orleans’ affiliation would be an issue in the coated paper investigation.

²⁷⁹ Indonesia First Written Submission, para. 59.

July 8, 2010,²⁸⁰ six days after the fifth supplemental questionnaire response deadline. USDOC had placed the GOI on notice in its verification outline that if the fifth supplemental questionnaire response specifically was “deemed unresponsive on some issues, those issues may be deleted from the verification agenda.”²⁸¹ That GOI response was non-responsive with regard to the bidding documents. It was entirely appropriate that USDOC canceled verification of the debt buy-back. Indeed, USDOC reasoned that “[p]roviding the opportunity to review the information at verification is not a substitute for providing the information for review beforehand.”²⁸² USDOC also explained that “verification is not an opportunity to submit new information, but rather is intended only to establish the accuracy of the information already submitted.”²⁸³ Finally, USDOC articulated that “[b]esides the fact that neither the Department nor Petitioners will have adequate time to prepare probing verification questions or suggestions for questions, the resources available at verification are completely different from those available at Department headquarters” in that there are substantially less personnel at on-the-spot verifications to “examine the information firsthand.”²⁸⁴

157. As a final point, Indonesia argues that the “best of its ability” standard for a failure to cooperate finding must be balanced against the “special interests” of Article 27 of the SCM Agreement.²⁸⁵ Although Article 27 contains multiple carve-outs and qualifications to application of other articles of the SCM Agreement with regard to developing country Members, Article 27 contains no limitation or prohibition to an investigating authority having resort to Article 12.7.

4. Reasonably Replace

158. Indonesia claims that the “facts available” USDOC relied on in finding affiliation did not “reasonably replace” the missing information under Article 12.7.²⁸⁶ Underpinning Indonesia’s argument is that USDOC unreasonably relied on “speculative” “newspaper articles and reports.”²⁸⁷

159. As discussed above, the “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”²⁸⁸ An Article 12.7 determination “cannot

²⁸⁰ Coated Paper Final Determination I&D Memo, at 3 (Exhibit IDN-10). Verification of the GOI took place first, from June 28, 2010, through July 1, 2010. See GOI Verification Report, at 1 (Exhibit US-35) (BCI version).

²⁸¹ GOI Verification Outline, at 2 (June 18, 2010) (Exhibit US-77).

²⁸² Coated Paper Final Determination I&D Memo, at 56 (Exhibit IDN-10).

²⁸³ Coated Paper Final Determination I&D Memo, at 56 (Exhibit IDN-10).

²⁸⁴ Coated Paper Final Determination I&D Memo, at 56 (Exhibit IDN-10).

²⁸⁵ Indonesia First Written Submission, para. 65. Indonesia makes no Article 27 claim in its panel request.

²⁸⁶ Indonesia First Written Submission, paras. 66-71.

²⁸⁷ See Indonesia First Written Submission, paras. 61, 67, 70-71.

²⁸⁸ *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

be made on the basis of non-factual assumptions or speculation.”²⁸⁹ In this investigation, USDOC relied on “newspaper articles and reports suggesting that APP/SMG may have purchased its own debt, and that Orleans was an affiliate of APP/SMG.”²⁹⁰ These documents were “on the record.”²⁹¹

160. Although Indonesia repeatedly asserts that the GOI “provided all of the information that [USDOC] requested,”²⁹² the United States respectfully disagrees. Indonesia’s argument that “while records from the other transactions might have shown differences in how the sales were conducted, they would not have established the central fact of whether there was an affiliation between Orleans and APP/SMG,”²⁹³ is speculative. Those documents were not on the record because Indonesia failed to provide them.

161. Indonesia opines that USDOC failed to employ a comparative approach to selecting facts available.²⁹⁴ Indonesia accuses USDOC of giving more weight to “speculative newspaper articles and rumor than the actual documents from the transaction,”²⁹⁵ yet the actual documents from the APP/SMG debt sale provided no information on Orleans’ ownership in the first place.

162. As an initial matter, Indonesia ignores additional analysis in the case it cites. In *US – Carbon Steel (India)*, the Appellate Body disagreed that a “comparative evaluation” of information to use as “facts available” “is a necessary pre-requisite to making a determination in every instance,” because “[c]onceivably, there may be circumstances where the kind of ‘comparative evaluation’ . . . is not practicable.”²⁹⁶ The Appellate Body pointed to an example where a “comparative approach” would not be “feasible” because “there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination.”²⁹⁷

163. Here, it would not have been practicable to comparatively evaluate record information to determine the “best” facts available. The question of whether APP/SMG and Orleans were affiliated was necessarily a binary one. Although the GOI placed information on the record to support that the two companies were not affiliated, the GOI failed to satisfy that evidentiary

²⁸⁹ *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); see also *US – Carbon Steel (India) (AB)*, para. 4.428.

²⁹⁰ Coated Paper Final Determination I&D Memo, at 6 (Exhibit IDN-10) (citing Petitioners’ General Factual Information Submission (June 21, 2010), at Exhibits 10-12, 16, 18, 22, 24, 33, and 36 (Exhibit US-40)).

²⁹¹ Coated Paper Final Determination I&D Memo, at 6 (Exhibit IDN-10).

²⁹² See Indonesia First Written Submission, para. 70.

²⁹³ See Indonesia First Written Submission, para. 70.

²⁹⁴ Indonesia First Written Submission, paras. 69-70 (quoting *US – Carbon Steel (India) (AB)*, para. 4.435).

²⁹⁵ Indonesia First Written Submission, para. 71.

²⁹⁶ *US – Carbon Steel (India) (AB)*, para. 4.435 (emphasis added).

²⁹⁷ *US – Carbon Steel (India) (AB)*, para. 4.435.

burden through its repeated failure to provide *all* the information necessary to allow USDOC to make a determination, as discussed in subsection C.

164. As to the record “facts available” on which USDOC relied, it acted consistently with Article 12.7. USDOC cited to record newspaper articles and reports suggesting that APP/SMG was allowed to buy back its own debt and further suggesting that Orleans was affiliated with that respondent.²⁹⁸

165. Article 12.7 of the SCM Agreement, properly interpreted, “acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party.”²⁹⁹ USDOC selected facts from the record that reflected the GOI’s non-cooperation in the investigation. By selecting facts that led to a less favorable outcome for the GOI, USDOC acted consistently with Article 12.7.

D. The United States Acted Consistently with Article 2.1 of the SCM Agreement In Making Its *De Facto* Specificity Findings

166. Indonesia claims that USDOC acted inconsistently with Article 2.1 of the SCM Agreement with regard to its findings of *de facto* specificity for three subsidies: (1) the provision of standing timber for less than adequate remuneration, (2) the log export ban, and (3) the debt buy-back. Indonesia’s Article 2.1 challenge is two-fold. First, Indonesia argues that USDOC failed to demonstrate the existence of a “subsidy program” under Article 2.1(c) for each of these countervailable subsidies.³⁰⁰ Second, Indonesia contends that USDOC acted inconsistently with Article 2.1’s chapeau because USDOC did not identify the “relevant jurisdiction” of the granting authority for each subsidy.³⁰¹ For the reasons that follow, Indonesia’s arguments are not supported by the SCM Agreement or USDOC’s record.

167. Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is “specific in accordance with the provisions of Article 2.” Article 2.1 “sets out a number of principles for determining whether a subsidy is specific by virtue of its limitation to an enterprise or industry or group of enterprises or industries (‘certain enterprises’).”³⁰²

168. Article 2.1 provides:

²⁹⁸ See Coated Paper Final Determination I&D Memo, at 6 (Exhibit IDN-10) (citing Petitioners’ General Factual Information Submission (June 21, 2010), at Exhibits 10-12, 16, 18, 22, 24, 33 36 (Exhibit US-40).

²⁹⁹ *US – Carbon Steel (India) (AB)*, para. 4.426 (discussing relevance of Annex II(7) of the AD Agreement in interpreting Article 12.7 of the SCM Agreement).

³⁰⁰ Indonesia First Written Submission, paras. 72-83.

³⁰¹ Indonesia First Written Submission, paras. 84-95.

³⁰² *US – Antidumping and Countervailing Duties (AB)*, para. 364. By contrast, Article 2.2 articulates how a subsidy can be “regionally” specific, and Article 2.3 “deems all prohibited subsidies within the meaning of Article 3 (export subsidies and import substitution subsidies) to be specific.” *US – Antidumping and Countervailing Duties (AB)*, para. 364.

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, of the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such a subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions [FN omitted] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy by certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant the subsidy. In applying this subparagraph account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority as well as the length of time during which the subsidy programme has been in operation.

169. The term “industry” in the chapeau of Article 2 “signifies ‘[a] particular form or branch of productive labour;’ a trade, a manufacture.”³⁰³ As the *US – Upland Cotton* panel explained, in a decision cited favorably by the Appellate Body, what represents a limited “industry” is largely dependent on the facts of a given case:

The breadth of this concept of “industry” may depend on several factors in a given case. At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not

³⁰³ *US – Antidumping and Countervailing Duties (AB)*, para. 373 (quoting *Shorter Oxford English Dictionary*, 6th edn., A Stevenson (ed.) (Oxford Univ. Press, 2007), Vol. 1, p. 1371).

susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis.³⁰⁴

170. The ultimate question is whether the industry, or group of industries, at issue “is a sufficiently discrete segment” of the “economy in order to qualify as ‘specific’ within the meaning of Article 2 of the SCM Agreement.”³⁰⁵

171. Article 2.1(a) addresses the principles applicable for finding that a subsidy is *de jure* specific, that is, when access to the subsidy is “explicitly limited to certain enterprises.” Article 2.1’s chapeau also references “an enterprise” in the singular, which indicates that a subsidy can be explicitly limited to one enterprise. Similarly, Article 2.1(b) provides a framework for finding a subsidy not *de jure* specific “because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document.”³⁰⁶

172. By contrast, Article 2.1(c) addresses the principles for finding that a subsidy is *de facto* specific, that is, when a subsidy is limited in fact to certain enterprises. Thus, where an investigating authority clearly substantiates, on the basis of positive evidence,³⁰⁷ that use of a subsidy is limited to “certain enterprises,” then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement.

173. This dispute solely involves Article 2.1(c) specificity determinations.

1. Provision of Timber for Less Than Adequate Remuneration

174. Indonesia argues that USDOC did not identify the existence of a “subsidy program,” with regard to the provision of standing timber for less than adequate remuneration.³⁰⁸ Indonesia principally argues that USDOC failed to cite to evidence demonstrating the existence of “a plan, scheme, or *systematic* series of actions to confer a benefit.”³⁰⁹ The United States disagrees and rejects a number of Indonesia’s interpretations in light of the Appellate Body report in *US – Countervailing Measures (China)*.

175. With regard to the provision of standing timber for less than adequate remuneration, Indonesia principally argues that Indonesia is merely exercising its regulatory power to manage

³⁰⁴ *US – Upland Cotton (Panel)*, para. 7.1142; *see also, US – Antidumping and Countervailing Duties (AB)*, para. 373 (agreeing with the *US – Upland Cotton* panel’s finding that such a decision “can only be made on a case-by-case basis.”).

³⁰⁵ *US – Upland Cotton (Panel)*, para. 7.1151; *see also US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.

³⁰⁶ *US – Countervailing Measures (AB)*, para. 4.120.

³⁰⁷ Article 2.4 of the SCM Agreement.

³⁰⁸ Indonesia First Written Submission, para. 73 (citing *US – Countervailing Measures (China) (AB)*, para. 4.413).

³⁰⁹ Indonesia First Written Submission, para. 74.

natural resources and promote conservation,³¹⁰ and that “the manner in which it manages its forests is not intended to nor does it confer a benefit.”³¹¹ Indonesia also contends that because stumpage license holders incurred certain expenses which benefit Indonesia, the provision of standing timber for less than adequate remuneration cannot constitute a “subsidy program” under Article 2.1(c).³¹² That is, Indonesia contends that USDOC failed to demonstrate the existence of “evidence . . . of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.”³¹³ Once again, the United States submits that Indonesia over-reads *US – Countervailing Measures (China)*, and that Appellate Body report is distinguishable from this dispute.

176. In *US – Countervailing Measures (China)*, the Appellate Body considered the significance of “programme” in paragraph (c) of Article 2.1, following “subsidy,” and whether a “subsidy programme” (as distinct from a “subsidy”) thus required the formalities of being reduced to writing or pronounced in some manner.³¹⁴ In that case, SOEs consistently provided inputs at what USDOC found were less than adequate remuneration, pursuant to “unwritten measures.”³¹⁵ The Appellate Body underlined that, generally, “[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy.”³¹⁶ In the particular context of *US – Countervailing Measures (China)*, the Appellate Body envisioned that a subsidy program, in the form of an unwritten “plan or scheme” could be evidenced by “a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.”³¹⁷

177. Here, the record supports that the provision of standing timber for less than adequate remuneration is a “subsidy program” in the form of “a plan or scheme.”³¹⁸ Indonesia explained to USDOC that “[t]o harvest wood products from the State Forest, a harvester must obtain a license,” and that a Ministry of Forestry regulation sets forth the application requirements to obtain a stumpage license.³¹⁹ This constitutes a systematic series of actions.

³¹⁰ See also *supra* discussion on Indonesia’s Article 14(d) claims at paras. 35-41 and accompanying notes.

³¹¹ Indonesia First Written Submission, para. 77.

³¹² Indonesia First Written Submission, para. 75-76.

³¹³ Indonesia First Written Submission, para. 73 (quoting *US – Countervailing Measures (China) (AB)*, para. 4.143).

³¹⁴ *US – Countervailing Measures (China) (AB)*, paras. 4.141-4.145.

³¹⁵ See *US – Countervailing Measures (China) (AB)*, paras. 4.128, 4.147.

³¹⁶ *US – Countervailing Measures (China) (AB)*, para. 4.141.

³¹⁷ See *US – Countervailing Measures (China) (AB)*, para. 4.141.

³¹⁸ *US – Countervailing Measures (China) (AB)*, para. 4.143 (emphasis in original).

³¹⁹ See GOI Initial Questionnaire Response (Dec. 29, 2009), at 7-13 (Exhibit US-32); see also Coated Paper Final Determination I&D Memo, at 6-7 (Ex. US-31) (discussing how provision of stumpage constitutes a financial contribution). As discussed below, the record supports that Indonesia owned the “State Forest.” See Coated Paper Final Determination I&D Memo, at 6-7 (Ex. US-31).

178. To be clear, the United States is not contending that these laws and regulations evince *de jure* specificity. There was no explicit limitation of access to the subsidy to particular industries or enterprises in Indonesian law.³²⁰ This does not mean, however, that a financial contribution and benefit, and thereby a subsidy, does not exist within the meaning of Article 1 of the SCM Agreement, which can inform the “subsidy program” analysis under Article 2.1(c).³²¹

179. Therefore, given this regulation, USDOC “ha[d] an appropriate understanding of the subsidy programme at issue when proceeding to an analysis under Article 2.1(c) of whether, notwithstanding such appearance of non-specificity” in those acts or pronouncements that were, facially, not limited to certain enterprises, “the relevant subsidy programme [was], in fact, used by a limited number of certain enterprises.”³²² USDOC’s understanding of the subsidy program – its parameters, how it operates – is likewise supported by the agency’s identification and articulation of the program as the “provision of standing timber for less than adequate remuneration” in the preliminary and final determinations.³²³

180. Indonesia does not otherwise contest USDOC’s *de facto* specificity finding. In any event, USDOC’s finding that “the provision of stumpage is specific . . . because it is limited to a group of industries,”³²⁴ is sound. Indonesia provided a listing of harvesting license approvals for a three-year period.³²⁵ USDOC had asked Indonesia to “identify each company, and its industry, that were approved for harvesting licenses in each year from 2005 through 2008.”³²⁶ In response to another question concerning Indonesia’s industrial classifications, Indonesia explained that “[w]ithin the category of large and medium companies, there are a total of 23 separate industry groupings,” of which “the five industry groupings making use of timber account roughly [sic] 22 percent of the number of industry groupings, and approximately 23 percent of the output of all such groups.”³²⁷ Paper production, in turn, constitutes two of the five users of timber, along with

³²⁰ Those who may apply included: “a. Cooperative; b. Indonesian Private Business Entity; c. State Owned Company (BUMN); or d. Regionally Owned Company.” GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 10 (Ex. US-32)

³²¹ See *US – Countervailing Measures (China) (AB)*, para. 4.144 (“the relevant ‘subsidy programme’, under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1”).

³²² See *US – Countervailing Measures (China) (AB)*, para. 4.146; *US – Carbon Steel India (AB)*, paras. 4.359-4.360.

³²³ See Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,765 (Exhibit IDN-05); Coated Paper Final Determination I&D Memo, at 6-12 (Ex. US-31).

³²⁴ Coated Paper Final Determination I&D Memo, at 7 (Exhibit IDN-10); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,766 (Exhibit IDN-05).

³²⁵ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 40 & Exhibit 39 (Exhibit US-34 (BCI)).

³²⁶ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 40 (Exhibit US-34 (BCI)).

³²⁷ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 40 & Exhibit 40 (Exhibit US-34 (BCI)).

wood products, chemicals, and furniture.³²⁸ This evidence supports USDOC’s *de facto* specificity finding.

181. The foregoing record evidence, namely, the regulatory process governing the distribution of forestry harvesting licenses, demonstrates the existence of a subsidy program, and the three years’ worth of stumpage license issuances, coupled with a breakdown of industry users of standing timber, demonstrates that the subsidy program was *de facto* specific. The United States adds that it investigated this same “subsidy program” in the prior *CFS from Indonesia* investigation,³²⁹ which supports that USDOC “assess[ed] the operation of such plan or scheme over a period of time.”³³⁰

2. Log Export Ban

182. Indonesia claims that USDOC failed to explain how the log export ban constituted a “subsidy program” within the meaning of Article 2.1(c), in the form of “a plan or scheme and systematic series of actions that confer a benefit.”³³¹ More specifically, Indonesia argues that because the GOI discontinued the ban on chipwood exports “well before the start of [USDOC’s] period of investigation,” the “downstream input for making pulp, including pulp itself, could be freely exported.”³³² Indonesia also faults USDOC’s “entrustment or direction” finding and contends that USDOC “did not undertake even a basic analysis of supply and demand in the Indonesian market to determine whether prices might be impacted.”³³³ These arguments are nearly identical to those raised with respect to Article 14(d) (and some of them, as the United States argues above, are relevant to financial contribution, not benefit). The United States’ discussion of the programs show that the relevant “subsidy program” “under which the subsidy at issue is granted, was already “identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.”³³⁴

183. As an overarching point, the Panel should reject Indonesia’s argument that a subsidy program can only be demonstrated both by “a plan or scheme *and* systematic series of actions that confer a benefit.”³³⁵ Indonesia’s proposed interpretation muddies the Appellate Body’s analysis in *US – Countervailing Measures (China)*. As discussed above, a plan or scheme may

³²⁸ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 40 (Exhibit US-34 (BCI)).

³²⁹ See CFS IDM, at 18-25 (Exhibit US-43).

³³⁰ *US – Countervailing Measures (China) (AB)*, para. 4.142; see also *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60,642, 60,643 (Dep’t of USDOC Oct. 25, 2007) (Exhibit US-74) (referencing period of investigation from January 1, 2005, through December 31, 2005).

³³¹ Indonesia First Written Submission, para. 78 (internal quotations omitted).

³³² Indonesia First Written Submission, para. 79 (citing “Provision for Export of Forest Industry Products,” at Article 3 (Exhibit IDN-13)).

³³³ Indonesia First Written Submission, para. 79.

³³⁴ *US – Countervailing Measures (China) (AB)*, para. 4.144.

³³⁵ Indonesia First Written Submission, para. 78 (internal quotations omitted, emphasis added); see also *id.* at para. 81.

be evinced by a systematic series of actions. Elsewhere in its briefing, Indonesia concedes this interpretative point.³³⁶ Nonetheless, that is simply one way of demonstrating the existence of a plan or scheme.

184. Here, the evidence of the log export ban as a “subsidy program” under Article 2.1(c) is similar to that of the provision of standing timber for less than adequate remuneration. In particular, the “plan or scheme” is evinced by the log export ban itself.³³⁷ Having identified the “subsidy program,” the existence of which was also demonstrated by USDOC’s questions to the GOI during the investigation,³³⁸ and its identification of the “Government Prohibition of Log Exports” in the preliminary and final determinations,³³⁹ USDOC then examined whether the log export ban was *de facto* specific.

185. During the investigation Indonesia informed USDOC that, pursuant to Government Regulation No. 6 of 2007, Indonesia had “begun the process of legalizing the export of forest products,” but that authority had “not to date been exercised to formally implement this regulation.”³⁴⁰ Indonesia also stated that Minister of Trade Decree No. 20/M-DAG/Per/5/2008, which referenced Regulation No. 6 of 2007, provided that “chipwood” may be exported, but that “logs (including pulpwood)” may not be exported.³⁴¹ USDOC confirmed during its on-the-spot verification of Indonesia that “neither of these laws have been implemented.”³⁴² USDOC affirmed its prior findings in the *CFS from Indonesia* investigation, and explained that no interested party to the coated paper investigation provided information on the record for USDOC to reconsider those prior findings.³⁴³

186. USDOC’s determination in the CFS investigation, which involved nearly identical facts, was supported by certain “empirical evidence on the impact that this ban has had on the log and downstream forestry products industry in Indonesia,” namely, three independent studies that demonstrated that “this export ban reduced the price of logs and chipwood, as well as the value of stumpage in Indonesia; it increased the incidence of illegal logging; it led to greater

³³⁶ See Indonesia First Written Submission, para. 82 (“there is no evidence that the alleged debt forgiveness constituted a plan, scheme, or systematic series of actions designed to confer a benefit”) (italics in original, underlining added).

³³⁷ See GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 15 (Joint Ministerial Decree of the Minister of Forestry and the Minister of Industry and Trade, No. 1132/KPTS-II/2001, No. N292/MPP/KEP/10/2001, Log and Chip Wood Export Ban) (Exhibit US-34 (BCI)).

³³⁸ See, e.g., GOI Initial Questionnaire Response (Dec. 29, 2009), at 24-25 (Exhibit US-32).

³³⁹ See Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,768-769 (Exhibit IDN-05); Coated Paper Final Determination I&D Memo, at 12-13 (Exhibit IDN-10).

³⁴⁰ GOI Initial Questionnaire Response (Dec. 29, 2009), at 25 & Exhibit 8 (Exhibit US-32); see also GOI First Supplemental Questionnaire Response Part I (Feb. 16, 2010), at 7-8 (Exhibit US-39).

³⁴¹ GOI First Supplemental Questionnaire Response Part I (Feb. 16, 2010), at 7 & Exhibit 14 (English translation).

³⁴² GOI Verification Report, at 13 (Exhibit US-35 (BCI)); see also Coated Paper Final Determination I&D Memo, at 28 (Exhibit US-31).

³⁴³ See Coated Paper Final Determination I&D Memo, at 13 (Exhibit IDN-10).

consumption of logs; and, it was specifically used to benefit the expansion of the downstream users of wood, particularly the pulp and paper industries.”³⁴⁴ USDOC explained in this investigation that:

one purpose of the GOI’s ban was to develop downstream industries, which was why the Department determined that the GOI entrusts and directs domestic log suppliers to sell logs at suppressed prices to domestic consumers, providing a good to pulp and paper producers for less than adequate remuneration . . . As such, we continue to determine that the log export ban provides a countervailable subsidy to pulp and paper producers.³⁴⁵

187. The Indonesian government is aware of these studies and other research and reportage showing that the ban’s primary impact was on suppressing prices, not conservation. Yet the ban has remained in effect, including for 17 of the last 20 years preceding the CCP investigation.

188. Again, the United States is not contending that the log export ban was *de jure* specific. However, this does not mean that a financial contribution and benefit, and thereby a subsidy, does not exist within the meaning of Article 1.1(a)(1)(iii) and (b) of the SCM Agreement, which can inform the “subsidy program” analysis under Article 2.1(c).³⁴⁶

189. Indonesia does not challenge the evidence USDOC relied on in finding *de facto* specificity in its first written submission. Indonesia instead disagrees with USDOC’s financial contribution, entrustment and direction, and benefit findings.³⁴⁷ However, USDOC relied on the same industry evidence it relied on regarding the provision of standing timber for less than adequate remuneration. In that regard, Indonesia explained that it “recognizes 23 industry categories, of which five are related to the forestry industry” and “consume timber as primary input, either directly or through products that are produced with timber.”³⁴⁸ It was this evidence that informed USDOC’s finding that “the log export ban is *de facto* specific . . . because the industries receiving subsidies from the operation of the ban are limited in number,”³⁴⁹ *i.e.*, to five.

³⁴⁴ CFS IDM, at 29-30 (Exhibit US-43).

³⁴⁵ IDM, at 13 (Exhibit IDN-10) (citing CFS IDM, at 27 (Exhibit US-43)).

³⁴⁶ See *US – Countervailing Measures (China) (AB)*, para. 4.144 (“the relevant ‘subsidy programme’, under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1”).

³⁴⁷ See Indonesia First Written Submission, paras. 78-80.

³⁴⁸ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 40-41 & Exhibit 40 (Exhibit US-34 (BCI)).

³⁴⁹ Coated Paper Final Determination I&D Memo, at 13 (Exhibit IDN-10); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,769 (Exhibit IDN-05).

190. As a final point, the United States adds that it investigated this same subsidy program in the earlier *CFS from Indonesia* investigation,³⁵⁰ which supports that USDOC “assess[ed] the operation of such plan or scheme over a period of time.”³⁵¹

3. Debt Buyback Program (Debt Forgiveness)

191. As discussed above, USDOC applied facts available on the issue of whether APP/SMG and Orleans were “affiliated.”³⁵² USDOC determined that the sale of APP/SMG’s debt to Orleans constituted a financial contribution in the form of debt forgiveness, and that “[a] benefit was received equal to the difference between the value of the outstanding debt and the amount Orleans paid for it.”³⁵³ Furthermore, “[b]ecause the debt was sold to an APP/SMG affiliate, in violation of the GOI’s own prohibition against selling debt to affiliated companies, [USDOC] determine[d] that the sale was *company-specific*.”³⁵⁴

192. Indonesia claims that USDOC acted inconsistently with Article 2.1(c) because USDOC cited to no supporting evidence “that the GOI or any regional, or local government entity had in place a plan, scheme, or systematic series of actions to confer a benefit.”³⁵⁵

193. Once again, the Panel should reject Indonesia’s argument that an investigating authority must identify both “a plan or scheme *and* systematic series of actions that confer a benefit” for an Article 2.1(c) *de facto* specificity analysis.³⁵⁶ Indonesia misconstrues *US – Countervailing Measures (China)* when it suggests that an investigating authority must always identify a “systematic series of actions” for purposes of Article 2.1(c).

194. As the Appellate Body has explained, “the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1.”³⁵⁷ Thus, “[a] determination that a given measure constitutes a financial contribution that confers a benefit therefore informs the scope and content of the analysis required to establish *de facto* specificity.”³⁵⁸ Here, that “starting point” is the identified subsidy, namely, “debt forgiveness

³⁵⁰ See CFS IDM, at 25-35 (Exhibit US-43).

³⁵¹ *US – Countervailing Measures (China) (AB)*, para. 4.142; see also CFS Final Determination, 72 Fed. Reg. at 60,642 (Exhibit US-74) (CFS Final Determination) (referencing period of investigation from January 1, 2005, through December 31, 2005).

³⁵² Coated Paper Final Determination I&D Memo, at 19-20 (Exhibit IDN-10).

³⁵³ Coated Paper Final Determination I&D Memo, at 20 (Exhibit IDN-10).

³⁵⁴ Coated Paper Final Determination I&D Memo, at 20 (Exhibit IDN-10) (emphasis added).

³⁵⁵ Indonesia First Written Submission, paras. 81-82.

³⁵⁶ Indonesia First Written Submission, para. 81 (internal quotations omitted).

³⁵⁷ *US – Countervailing Measures (China) (AB)*, para. 4.140 (citing *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 747, 750).

³⁵⁸ *US – Countervailing Measures (China) (AB)*, para. 4.140 (citing *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 750).

through APP/SMG’s buyback of its own debt from the Indonesian Government.”³⁵⁹ The APP/SMG debt buy-back constituted a plan or scheme as contemplated by the Appellate Body, and thereby constitutes a subsidy program consistent with Article 2.1 of the SCM Agreement.

195. As discussed above in refuting Indonesia’s Article 12.7 claim, Indonesia created the PPAS in 2003.³⁶⁰ Furthermore, Article 1 of IBRA Regulation SK-7/BPPN/0101 “prohibit[ed] the resale of the debt either back to the original debtor or to affiliated parties.”³⁶¹ With regard to the APP/SMG debt sale, the IBRA issued “terms of reference” in “early December 2003,” which “sets out the process for bidder registration, due diligence, and submission of bids.”³⁶² The IBRA also developed “a specific set of bid protocols for the bidding,” which “described in some additional details the specific procedures that would be followed for the auctioning of the APP/SMG debt.”³⁶³ As explained above, those protocols prohibited debt purchases from affiliated companies.

196. USDOC determined that Indonesia had violated its own prohibition against selling debt to affiliated companies,³⁶⁴ and found as adverse facts available that APP/SMG and Orleans were affiliated companies.³⁶⁵ As such, USDOC determined that Indonesia had provided a company-specific subsidy to APP/SMG. Collectively, the aforementioned documents and findings of the investigating authority demonstrate that Indonesia was aware of Orleans’ affiliation and obviously had knowledge of its own laws prohibiting the sale to an affiliated buyer. Therefore, Indonesia had in place “a plan or scheme” to provide a financial contribution, which resulted in a company-specific subsidy.³⁶⁶ This finding is consistent with Article 2.1 (c) and the Appellate Body’s findings concerning the existence of a “plan or scheme.” Indeed, the subsidy that USDOC identified is the very definition of a company-specific measure.

197. Only the specific company debtor is “eligible to receive that same subsidy.”³⁶⁷ If an unaffiliated company had purchased APP/SMG’s debt, there would be no financial contribution or benefit because there would be no debt forgiven. The debt buy-back’s structure demonstrates

³⁵⁹ See Coated Paper Final Determination I&D Memo, at 17 (Exhibit IDN-10).

³⁶⁰ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 25-26 & Exhibit 21 (Exhibit US-34 (BCI)). The GOI later explained that it was not able to locate any other documents in the IBRA archives discussing the origins of the PPAS, but that the terms of reference “discusses why IBRA established the PPAS.” GOI Third Supplemental Questionnaire Response (May 27, 2010), at 3-4 (Exhibit IDN-15 (BCI)).

³⁶¹ GOI Third Supplemental Questionnaire Response (May 27, 2010), at 2 & Exhibit-3S-1 (Exhibit IDN-15) (BCI).

³⁶² GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 29-30, 36 & Exhibit 24 (Exhibit US-34 (BCI)).

³⁶³ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at 36 & Exhibit 35 (Exhibit US-34 (BCI)).

³⁶⁴ IDM, at 19-20 (Exhibit US31).

³⁶⁵ IDM, at 19-20 (Exhibit US-31).

³⁶⁶ See IDM, at 17-20 (Exhibit US-31); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10,771-773 (Exhibit IDN-05).

³⁶⁷ See *US – Countervailing Measures (China) (AB)*, para. 4.140.

that, as a matter of fact, it was company-specific.³⁶⁸ Therefore, the financial contribution and benefit was provided to one enterprise, and one enterprise constitutes “a limited number of certain enterprises” as defined within Article 2.1(c).

198. Indonesia’s misapplication of the Appellate Body’s analysis in *US – Countervailing Measures (China)* to the APP/SMG debt buy-back undermines an investigating authority’s ability to remedy countervailable subsidies to particular companies in the exporting market. Imputing a requirement that the subsidy must be a “systematic series of actions” in all instances voids the definition of a subsidy under Article 1. A “subsidy” under Article 1 is not limited in nature to a series of financial contributions.

199. Furthermore, where a subsidy is *de facto* specific to one company, the Article 2.1(c) factors may not be relevant. That provision lists several “factors” that “*may* be considered” in finding a subsidy *de facto* specific, one of which is “use of a subsidy programme by a limited number of certain enterprises.”³⁶⁹ The term “may” is permissive, and suggests that an investigating authority need not consider every one of these factors in examining *every* possible type of subsidy under a *de facto* specificity analysis. Any of the Article 2.1(c) factors may be relevant to whether certain types of subsidies are *de facto* specific. But in the highly fact-specific context where only the specific company debtor is “eligible to receive that same subsidy,”³⁷⁰ the first Article 2.1(c) factor would not be relevant.

4. USDOC Identified The Relevant Jurisdiction Of The Granting Authority Pursuant To The Chapeau Of Article 2.1 Of The SCM Agreement.

200. Indonesia claims that USDOC failed to identify the “relevant jurisdiction” of the granting authority with regard to the provision of standing timber for less than adequate remuneration, the log export ban, and the debt buy-back. Based on those assertions, Indonesia submits that USDOC acted inconsistently with Article 2.1’s chapeau. Indonesia’s arguments lack foundation.

201. In *US – Countervailing Measures (China)*, the Appellate Body stated that:

[A]n essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level.³⁷¹

202. However, based on the reference to Article 1.1 within Article 2.1’s chapeau, the Appellate Body recognized that “an investigating authority’s determination under Article 1.1 as to the existence of a subsidy will *inform* the assessment of whether such subsidy is specific to

³⁶⁸ See Coated Paper Final Determination I&D Memo, at 20 (Exhibit IDN-10).

³⁶⁹ Article 2.1(c) of the SCM Agreement (emphasis added).

³⁷⁰ See *US – Countervailing Measures (China) (AB)*, para. 4.140.

³⁷¹ *US – Countervailing Measures (China) (AB)*, para. 4.167 (emphasis in original).

certain enterprises ‘within the jurisdiction of the granting authority’.³⁷² In other words, if the investigating authority properly identifies the jurisdiction of the granting authority when analyzing the nature of a financial contribution, such a finding would satisfy the analysis contemplated under Article 2.1’s chapeau.³⁷³

203. The United States notes that the chapeau to Article 2.1 has not typically been a basis for a claim arising under the SCM Agreement.³⁷⁴ However, the Appellate Body in *US – Countervailing Duties (China)* did address the relationship between Articles 1.1 and 2.1:

[T]he 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.³⁷⁵

204. An investigating authority is directed to employ “a holistic analysis of the relevant facts and evidence in each case.”³⁷⁶ Thus, “provided that an investigating authority adequately substantiates any finding it makes as to whether the jurisdiction covers the entire territory of the WTO Member or is limited to a designated geographical region within that territory, in conducting this holistic assessment it would normally also identify the granting authority.”³⁷⁷ This is because “the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority,” such that each component is required to be analyzed “in a conjunctive manner.”³⁷⁸

³⁷² *US – Countervailing Measures (China) (AB)*, para. 4.167 (emphasis in original).

³⁷³ *US – Countervailing Measures (China) (AB)*, para. 4.167 (“Indeed, in determining whether a financial contribution exists, investigating authorities must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the ‘government’, by ‘any public body within the territory of a Member’, or by a ‘private body’ entrusted or directed by the government. Such assessment, in our view, will inform the identification of the jurisdiction of the granting authority”).

³⁷⁴ *Cf. US – Large Civil Aircraft (Second Complaint) (AB)*, para. 756 (“While the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is *not the purpose of a specificity analysis* to determine whether the authorities involved in granting the subsidies constitute a single subsidy grantor or several grantors” (emphasis added)).

³⁷⁵ *US – Countervailing Measures (China) (AB)*, para. 4.169.

³⁷⁶ *US – Countervailing Measures (China) (AB)*, para. 4.168.

³⁷⁷ *US – Countervailing Measures (China) (AB)*, para. 4.168.

³⁷⁸ *US – Countervailing Measures (China) (AB)*, para. 4.168.

205. As discussed below, the jurisdiction of the granting authority for each subsidy is “discernible from the determination.”³⁷⁹ More specifically, this was identified through USDOC’s questionnaires to Indonesia, read in light of the coated paper final determination.

a. The Provision of Standing Timber for Less Than Adequate Remuneration

206. With respect to the provision of standing timber for less than adequate remuneration, the jurisdiction of the granting authority is the Government of Indonesia. First, Indonesia’s argument that USDOC failed to define “GOI” is simply false. USDOC defined the acronym “GOI” as an abbreviation for the Government of Indonesia.³⁸⁰

207. USDOC also identified the jurisdiction of the granting authority as Indonesia. This is evidenced by several statements in the final determination. For example, USDOC explained that “standing timber was provided *by the GOI* to five industries during the [period of investigation], including the paper industry.”³⁸¹ USDOC also stated that “. . . the GOI provides standing timber . . .”³⁸² Moreover, USDOC observed that “private land accounts for only a ‘small portion’ of forest land *in Indonesia*.”³⁸³ With regard to benefit, USDOC found that “[t]he provision of standing timber provides a benefit . . . to the extent that *the GOI provided it* for less than adequate remuneration.”³⁸⁴

208. The questions USDOC posed to Indonesia further support USDOC’s understanding that the jurisdiction of the granting authority was Indonesia. For example, USDOC’s initial questionnaire referenced the prior *CFS* investigation and asked that “[i]f there is any new information or evidence of changed circumstances with respect to *the GOI’s administration of this program* since December 2005 which you believe warrant the Department’s reconsideration of the countervailability finding, please provide all of the relevant information and documentation.”³⁸⁵

209. Indonesia principally argues that USDOC failed to identify the jurisdiction of the granting authority because “merely refer[ring] to the ‘GOI’” ignores “that the process for obtaining a license to harvest standing timber involved provincial and regional level governments in addition to the national government.”³⁸⁶

³⁷⁹ *US – Countervailing Measures (China) (AB)*, para. 4.169.

³⁸⁰ IDM, at Appendix (Exhibit US-31).

³⁸¹ IDM, at 7 (Exhibit IDN-10) (emphasis added).

³⁸² IDM, at 7 (Exhibit IDN-10).

³⁸³ IDM, at 7 (Exhibit IDN-10) (emphasis added).

³⁸⁴ IDM, at 7 (Exhibit IDN-10) (emphasis added).

³⁸⁵ GOI Initial Questionnaire Response (Dec. 29, 2009), at 7 (Exhibit US-32) (emphasis added).

³⁸⁶ Indonesia First Written Submission, para. 86 (citing GOI Initial Questionnaire Response (Dec. 29, 2009), at 9-11 (Exhibit US-32)).

210. The United States does not dispute that provincial and regency governments play a role alongside the GOI with regard to the licensing regime.³⁸⁷ For example, as Indonesia explains in its first written submission, a license applicant applies with the Minister of Forestry by means of a letter, and is tasked with “sending copies to (1) the Director General of Forestry Production development, (2) the Director General of Forest Planning, (3) the Provincial Forestry Head, and (4) the Regency Forestry Head.”³⁸⁸ As Indonesia also highlights, “[i]f an applicant requests to harvest land outside the designated area stipulated by the Minister of Forestry, the Minister of Forestry may decide to designate the area for plantation forest upon consideration of the recommendation of the provincial Governor.”³⁸⁹ Finally, Indonesia is correct that “a licensee had to provide the Governor’s recommendation and Regent/Mayor’s consideration along with an analysis prepared by the Provincial Forestry Head and Forest Area Establishment Head”³⁹⁰ as an administrative requirement, that the “Provincial Forestry Office [was] responsible for evaluating the Forestry Utilization Documents that licensees submit and for authorizing them,”³⁹¹ and that “regional and local governments [were] involved in the collection of payments.”³⁹²

211. However, the United States disagrees that USDOC left the record “devoid of a specificity analysis at anything other than the national level.”³⁹³ USDOC understood from Indonesia’s reporting that the role played by the provinces and regencies was created through regulations emanating from Indonesia’s Ministry of Forestry.³⁹⁴ Indonesia’s arguments obfuscate that the entity that *granted* the stumpage licenses was Indonesia, namely, the Ministry of Forestry. Specifically, Indonesia explained to USDOC that “Minister of Forestry Regulation No. P.19/Menhut-II/2007 and associated Amendment No. P.11/Menut-II/2008 (*Procedures for Issuing License and Expansion of Working Area for Industrial Plantation Forest Concessionaire within Plantation Forest on Production Forest . . .*), sets forth the application requirements.”³⁹⁵ That regulation, issued by the “Minister of Forestry of [the] Republic of Indonesia,” explains at Article 12 that “[b]ased on the recommendation of the Secretary General . . ., within a period of

³⁸⁷ See Indonesia First Written Submission, paras. 86-87.

³⁸⁸ Indonesia First Written Submission, para. 86; GOI Initial Questionnaire Response (Dec. 29, 2009), at 9 (Exhibit US-32).

³⁸⁹ Indonesia First Written Submission, para. 86; GOI Initial Questionnaire Response (Dec. 29, 2009), at 9-10 (Exhibit US-32).

³⁹⁰ Indonesia First Written Submission, para. 87; GOI Initial Questionnaire Response (Dec. 29, 2009), at 10 (Exhibit US-32).

³⁹¹ Indonesia First Written Submission, para. 87; GOI Initial Questionnaire Response (Dec. 29, 2009), at 12 (Exhibit USA32).

³⁹² Indonesia First Written Submission, para. 87; GOI Initial Questionnaire Response (Dec. 29, 2009), at 12-13 (Exhibit US-32)).

³⁹³ Indonesia First Written Submission, para. 89.

³⁹⁴ As Indonesia alluded to before USDOC, the regulatory scheme defines the roles of various agencies (including provincial and regency agencies) through several regulations issued by the Minister of Forestry. See GOI Initial Questionnaire Response (Dec. 29, 2009), at 12-13 & Exhibits 16, 20, 21 (Exhibit US-32). These regulations give no indication of having been issued jointly with provincial or regional governments.

³⁹⁵ GOI Initial Questionnaire Response (Dec. 29, 2009), at 9 & Exhibit 10 (Exhibit US-32).

not later than 7 (seven) working days, the Minister shall sign the Decree concerning the Granting of IUPHHK-HTI.”³⁹⁶ Although the 2008 amendment appears to have relocated that authority to Article 11(4), this does not undermine that the Minister of Forestry issued the “Decree regarding Grant of IUPHHK-HTI.”³⁹⁷

212. As an additional point, USDOC’s verification report for Indonesia explained its understanding that if all necessary paperwork is provided:

[T]he MOF will review the company’s documentation, as well as the land requested by the company. If the MOF approves the application, it will reserve the requested area for the company, and the prospective company will be required to provide an environmental assessment study. If the study meets the MOF’s satisfaction, a map of the proposed area will be developed along with a working plan. The application will then be submitted to the general secretary of the MOF. If the application is approved, a decree for the land will be issued along with a concession fee order. Once the fee is paid, the company will be issued the HTI license.³⁹⁸

213. Therefore, USDOC understood from Indonesia’s reporting and its on-the-spot verification that it was Indonesia’s Ministry of Forestry that granted the licenses, after consultation with provincial governments and regency officials. Even more significantly, Indonesia reported that “private land” accounted for only a “small portion” of forest land in Indonesia.³⁹⁹ USDOC also referenced its prior finding in the CFS investigation that “virtually all harvestable forest land is owned by the GOI.”⁴⁰⁰ USDOC also adopted its finding from the CFS investigation that Indonesia set the stumpage fees.⁴⁰¹ Given these facts, USDOC understood that the jurisdiction of the granting authority here was Indonesia.

214. Contrary to Indonesia’s suggestion now,⁴⁰² USDOC acknowledged that certain regencies imposed their own “local fees based on the volume of wood harvested by companies” (*i.e.*, PSDA fees).⁴⁰³ However, those fees are not relevant to the jurisdiction of the granting authority

³⁹⁶ GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 10 (Exhibit US-32).

³⁹⁷ See GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 10 (Exhibit US-32).

³⁹⁸ GOI Verification Report (Aug. 3, 2010), at 2-3 (Exhibit US-35) (BCI version).(emphasis added)

³⁹⁹ Coated Paper Final Determination I&D Memo, at 7 (Exhibit IDN-10).

⁴⁰⁰ See Coated Paper Final Determination I&D Memo, at 6 (Exhibit IDN-10) (citing CFS IDM, at 18 (Exhibit US-43) (“According to the GOI, virtually all harvestable forest land in Indonesia is owned by the National Government”).

⁴⁰¹ See IDM, at 6-7 (Exhibit IDN-10) (citing CFS IDM, at 69 (Exhibit US-43); see also GOI Initial Questionnaire Response (Dec. 29, 2009), at 13 (Exhibit US-32) (“The MOF uses two types of tariffs for stumpage fee determinations. For the DR, the tariff is determined on a specific basis, while the PSDH is determined on an *ad valorem* basis”).

⁴⁰² See Indonesia First Written Submission, para. 88.

⁴⁰³ See GOI Initial Questionnaire Response (Dec. 29, 2009), at 15 & Exhibit 15 (Exhibit US-32)); see also Coated Paper Final Determination I&D Memo, at 6, 13 (Exhibit IDN-10).

for the subsidy under investigation. As discussed above, USDOC examined the extent to which the provision of standing timber by “the GOI” for less than adequate remuneration resulted in a benefit to APP/SMG.⁴⁰⁴ With regard to PSDA fees, USDOC understood that these fees constituted a separate tax on “forest products transported from and or to territory” of the regency (*i.e.*, a “levy on forest product traffic”),⁴⁰⁵ and were imposed distinct from the GOI’s PSDH and DR stumpage fees.⁴⁰⁶ USDOC did not ignore those regency fees either. In its benefit calculation, USDOC included these PSDA fees as part of the stumpage that APP/SMG paid when comparing those prices to a market-determined stumpage price.⁴⁰⁷ However, by including these PSDA fees in that stumpage rate, USDOC *understated* the benefit to APP/SMG of the GOI’s PSDH and DR stumpage because had USDOC not deducted the PSDA fees, the benefit from the PSDH and DR stumpage would have been higher.

b. The Log Export Ban

215. Indonesia argues that USDOC failed to identify the granting authority as it pertained to the log export ban.⁴⁰⁸ Indonesia also faults USDOC for not investigating how the log export ban was implemented within Indonesia, because this is “crucial for determining whether the law is specific.”⁴⁰⁹ Finally, Indonesia contends that “investigating the law as implemented is necessary for determining whether there is systematic government action intended to confer a benefit.”⁴¹⁰ Indonesia is incorrect for several reasons.

216. First, Indonesia concedes in its first written submission that “the log export ban was enacted at the national level.”⁴¹¹ The United States shares Indonesia’s view. Second, that finding is implicit in USDOC’s final determination. USDOC found that “[t]he ban constitutes a financial contribution . . . through *the GOI’s entrustment and direction* of forestry/harvesting companies to provide goods (*i.e.*, logs and chipwood).⁴¹² Other excerpts similarly demonstrate that Indonesia was considered to be the granting authority.⁴¹³ USDOC additionally explained that the ban “provides a benefit . . . to the extent that the prices paid by APP/SMG to unaffiliated

⁴⁰⁴ See Coated Paper Final Determination I&D Memo, at 7 (Exhibit IDN-10).

⁴⁰⁵ See, *e.g.*, GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 15 (Exhibit US-32) (Regional Regulation of Indragiri Hilir Regency, at Article 1(h), 2(1), 3(1)).

⁴⁰⁶ See GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 26 (Exhibit US-32).

⁴⁰⁷ See Coated Paper Final Determination I&D Memo, at 11-12 (Exhibit IDN-10).

⁴⁰⁸ Indonesia First Written Submission, para. 90.

⁴⁰⁹ Indonesia First Written Submission, para. 91.

⁴¹⁰ Indonesia First Written Submission, para. 91 (citing *US – Countervailing Measures (China) (AB)*, para. 4.143).

⁴¹¹ Indonesia First Written Submission, para. 91.

⁴¹² Coated Paper Final Determination Memo, at 13 (Exhibit IDN-10) (emphasis added).

⁴¹³ See Coated Paper Final Determination I&D Memo, at 13 (Exhibit IDN-10) (explaining that “[w]hile *the GOI* may have begun the process of legalizing exports of certain forest products, the GOI confirmed that a ban on the exportation of logs was still in effect during the POI of this investigation”) (emphasis added); Coated Paper Preliminary Determination, 75 Fed. Reg. at 10769 (Exhibit IDN-05) (similar).

logging companies are less than the benchmark price.”⁴¹⁴ Again, those unaffiliated logging companies were found to be entrusted and directed by Indonesia to provide the financial contribution.⁴¹⁵

217. Thus, it is readily “discernible from the determination”⁴¹⁶ that USDOC understood the “granting authority” to be the national government of Indonesia, *i.e.*, “the GOI.” By implication, USDOC considered the “jurisdiction of the granting authority” to be Indonesia. This latter finding is bolstered by USDOC’s market distortion discussion that relates to “the predominance of the GOI in the Indonesian timber market,”⁴¹⁷ which refers to the territory of Indonesia at large. That the jurisdiction of the log export ban pertains to Indonesia is also supported by the nature of the program itself: the ban is a foreign trade measure and applies to all log exports from Indonesia.⁴¹⁸

218. USDOC did not simply “presume” that the law was enacted by the Minister of Forestry and the Minister of Industry and Trade.⁴¹⁹ Indonesia *reported* that information to USDOC.⁴²⁰ Regardless, the Appellate Body’s analysis in *US – Countervailing Measures (China)* does not go so far as requiring that an investigating authority identify the specific agency or ministry *within* a national, regional, or local government, in determining the “jurisdiction of the granting authority.”⁴²¹

219. To the extent Indonesia argues that USDOC was obligated to investigate how the log export ban was implemented,⁴²² that argument goes to whether the log export ban provides a financial contribution. The United States refers to its points made above that the log export ban constituted a financial contribution in the coated paper investigation.

c. Debt Forgiveness Program

220. Indonesia’s argument that USDOC failed to “identify the government entity that allegedly forgave debt” is largely repetitive of arguments made under Indonesia’s Article 12.7

⁴¹⁴ IDM, at 13 (Exhibit IDN-10).

⁴¹⁵ *See* IDM, at 13 (Exhibit IDN-10).

⁴¹⁶ *See US – Countervailing Measures (China) (AB)*, para. 4.169.

⁴¹⁷ *See* Coated Paper Final Determination I&D Memo, at 31 (Exhibit US-31).

⁴¹⁸ *See* GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 15 (Article 1, which states that “Log/chip wood export is to be stopped from whole country region of Indonesian republic”) (Exhibit US-34 (BCI)).

⁴¹⁹ Indonesia First Written Submission, para. 90.

⁴²⁰ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 15 pp. 1-2 (Exhibit US-34 (BCI)).

⁴²¹ *See US – Countervailing Measures (China) (AB)*, para. 4.166 (“an essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level”).

⁴²² Indonesia First Written Submission, para. 91.

claim.⁴²³ As discussed above, Indonesia failed to provide information pertaining to other PPAS debt sales, which USDOC determined was “necessary to ensure that IBRA followed proper procedures in the Orleans-APP/SMG transaction in not inquiring further into the ownership of Orleans or any relationship between the entities.”⁴²⁴ Because USDOC could not determine whether the IBRA made further inquiries in this regard, USDOC resorted to facts available with adverse inferences in finding affiliation.

221. Furthermore, contrary to Indonesia’s arguments,⁴²⁵ the granting authority was “discernible from the determination.”⁴²⁶ USDOC found that “the GOI’s sale of APP/SMG’s debt to Orleans constituted a financial contribution, in the form of debt forgiveness.”⁴²⁷ Despite the fact it had no obligation to do so,⁴²⁸ USDOC also identified the particular agency within Indonesia that provided the financial contribution, the IBRA,⁴²⁹ which Indonesia reported “was responsible for administering the program,” which “the GOI created.”⁴³⁰ It is clear that IBRA is a national banking authority.

VI. THE USITC’S INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

222. Indonesia contends that the United States acted inconsistently with Article 3.5 of the ADA and Article 15.5 of the SCMA. Specifically, Indonesia alleges that the investigating authority – the U.S. International Trade Commission (“the Commission” or “ITC”) did not adequately ensure that any threat of material injury caused by factors other than subject imports, including declining demand and nonsubject imports, was not attributed to subject imports. Indonesia also alleges a violation of ADA Article 3.7 and SCMA Article 3.7. This claim is based on Indonesia’s belief that the Commission, in finding that in the absence of antidumping and countervailing duty measures, subject imports would imminently depress or suppress domestic prices and take sales from the domestic industry, based its affirmative threat determination on speculation and conjecture regarding events not clearly foreseen or imminent. Purely as a consequence of each of these alleged violations, Indonesia claims that the Commission failed to exercise “special care” in conducting its threat analysis, contrary to ADA Article 3.8 and SCMA article 15.8.

⁴²³ See Indonesia First Written Submission, paras. 93-95.

⁴²⁴ Coated Paper Final Determination I&D Memo, at 53 (Exhibit IDN-10).

⁴²⁵ Indonesia First Written Submission, para. 95.

⁴²⁶ See *US – Countervailing Measures (China) (AB)*, para. 4.169.

⁴²⁷ Coated Paper Final Determination I&D Memo at 20 (Exhibit IDN-10) (emphasis added).

⁴²⁸ See *US – Countervailing Measures (China) (AB)*, para. 4.166 (“an essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level”) (emphasis in original).

⁴²⁹ See Coated Paper Final Determination I&D Memo, at 20 (Exhibit IDN-10).

⁴³⁰ GOI First Supplemental Questionnaire Response Part II (Feb. 22, 2010), at Exhibit 21 (Exhibit US-34 (BCI)).

223. Indonesia’s claims are based on a selective and incomplete reading of the Commission’s determination. Indonesia overlooks the Commission’s detailed analysis of the conditions of competition relevant to the coated paper market; the likelihood of significantly increased subject import volumes absent relief; and the likelihood that subject imports would continue to undersell domestic products and use aggressive pricing to quickly increase their penetration of the U.S. market, adversely impacting domestic prices. Indonesia also overlooks the Commission’s thorough explanation of why the factors other than subject imports that contributed to the domestic industry’s declining performance during the period of investigation would recede going forward, leaving subject imports as a key driver posing a threat of material injury to the domestic industry. When judged against the Commission’s actual analysis, Indonesia’s claims do not withstand scrutiny, and fail to establish a prima facie case that the Commission’s determination is inconsistent with any of the cited provisions.

A. Overview of the USITC Determination

1. The Commission’s Affirmative Threat of Material Injury Determination

224. To provide a complete understanding of the reasoning underlying the Commission’s affirmative threat-of-material-injury determination, we set out below a summary of the Commission’s step-by-step analysis. Indonesia does not challenge various aspects of the Commission’s determination, including the Commission’s definition of the domestic like product and the domestic industry, and the Commission’s cumulation of all subject imports. Nevertheless, we summarize the unchallenged findings that underpin the Commission’s analysis, while providing a more detailed discussion of the findings directly related to Indonesia’s challenge.

225. The Commission instituted these investigations in September 2009, following receipt of a petition filed by domestic producers of certain coated paper and a labor union representing workers producing that product.⁴³¹ The Respondents in the investigations encompassed a group of producers that participated in the Commission proceedings through their corporate affiliates Asia Pulp and Paper, Ltd. (China) and Asia Pulp and Paper, Ltd. (Indonesia) (collectively “APP”).⁴³² To collect the information necessary for its analysis, the Commission issued detailed questionnaires, developed with input from petitioners and respondents, to known industry participants. The Commission received questionnaire responses from: 11 domestic producers, accounting for the vast majority of domestic CCP production; 11 importers, accounting for a majority of subject imports; 35 purchasers; ten Chinese producers; and three Indonesian producers.⁴³³ Petitioners and respondents participated in the investigation by filing prehearing briefs, posthearing briefs, and final comments, and by participating in a public hearing held by

⁴³¹ 75 Fed. Reg. 70289 (Nov. 17, 2010) (Exhibit IDN-9)

⁴³² USITC Pub. 4192 (Exhibit US-1) at 3.

⁴³³ USITC Pub. 4192 (Exhibit US-1) at 3.

the Commission, where they presented argument and witness testimony, and answered questions posed by individual Commissioners.⁴³⁴

226. The Commission reached a unanimous affirmative determination, with the majority (five) of the Commissioners finding threat of material injury and one finding present material injury. In its final determination, the Commission defined a single domestic like product consisting of certain coated paper, including sheeter rolls, (collectively referred to as “CCP”).⁴³⁵ CCP is most commonly used in printed material requiring high-gloss sheets, including annual company reports, high-end brochures, catalogues, magazines, direct mail advertisements, labels, and certain packaging applications.⁴³⁶ In turn, the Commission defined a single domestic industry consisting of all U.S. producers of CCP, including converters that cut sheeter rolls purchased from integrated producers into the finished product.⁴³⁷

227. The Commission cumulated subject imports from China and Indonesia for purposes of its analysis of material injury by reason of subject imports, based on its finding of a reasonable overlap of competition between subject imports from both sources and the domestic like product.⁴³⁸ The Commission also exercised its discretion to cumulate imports for the purposes of its threat analysis, finding that subject imports from China and Indonesia were likely to compete under similar conditions of competition in the U.S. market in the imminent future.⁴³⁹ Notably, the Commission also observed that subject producers affiliated with a single firm, APP, accounted for a substantial share of exports from both countries to the United States, and that APP had the ability to shift exports to the United States from one facility to another.⁴⁴⁰

228. For the purposes of its injury analysis, the Commission collected and examined data for a period of investigation (“POI”) consisting of three full years, from 2007 through 2009, as well as the first halves of 2009 and 2010 (“interim” 2009 and 2010). At the outset, the Commission

⁴³⁴ USITC Pub. 4192 (Exhibit US-1) at 3, I-1. Hearing Tr. (Exhibit US-11), pp. 4-5; APP’s Prehearing Brief (Exhibit US-13); APP’s Posthearing Brief (Exhibit US-14); APP’s Final Comments (Exhibit US-15).

⁴³⁵ USITC Pub. 4192 (Exhibit US-1) at 11. Sheeter rolls are a semi-finished form of coated paper that are cut into individual sheets by integrated producers or independent converters. *Id.* at 7. The Commission also found that the scope definition published by USDOC encompassed paperboard otherwise meeting the physical specifications set forth in the scope definition, even if such paperboard was used for packaging rather than for commercial printing, and included such paperboard in the like product. *Id.* at 11.

⁴³⁶ USITC Pub. 4192 (Exhibit US-1) at 22.

⁴³⁷ USITC Pub. 4192 (Exhibit US-1) at 12. The Commission found that converters engaged in sufficient production-related activities to be considered domestic producers based on their substantial capital investments and employment. *Id.* In 2009, integrated producers accounted for most domestic CCP production, with converters accounting for the balance. *Id.* at 23.

⁴³⁸ USITC Pub. 4192 (Exhibit US-1) at 15-16.

⁴³⁹ In this regard, the Commission found that subject imports from China and Indonesia exhibited similar volume and price trends during the period of investigation. USITC Pub. 4192 (Exhibit US-1) at 16. No respondent opposed or even addressed cumulation (for either present injury or threat of injury purposes) during the final investigations. USITC Pub. 4192 (Exhibit US-1) at 15. Nor does Indonesia contest cumulation in this dispute.

⁴⁴⁰ USITC Pub. 4192 (Exhibit US-1) at 16-17.

discussed several conditions of competition that it found relevant to its analysis of injury and threat:

229. *Demand Conditions.* The Commission found that demand for CCP was largely determined by the overall economy and demand for high-end commercially printed advertisements, reports, and brochures.⁴⁴¹ Commercial printing activity, which determines demand, decreased overall from the first quarter of 2007 to the second quarter of 2010.⁴⁴² Apparent U.S. consumption (which reflects demand) decreased by 21.3 percent from 2007 to 2009, but improved in the first half of 2010.⁴⁴³ Market participants attributed declining demand for CCP to the recession that began in late 2008 and continued through 2009 and to competing forms of advertising and online retail sales.⁴⁴⁴ Despite the rebound in the first half of 2010, the Commission, relying on figures from forest-products industry information provider RISI, concluded that demand would decline, but only modestly, from 2010 to 2011 and that the modest decline would continue into 2012.⁴⁴⁵ RISI projected demand declines of 3.3 percent in 2011 and 2.5 percent in 2012.⁴⁴⁶

230. *Supply Conditions.* As reflected in the Commission’s finding of no present material injury by reason of the subject imports, the Commission found that the domestic industry commanded the largest share of apparent U.S. consumption, which increased from 60.7 percent in 2007 to 62.4 percent in 2008 and 65.5 percent in 2009, and was 68.7 percent in interim 2010, up from 61.9 percent in interim 2009.⁴⁴⁷ Subject import market share increased from 13.9 percent in 2007 to 14.5 percent in 2008 and 18.3 percent in 2009, and was 6.8 percent in interim 2010, down from 19.7 percent in interim 2009.⁴⁴⁸ Nonsubject import market share decreased from 25.4 percent in 2007 to 23.1 percent in 2008 and 16.1 percent in 2009, and was 24.5 percent in interim 2010, up from 18.4 percent in interim 2009.⁴⁴⁹

231. Other aspects of supply conditions informed the Commission’s finding of threat of material injury. First, the Commission explained that domestic industry underwent significant restructuring during the period of investigation, including the merger of petitioner NewPage with another domestic producer and the closure of several plants.⁴⁵⁰ The Commission also observed

⁴⁴¹ USITC Pub. 4192 (Exhibit US-1) at 22.

⁴⁴² USITC Pub. 4192 (Exhibit US-1) at 22, Table IV-6.

⁴⁴³ USITC Pub. 4192 (Exhibit US-1) at 22

⁴⁴⁴ USITC Pub. 4192 (Exhibit US-1) at 22.

⁴⁴⁵ USITC Pub. 4192 (Exhibit US-1) at 28, 34, 38-39. The Commission noted that Resource Information Systems Inc. (RISI) was “an information provider for the global forest products industry, and a resource cited by both Petitioners and Respondents.”).

⁴⁴⁶ USITC Pub. 4192 (Exhibit US-1) at 38, II-12; *see also* Petitioners’ posthearing brief, responses to question 3, exhibit 1 (Exhibit US-4).

⁴⁴⁷ USITC Pub. 4192 (Exhibit US-1) at 22.

⁴⁴⁸ USITC Pub. 4192 (Exhibit US-1) at 22-23.

⁴⁴⁹ USITC Pub. 4192 (Exhibit US-1) at 23.

⁴⁵⁰ USITC Pub. 4192 (Exhibit US-1) at 23.

that the U.S. shipments of both integrated domestic producers and importers of subject merchandise were largely made to merchant/distributors, while most U.S. shipments of domestic converters were made to end users (typically printers).⁴⁵¹ Finally, the Commission highlighted that a large majority of subject imports were produced by Chinese and Indonesian producers under the corporate umbrella of APP.⁴⁵² In the second half of 2009, the Commission explained, APP began to establish an e-commerce distribution network for its CCP in the United States known as Eagle Ridge, following its loss of business with U.S. distributor Unisource.⁴⁵³

232. *Substitutability.* The Commission found a moderately high degree of substitutability between the domestic like product and subject imports, based on the “large majority” of questionnaire respondents reporting that the domestic like product, subject imports, and nonsubject imports were frequently or always interchangeable.⁴⁵⁴ Market participants also indicated that price is a “very important” consideration, although not necessarily the most important consideration, in selecting between competing suppliers of coated paper.⁴⁵⁵ The Commission also noted that domestic producers sell CCP categorized as grade 1, grade 2, and grade 3, in order of decreasing brightness, whereas respondents claimed that most subject imports consisted of grade 3 “economy” grades.⁴⁵⁶

233. *Other Conditions of Competition.* The Commission found that several integrated producers, the majority of converters, and the majority of importers of subject merchandise made substantial spot sales, while the remaining seven integrated producers made both long-term and/or short-term contract sales and spot sales.⁴⁵⁷ Noting that the principal raw materials for the production of CCP were pulp, chemicals and dyes, coating additives, and packaging, the Commission found that all U.S. integrated producers reported that the cost of chemicals and dyes had increased during the period of investigation, although the record was mixed on whether the cost of pulp had increased or decreased.⁴⁵⁸ The Commission also explained that in 2009 certain domestic producers had applied for and received a tax credit, which had gone into effect in late 2007, for their production and use of a kraft pulp by-product (“black liquor”) as an alternative fuel.⁴⁵⁹ This was known as the “black liquor” tax credit. They received \$0.50 per gallon of black liquor produced in 2009, after which the program expired.⁴⁶⁰

⁴⁵¹ USITC Pub. 4192 (Exhibit US-1) at 23.

⁴⁵² USITC Pub. 4192 (Exhibit US-1) at 24.

⁴⁵³ USITC Pub. 4192 (Exhibit US-1) at 24, 29.

⁴⁵⁴ USITC Pub. 4192 (Exhibit US-1) at 24.

⁴⁵⁵ USITC Pub. 4192 (Exhibit US-1) at 24.

⁴⁵⁶ USITC Pub. 4192 (Exhibit US-1) at 24-5.

⁴⁵⁷ USITC Pub. 4192 (Exhibit US-1) at 25.

⁴⁵⁸ USITC Pub. 4192 (Exhibit US-1) at 25.

⁴⁵⁹ USITC Pub. 4192 (Exhibit US-1) at 25.

⁴⁶⁰ USITC Pub. 4192 (Exhibit US-1) at 25.

234. Against the background discussed above, the Commission separately discussed the volume, price effects, and impact of the subject imports. For each of these subjects, the Commission first considered present material injury and then threat of material injury.

235. *Volume.* In finding no present material injury, the Commission found that the increase in subject imports during the period of investigation was significant both on an absolute basis and relative to apparent U.S. production and consumption.⁴⁶¹ In particular, the Commission observed that the increase in subject import market share, from 13.9 percent in 2007 to 18.3 percent in 2009, was significant.⁴⁶² As the Commission noted, the quantity of subject imports increased by over 15,000 short tons from 2007 to 2009, even though apparent U.S. consumption of CCP declined by 21.3 percent over the same period.⁴⁶³

236. Addressing the absolute and relative declines in subject import volume during interim 2010, the Commission noted that subject imports continued at elevated levels in January and February and then dropped precipitously in March 2010, the month in which the Department of Commerce issued preliminary countervailing duty determinations and imposed provisional duties on the subject merchandise.⁴⁶⁴ In fact, Respondents themselves had acknowledged that the interim 2010 decline in subject import volume resulted from the pending trade cases.⁴⁶⁵ The Commission consequently exercised its discretion to reduce the weight it accorded to data subsequent to the filing of the petition, finding that changes in the volume, price effects, and impact of the subject imports were due to the pendency of the investigations.⁴⁶⁶ The Commission thus found that absent the investigations, the absolute and relative volume of subject imports would likely have been greater in interim 2010.⁴⁶⁷

237. With respect to its analysis of threat of material injury, the Commission found that, absent the imposition of antidumping and countervailing duty orders, a continuation of the increases in subject import volume that occurred during the period of investigation was likely. The Commission cited three principal reasons for this conclusion. First, the Commission noted the historic increase in the volume and market penetration of the subject imports from 2007 to 2009, in spite of the 21.3 percent decline in apparent U.S. consumption during the period.⁴⁶⁸ Second, the Commission found that coated paper capacity and production in the subject countries (Indonesia and China) would likely increase imminently. In both subject countries, coated paper production was projected to increase in the imminent future, with the increase in coated paper

⁴⁶¹ USITC Pub. 4192 (Exhibit US-1) at 26.

⁴⁶² USITC Pub. 4192 (Exhibit US-1) at 26.

⁴⁶³ USITC Pub. 4192 (Exhibit US-1) at 26.

⁴⁶⁴ USITC Pub. 4192 (Exhibit US-1) at 27.

⁴⁶⁵ USITC Pub. 4192 (Exhibit US-1) at 27.

⁴⁶⁶ USITC Pub. 4192 (Exhibit US-1) at 27 n.174.

⁴⁶⁷ USITC Pub. 4192 (Exhibit US-1) at 27.

⁴⁶⁸ USITC Pub. 4192 (Exhibit US-1) at 27.

production capacity in China projected to be approximately double the increase in Chinese consumption.⁴⁶⁹

238. Third, the Commission found that the subject producers were likely to utilize the additional capacity to increase shipments to the United States. Throughout the period of investigation, APP, which was the predominant producer and exporter of subject merchandise in both China and Indonesia, had attempted aggressively to increase exports to the United States.⁴⁷⁰ In late 2008 – while U.S. demand for CCP was declining – APP informed Unisource, a leading U.S. distributor, that it desired to double its monthly coated paper exports to the United States and was willing to cut prices in order to increase volume.⁴⁷¹ When this attempt failed and APP lost the Unisource account, APP invested in its own distributor, Eagle Ridge, to retain and increase its presence in the U.S. market.⁴⁷² Additionally, despite declining demand, the U.S. market was relatively large, and offered higher prices for CCP than in China or other markets in Asia.⁴⁷³ Furthermore, record evidence established that exporters could easily increase their presence in the U.S. market due to their familiarity with the distribution network and the prevalence of spot market sales.⁴⁷⁴ Given the importance of price in purchasing decisions, the Commission found that aggressively priced subject imports would be able to quickly gain market share, or alternatively, force domestic producers to lower their prices substantially in order to retain volume.⁴⁷⁵

239. The Commission considered but found unpersuasive several arguments presented by Respondents as to why further increases in subject imports were unlikely. It found that APP's loss of business in 2009 with major distributors Unisource and xpedx was recouped by increased sales to other accounts.⁴⁷⁶ It similarly found that subject imports generally continued to increase, reaching their highest level in 2009, even after APP lost its certification from the Forest Stewardship Council (FSC) in November 2007.⁴⁷⁷ It also found that “paper directed buy” (PDB)

⁴⁶⁹ USITC Pub. 4192 (Exhibit US-1) at 28. This capacity projection was made by a resource cited by both Petitioners and Respondents, *viz.*, RISI, an information provider for the global forest products industry.

⁴⁷⁰ USITC Pub. 4192 (Exhibit US-1) at 3, 24, 29.

⁴⁷¹ USITC Pub. 4192 (Exhibit US-1) at 29 (citing the “Unisource Affidavit”, attached to Petitioners’ Posthearing Brief as Exhibit 1); Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2). Information from the Unisource Affidavit was redacted in the Commission’s public determinations pursuant to a confidentiality request by petitioners. The petitioners subsequently filed a letter with the Commission stating that the entire contents of the affidavit may be disclosed publicly.

⁴⁷² USITC Pub. 4192 (Exhibit US-1) at 29.

⁴⁷³ USITC Pub. 4192 (Exhibit US-1) at 29.

⁴⁷⁴ USITC Pub. 4192 (Exhibit US-1) at 29.

⁴⁷⁵ USITC Pub. 4192 (Exhibit US-1) at 29.

⁴⁷⁶ USITC Pub. 4192 (Exhibit US-1) at 29-30.

⁴⁷⁷ USITC Pub. 4192 (Exhibit US-1) at 30.

programs, which only accounted for a small share of the U.S. market, did not exclude subject imports.⁴⁷⁸

240. *Price Effects.* To analyze subject import price effects, the Commission collected quarterly pricing data on five representative products, covering a significant proportion of subject import and domestic industry shipments.⁴⁷⁹ Based on these data, the Commission found that there was predominant underselling by the subject imports during the period of investigation. In particular, the subject imports undersold the domestic like product in 48 out of 58 quarterly comparisons.⁴⁸⁰ Average underselling margins ranged from 7.2 to 19.1 percent and exceeded any price premium that the domestic like product might obtain because of advantages in lead times and supply chains and purchaser preferences, which ranged from 3.0 to 6.0 percent at most.⁴⁸¹ In light of these considerations, the moderately high interchangeability between the domestic like product and the subject imports, and the importance of price in purchasing decisions, the Commission found the underselling by the subject imports to be significant.⁴⁸²

241. In examining price depression, the Commission observed an apparent relationship between price declines for the subject imports beginning in the fourth quarter of 2008 and price declines for the domestic like product in early 2009 for products 1 and 4, which accounted for a majority of Chinese imports for which pricing data were reported.⁴⁸³ Domestic producers testified that they lowered their prices to compete with declining subject import prices, and numerous responding purchasers confirmed as much.⁴⁸⁴ While the Commission concluded that these trends, together with the significant underselling, “show that subject imports depressed domestic prices at least to some extent for part of the period under examination,” it did not find significant price depression.⁴⁸⁵ As the Commission explained, it could not ascertain whether subject imports contributed significantly to the price depression that occurred in light of two other factors that contributed to the price depression, particularly in the latter portions of 2009: significant declines in consumption and the “black liquor” tax credit, which effectively served to lower domestic producers’ input costs.⁴⁸⁶ For the same reason, the Commission also could not determine that there was a significant current linkage between subject imports and price

⁴⁷⁸ USITC Pub. 4192 (Exhibit US-1) at 30. PDB programs are defined as sales of certain coated paper where the ultimate end-use customer (i.e., the purchaser of printed materials from the printer) negotiates the paper source, specifications, and/or price directly with the paper distributor or the paper mill. In these transactions, the printer for the ultimate end user must use the specified paper at the specific price. USITC Pub. 4192 (Exhibit US-1) at 23n.144.

⁴⁷⁹ USITC Pub. 4192 (Exhibit US-1) at 31.

⁴⁸⁰ USITC Pub. 4192 (Exhibit US-1) at 31.

⁴⁸¹ USITC Pub. 4192 (Exhibit US-1) at 31.

⁴⁸² USITC Pub. 4192 (Exhibit US-1) at 24, 31.

⁴⁸³ USITC Pub. 4192 (Exhibit US-1) at 32.

⁴⁸⁴ USITC Pub. 4192 (Exhibit US-1) at 32 & V-12-14.

⁴⁸⁵ USITC Pub. 4192 (Exhibit US-1) at 33.

⁴⁸⁶ USITC Pub. 4192 (Exhibit US-1) at 33.

suppression, although the domestic industry's ratio of cost of goods sold to net sales increased from 2007 to 2009.⁴⁸⁷

242. In its analysis of threat of material injury, the Commission found that, as subject producers likely attempted to increase exports to the United States, they were likely to continue to use underselling and aggressive pricing as a means to increase market share in the imminent future, given the general substitutability of the products.⁴⁸⁸ As the Commission explained, the likely significant underselling by subject imports was likely to increase the attractiveness of those imports to U.S. purchasers to the detriment of sales of domestically-produced CCP.⁴⁸⁹ Given projections that CCP demand would decline moderately over the next two years, the Commission found that there would not be increased demand in the U.S. market that could absorb the increased subject import volume⁴⁹⁰

243. The Commission also explained that the factors other than subject imports that contributed to price depression and suppression during the period of investigation would not play the same role in the imminent future. Projected declines in domestic consumption of 3.3 percent in 2011 and 2.5 percent in 2012 were modest compared to the 14.7 percent drop in consumption between 2008 and 2009.⁴⁹¹ The black liquor tax credit (which, as noted, affected input costs) had expired in 2009 and was unlikely to be renewed.⁴⁹² With the reduced influence of these factors, the Commission explained, a key driver of market prices would likely become the significant volumes of subject imports.⁴⁹³

244. Absent antidumping and countervailing duty orders, the Commission found it likely that subject imports would be priced aggressively so as to regain market share lost in interim 2010 due to the pendency of the investigations.⁴⁹⁴ Subject producers would be motivated to do so by their substantial and imminent new capacity, in excess of home market demand growth; their knowledge of the U.S. market; and the relatively higher prices available in the U.S. market compared to China and Asia.⁴⁹⁵ As further evidence that subject producers would aggressively seek to increase their exports to the United States, the Commission highlighted APP's effort to greatly increase its shipments into an already depressed market in late 2008 by offering to cut its

⁴⁸⁷ USITC Pub. 4192 (Exhibit US-1) at 33.

⁴⁸⁸ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁸⁹ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹⁰ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹¹ USITC Pub. 4192 (Exhibit US-1) at 34; Petitioners' Public Posthearing Brief, Responses to Commissioner Questions, Commissioner Pinkert Question 3, Exhibit 1 at 21 (Exhibit US-4). We note that the demand projections redacted in the Commission's public determinations were disclosed in the public version of petitioner's posthearing brief.

⁴⁹² USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹³ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹⁴ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹⁵ USITC Pub. 4192 (Exhibit US-1) at 34.

low prices further, and the establishment of Eagle Ridge in 2009.⁴⁹⁶ Given the prevalence of spot sales and the proclivity of purchasers to rapidly switch suppliers, the Commission explained, low-priced subject import competition would likely pressure domestic producers to lower their prices in order to compete for sales and prevent erosion of their market share.⁴⁹⁷ Based on these considerations and the market's continuing recovery from severely depressed demand, the Commission concluded that continued underselling by subject producers, combined with increased volumes of subject imports, would likely cause the domestic industry to experience significant price depression or suppression in the imminent future.⁴⁹⁸

245. *Impact.* After analyzing the domestic industry's declining performance according to most measures during the period of investigation, including capacity, production, shipments, employment, and operating income, the Commission found an insufficient causal nexus between the declines and subject imports to conclude that subject imports had a current significant adverse impact on the industry.⁴⁹⁹ As the Commission explained, the industry's declining performance during the period coincided with the economic downturn and a sharp decline in CCP demand,⁵⁰⁰ the industry remained profitable and increased its market share during the period despite declining demand, and many of the domestic industry's performance indicators did not improve after subject imports largely left the market in interim 2010.⁵⁰¹

246. The record, however, indicated an imminent threat of material injury to the domestic industry. The Commission found the domestic industry to be vulnerable to material injury, based on the double-digit declines in its production, capacity utilization, U.S. shipments, employment, and capital expenditures between 2007 and 2009.⁵⁰² The domestic industry's operating income decreased during each of the full years, and its operating income margin fell from 7.4 percent in 2007 to 4.9 percent in 2008 and to 3.8 percent in 2009.⁵⁰³ The Commission recognized that the industry's financial performance would have been even worse in 2009 but for the black liquor tax credit, which expired that year.⁵⁰⁴ Even as demand improved in interim 2010 as compared to 2009 and subject imports exited the market, the Commission noted, the industry's operating income margin was slightly lower in interim 2010 than in interim 2009 and its ratio of cost of goods sold to sales higher.⁵⁰⁵ The domestic industry's vulnerability to material injury weighed

⁴⁹⁶ USITC Pub. 4192 (Exhibit US-1) at 34.

⁴⁹⁷ USITC Pub. 4192 (Exhibit US-1) at 34-35 (citing the Unisource Affidavit).

⁴⁹⁸ USITC Pub. 4192 (Exhibit US-1) at 35.

⁴⁹⁹ USITC Pub. 4192 (Exhibit US-1) at 35-37.

⁵⁰⁰ USITC Pub. 4192 (Exhibit US-1) at 37.

⁵⁰¹ USITC Pub. 4192 (Exhibit US-1) at 37-38.

⁵⁰² USITC Pub. 4192 (Exhibit US-1) at 35-38.

⁵⁰³ USITC Pub. 4192 (Exhibit US-1) at 37.

⁵⁰⁴ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵⁰⁵ USITC Pub. 4192 (Exhibit US-1) at 38.

heavily on the Commission’s consideration of the impact of subject imports on the domestic industry in the imminent future.⁵⁰⁶

247. In analyzing threat of material injury, the Commission found that the domestic industry’s vulnerable state made it likely that the industry would continue to experience declining performance in the imminent future as subject imports continued underselling the domestic like product in order to significantly increase their sales and market share.⁵⁰⁷ As the Commission explained, subject producers had demonstrated the ability and willingness to lower their prices to increase exports to the U.S. market, and would likely continue such behavior in the imminent future in light of the significant new capacity in China, the establishment of Eagle Ridge, and the attractiveness of the U.S. market.⁵⁰⁸ In light of the moderate decline in CCP demand projected for 2011 and 2012, the Commission found that the U.S. market could not accommodate the likely increase in subject import volume without subject imports taking sales from current suppliers including domestic producers, and causing material injury to the domestic industry.⁵⁰⁹ The Commission therefore found a likely causal relationship between subject imports and an imminent adverse impact on the domestic industry.⁵¹⁰

248. The Commission considered whether there were other factors that would likely have an imminent impact on domestic industry, in particular: declining demand for CCP and nonsubject imports. The Commission found that the modest decline in CCP demand projected for 2011, 3.3 percent, would limit sales opportunities and restrain prices, but was not of a magnitude that would render insignificant the likely impact of subject imports.⁵¹¹ Finding that the same held true for nonsubject imports, the Commission explained that nonsubject import market share declined from 25.4 percent in 2007 to 16.1 percent in 2009, and that nonsubject import prices were generally higher than subject import prices.⁵¹² While acknowledging that nonsubject import market share increased 6.1 percentage points over the interim period, when subject imports exited the market, the Commission observed that the domestic industry also gained 6.8 percentage points of market share during the period.⁵¹³ The Commission found it likely that, if preliminary duties were lifted and antidumping and countervailing duty orders were not imposed, subject producers would seek to regain market share lost to both the domestic industry and nonsubject imports using low prices.⁵¹⁴

⁵⁰⁶ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵⁰⁷ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵⁰⁸ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵⁰⁹ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵¹⁰ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵¹¹ USITC Pub. 4192 (Exhibit US-1) at 38-39.

⁵¹² USITC Pub. 4192 (Exhibit US-1) at 39.

⁵¹³ USITC Pub. 4192 (Exhibit US-1) at 39.

⁵¹⁴ USITC Pub. 4192 (Exhibit US-1) at 39.

249. The Commission concluded that, in light of the domestic industry’s vulnerability and its findings that subject import volume would likely increase significantly at prices likely to depress and suppress domestic prices to a significant degree, material injury by reason of subject imports was likely to occur in the imminent future absent imposition of antidumping and countervailing duties.⁵¹⁵ Accordingly, the Commission determined that the domestic industry was threatened with material injury by reason of subject imports from China and Indonesia.⁵¹⁶

2. Affirmance by the U.S. Court of International Trade

250. Under U.S. law, parties to an antidumping or countervailing duty investigation conducted by the Commission may appeal an adverse injury determination to the U.S. Court of International Trade (“CIT”).⁵¹⁷ Respondent Chinese producers belonging to APP appealed the Commission’s determination to the CIT under this provision, raising many of the same arguments raised by Indonesia here. After briefing and oral argument, the CIT issued a comprehensive decision, exhaustively discussing the facts and issues, and soundly rejecting all of respondents’ arguments raised in the appeal.⁵¹⁸

251. In reviewing the Commission’s threat of material injury determination, the Court scrutinized the Commission’s factual findings and legal conclusions, and upheld that determination in full. Specifically, the Court rejected plaintiffs’ argument that the Commission’s finding that subject import volume was likely to increase significantly in the imminent future was based on speculation.⁵¹⁹ The Court held that the Commission supported with substantial evidence its finding that Chinese capacity would likely increase significantly by relying on RISI projections of Chinese CCP consumption and capacity and the Chinese producers’ own projection that their actual production would roughly equal their capacity in the imminent future.⁵²⁰ The Court also upheld the Commission finding that subject import volume was likely to increase significantly in the imminent future, and in particular the underlying findings of a significant increase in subject imports during the period of investigation,⁵²¹ that a substantial proportion of increased Chinese capacity would be directed at the United States,⁵²² and that subject producers had the incentive and the intention to increase exports to the United States.⁵²³

⁵¹⁵ USITC Pub. 4192 (Exhibit US-1) at 39.

⁵¹⁶ USITC Pub. 4192 (Exhibit US-1) at 39.

⁵¹⁷ 19 U.S.C. § 1516a(c) (Exhibit US-5); 28 U.S.C. § 1581(c) (Exhibit US-6).

⁵¹⁸ *Gold East Paper (Jiangsu) Co., Ltd., Ningbo Zhonghua Paper Co., Ltd., Global Paper Solutions, PT Pindo Deli Pulp and Paper Mills, and Paper Max Ltd. v. United States*, 896 F. Supp. 2d 1242, 1281 (Ct. Int’l Trade 2012) (“*Gold East*”) (Exhibit US-7).

⁵¹⁹ *See id.* at 1255-65.

⁵²⁰ *Id.* at 1254-57.

⁵²¹ *See id.* at 1259-62.

⁵²² *See id.* at 1257-59.

⁵²³ *See id.* at 1263-65.

252. The Court additionally rejected plaintiffs’ challenge to the Commission’s finding that subject imports were likely to depress or suppress domestic prices to a significant degree in the imminent future, finding the Commission’s analysis to be supported by substantial evidence and in accordance with law.⁵²⁴ In particular, the Court held that “the Commission reasonably determined that, absent negative market factors, an increase in subject import volume would likely lead to significant underselling and price suppression within the foreseeable future.”⁵²⁵ As the Court explained, the Commission supported this finding with evidence that projected U.S. demand would be insufficient to absorb increased subject import volume, that significant subject import underselling was likely to continue, and that subject imports led domestic prices downward in 2008 and 2009.⁵²⁶

253. Finally, the Court rejected plaintiffs’ challenge to the Commission’s finding of a causal nexus between subject imports and the imminent threat of material injury to the domestic industry, holding that the Commission’s causation analysis was supported by substantial evidence and in accordance with law.⁵²⁷ Indeed, the Court rejected plaintiffs’ argument that “the Commission failed to ensure that its finding of a threat of material injury did not attribute injury from other market sources to subject imports,”⁵²⁸ which is similar to the Indonesia’s claim that the Commission breached ADA Article 3.5 and SCMA article 15.5. The Court held that the Commission reasonably found that “the projected decline in U.S. consumption would have little adverse effect on the U.S. industry,” and “logically had no obligation to explain how it ensured that those (insignificant) effects were not attributed to subject imports.”⁵²⁹ The Court rejected plaintiffs’ argument that increased subject imports would likely displace only nonsubject imports.⁵³⁰ As the Court explained, the Commission supported the finding that the increase would also displace domestic industry sales with evidence that subject imports lost 6.8 percentage points of market share to the domestic industry during the interim period – when orders were in effect – and that domestic industry sales declined as subject imports increased during the period of investigation.⁵³¹

254. The CIT’s affirmance of the Commission’s affirmative threat determinations on appeal is compelling and instructive for this Panel’s review here. In particular, the Court’s affirmance of the Commission’s analysis of the likely volume and price effects of subject imports further confirms that the analysis was supported by facts and consistent ADA Article 3.7 and SCMA Article 15.7. The reasoning behind the Court’s finding that the Commission did not attribute injury from declining demand and nonsubject imports to subject imports similarly indicates that

⁵²⁴ See *id.* at 1265-75.

⁵²⁵ *Id.* at 1269.

⁵²⁶ See *id.* at 1268-69.

⁵²⁷ See *id.* at 1275-81.

⁵²⁸ *Id.* at 1276.

⁵²⁹ *Gold East*, 896 F. Supp. 2d at 1279 (Exhibit US-7).

⁵³⁰ *Id.* at 1279-80.

⁵³¹ *Id.* at 1279-80.

the Commission complied with the attribution requirements of ADA Article 3.5 and SCMA article 15.5.

B. The Commission Complied With Article 3.7 of the ADA and Article 15.7 of the SCM Agreement by Basing Its Affirmative Threat Determination on Facts, and a Clearly Foreseen and Imminent Change in Circumstances

1. The Relevant Obligations under Article 3.7 of the ADA and Article 15.7 of the SCM Agreement

255. Indonesia’s challenge to the Commission’s affirmative threat determination under Article 3.7 of the ADA and Article 15.7 of the SCM Agreement is limited to the requirements contained in the first two sentences of both articles:

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility. The change in circumstances which would create a situation in which the dumping [or subsidy] would cause injury must be clearly foreseen and imminent.

A footnote off the second sentence of Article 3.7 of the ADA provides that “[o]ne example” of a legally sufficient change in circumstances, “though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.”⁵³² Although the SCM Agreement omits this footnote, the same example would logically apply to the “change in circumstances” envisioned under Article 15.7 of the SCM Agreement, given that the first two sentences of that article are identical to those in Article 3.7 of the ADA.

256. The first sentence of ADA Article 3.7 and SCMA article 15.7 requires investigating authorities to base threat determinations on “facts and not merely on allegation, conjecture, or remote possibility.” The Agreements leave latitude for authorities to draw reasonable inferences from the facts. As the Appellate Body explained in *Mexico – Corn Syrup (Article 21.5)*:

In our view, the “establishment” of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analysis. In determining the existence of a threat of material injury, the investigating authorities will necessarily have to make assumptions relating to the “occurrence of future events” since such future events “can never be definitively proven by facts.” Notwithstanding this intrinsic uncertainty, a “proper establishment” of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be “clearly foreseen and imminent,” in accordance with Article 3.7 of the [ADA].⁵³³

⁵³² ADA Article 3.7, footnote 10.

⁵³³ *Mexico – Corn Syrup (21.5) (AB)*, para. 85.

The Appellate Body recognized that investigating authorities must necessarily base threat of injury determinations on “assumptions” about future events, and reasoned that such assumptions are properly based on facts where the future events are “clearly foreseen and imminent” within the meaning of ADA Article 3.7, and by extension SCMA article 15.7.

257. The second sentence of ADA Article 3.7 and SCMA article 15.7 requires that “[t]he change in circumstances which would create a situation in which the [dumping] [subsidy] would cause injury must be clearly foreseen and imminent.” While finding this text “not a model of clarity,” the Panel in *U.S. – Softwood Lumber VI* found that a broad range of changes in circumstances would be legally sufficient:

[T]he relevant “change in circumstances” referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently.⁵³⁴

In that dispute, the Panel agreed with the United States that “the continuation of adverse trends into the future, as identified in the USITC determination, is sufficient to satisfy the change in circumstances requirement”:

In this case, the facts the United States points to as demonstrating the “progression” of circumstances which would create a situation in which injury would occur in the near future are thoroughly intertwined with the USITC’s discussion of the present condition of the domestic industry, the present impact of imports, and the facts asserted in support of the conclusion that imports will increase substantially. Thus, in our view, the USITC considered these various elements in concluding that the continuation of the trends in the situation of the domestic industry, coupled with predicted substantially increased imports, would result in an imminent change in circumstances such that injury would occur.⁵³⁵

Thus, an investigating authority’s demonstration that adverse trends are likely to continue into the imminent future, resulting in injury, is sufficient to satisfy the “change in circumstances” requirement under ADA Article 3.7 and SCMA article 15.7.

258. Panels have also recognized that the magnitude of the imminent “change in circumstances” necessary to cause material injury to a domestic industry will depend upon the present condition of the industry. As the Panel explained in *Egypt – Steel Rebar*:

⁵³⁴ *US – Softwood Lumber VI (Panel)*, para. 7.57.

⁵³⁵ *US – Softwood Lumber VI (Panel)*, para. 7.60.

Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.⁵³⁶

Thus, it would take a less dramatic imminent change in circumstances to cause material injury to a domestic industry suffering low and declining performance than to a domestic industry performing robustly. In this regard, it is illogical that Indonesia draws attention to the fact that the Commission found no present material injury before moving on to an analysis of threat of material injury.⁵³⁷ Rather, it is logical that investigating authorities need not find present material injury in order to find a threat of material injury. Indeed, only after finding no present material injury caused by subject imports would it become necessary for the authorities to address whether material injury caused by subject imports was imminent.

259. As discussed below, the Commission's threat determination was based on facts and clearly foreseen and imminent changes in circumstances, consistent with ADA Article 3.7 and SCMA article 15.7. Indonesia has failed to make a *prima facie* case that the United States breached these obligations.

2. The Commission's Threat Determination Was Based on Facts and Clearly Foreseen and Imminent Changes in Circumstances, Consistent with Article 3.7 of the ADA and Article 15.7 of the SCM Agreement

260. Indonesia claims that the Commission based two aspects of its threat analysis on speculation instead of facts, contrary to ADA Article 3.7 and SCMA article 15.7. First, Indonesia argues that that Commission speculated that the imminent substantial increase in subject import volume that was likely would adversely impact the domestic industry, given that non-subject import market share fell as subject import market share rose during the period of investigation.⁵³⁸ Second, Indonesia contends that the Commission speculated that the subject import underselling that was likely, coupled with the likely significant increase in subject import volume, would depress or suppress domestic industry prices to a significant degree, given the Commission's finding that subject imports caused no significant price depression or suppression during the period of investigation.⁵³⁹ None of these claims have merit.

⁵³⁶ *Egypt – Steel Rebar*, para. 7.91.

⁵³⁷ *See* Indonesia's FWS, paras. 104-107, 114,125, 128.

⁵³⁸ Indonesia's FWS, paras. 128-29.

⁵³⁹ Indonesia's FWS, paras. 125-27.

261. Indonesia's arguments are based on the mistaken assumption that certain trends and factors during the period of investigation, which influenced the Commission's negative present material injury determination, would continue in the imminent future. As the Commission explained, however, several changes in circumstances made it likely that subject import volume would increase substantially in the imminent future: the projected increase in Chinese capacity of at least 1.5 million short tons during the 2009-11 period and APP's avowed determination to use low prices to increase substantially its exports of coated paper to the United States and establishment of Eagle Ridge as a means of doing so.⁵⁴⁰ The Commission also explained that factors other than subject imports that had adversely affected domestic prices during the period of investigation would not have the same effect in the imminent future, as the steep decline in coated paper demand during the period of investigation moderated and the black liquor tax credit expired.⁵⁴¹ As discussed below, the Commission's affirmative threat determination was based on facts, as well as on clearly foreseen and imminent changes in circumstances, consistent with the first two sentences of ADA Article 3.7 and SCMA article 15.7.

- a. The Commission's Analysis of the Likely Impact of Subject Imports on the Sales Volume of Domestic Industry Was Based on Facts and Clearly Foreseen and Imminent Changes in Circumstances

262. There is ample factual support for the Commission's finding that cumulated subject imports were likely to increase significantly in the imminent future, taking sales from existing suppliers such as the domestic industry, contrary to Indonesia's argument.⁵⁴² Indeed, Indonesia does not challenge the Commission's finding that subject import volume and market share was likely to increase significantly. Rather, Indonesia focuses on the Commission's finding that increased subject imports would take sales from existing suppliers such as the domestic industry.⁵⁴³ Contrary to Indonesia's claims, the Commission's analysis of subject imports' likely impact on the sales volume of domestic industry was based on facts, as well as clearly foreseen and imminent changes in circumstances, consistent with ADA Article 3.7 and SCMA article 15.7.

263. As an initial matter, the Commission did not find that the increase in subject import volume and market share during the POI was innocuous for domestic industry, as Indonesia suggests.⁵⁴⁴ On the contrary, the Commission found that the increase in subject imports, both on an absolute basis and relative to apparent U.S. consumption and production, was significant.⁵⁴⁵ From 2007 to 2009, cumulated subject import volume increased from 398,309 short tons to

⁵⁴⁰ See USITC Pub. 4192 (Exhibit US-1) at 28-29, 34, 38.

⁵⁴¹ See USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁴² USITC Pub. 4192 (Exhibit US-1) at 30-31.

⁵⁴³ Indonesia's FWS, paras. 128-29.

⁵⁴⁴ See Indonesia's FWS, para. 128.

⁵⁴⁵ USITC Pub. 4192 (Exhibit US-1) at 27.

413,593 short tons despite a 21.3 percent decline in apparent U.S. consumption.⁵⁴⁶ As a consequence, the market share of cumulated subject imports increased from 13.9 percent to 18.3 percent during this period.⁵⁴⁷ The Commission stressed that the increase in subject import volume and coincided with a decline in the volume of the domestic industry’s U.S. shipments.⁵⁴⁸ Although subject import volume declined during interim 2010, it was undisputed that this decline was attributable to the pendency of the investigations.⁵⁴⁹

264. In its threat analysis, the Commission provided ample evidentiary support for its conclusion that the likely significant increase in subject import volume would take sales from current suppliers including the domestic industry, contrary to Indonesia’s argument. Indonesia does not contest the Commission’s finding that subject producers possessed both the ability and the incentive to increase their exports to the United States significantly in the imminent future. All parties agreed that capacity and production would increase imminently in the subject countries.⁵⁵⁰ Indonesian producers themselves projected that their coated paper production in 2010 and 2011 would be greater than that in 2009.⁵⁵¹ Respondents acknowledged to the Commission 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.⁵⁵² RISI, an information provider to the global forest products industry, projected that Chinese coated paper production capacity would grow at twice the rate of Chinese coated paper consumption between 2009 and 2011.⁵⁵³ Given this, Chinese producers would have at least 750,000 short tons of coated paper capacity available for export to the United States in 2011, equivalent to 38 percent of apparent U.S. consumption in 2009. These facts reasonably supported the Commission’s finding that subject producers possessed the ability to increase their exports to the United States in the imminent future.

265. There was also ample factual support for the Commission’s finding that subject producers had every incentive to use their excess capacity to increase exports to the United States. In particular, the record contained direct, unrebutted evidence concerning the dominant subject exporter’s desire to increase sharply its presence in the U.S. market by reducing its already low prices. Specifically, an official from Unisource Worldwide, Inc., a leading U.S. distributor of CCP, submitted an affidavit concerning his interactions with APP, the leading exporter of subject merchandise from China and Indonesia.⁵⁵⁴ In the affidavit he stated that APP told Unisource in

⁵⁴⁶ USITC Pub. 4192 (Exhibit US-1) at 26.

⁵⁴⁷ USITC Pub. 4192 (Exhibit US-1) at 26.

⁵⁴⁸ USITC Pub. 4192 (Exhibit US-1) at 26-27.

⁵⁴⁹ USITC Pub. 4192 (Exhibit US-1) at 27.

⁵⁵⁰ USITC Pub. 4192 (Exhibit US-1) at 28.

⁵⁵¹ USITC Pub. 4192 (Exhibit US-1) at 28.

⁵⁵² USITC Pub. 4192 (Exhibit US-1) at 28.

⁵⁵³ USITC Pub. 4192 (Exhibit US-1) at 28.

⁵⁵⁴ See USITC Pub. 4192 (Exhibit US-1) at 29 (citing the Unisource Affidavit); Petitioner’s Posthearing Brief, Exhibit 1 (Unisource Affidavit) (Exhibit US-2). The Commission found that APP accounted for “the large majority” of subject imports in 2009. USITC Pub. 4192 (Exhibit US-1) at 24.

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 2009.⁵⁵⁵ Unisource declined the offer because it believed that APP's increased volume and reduced pricing would seriously disrupt the U.S. market.⁵⁵⁶ 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.⁵⁵⁷ Indeed, subject imports continued to increase in 2009 even after APP lost the Unisource account, and subject imports also continued to be priced aggressively.⁵⁵⁸

266. The Commission also found that the United States represented a highly attractive market to subject Chinese and Indonesian producers for several reasons.⁵⁵⁹ 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.⁵⁶⁰ 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.⁵⁶¹ 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.⁵⁶² 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.⁵⁶³

267. Having established that subject imports were likely to increase significantly in the imminent future, the Commission reasonably explained that the increase would likely take sales from current suppliers including the domestic industry, providing ample factual support.⁵⁶⁴ First, the Commission reasonably found that the significant increase in subject imports would necessarily take sales from current suppliers, rather than satisfy increased demand, based on RISI's projection that apparent U.S. consumption would decline 3.3 percent in 2011 and another

⁵⁵⁵ USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner's Posthearing Brief, Exhibit 1 (Exhibit US-2).

⁵⁵⁶ USITC Pub. 4192 (Exhibit US-1) at 29; Petitioner's Posthearing Brief, Exhibit 1 (Exhibit US-2).

⁵⁵⁷ USITC Pub. 4192 (Exhibit US-1) at 29.

⁵⁵⁸ See USITC Pub. 4192 (Exhibit US-1) at 26, 32.

⁵⁵⁹ USITC Pub. 4192 (Exhibit US-1) at 29.

⁵⁶⁰ USITC Pub. 4192 (Exhibit US-1) at 29 & n.188, Table VII-2.

⁵⁶¹ USITC Pub. 4192 (Exhibit US-1) at 29.

⁵⁶² USITC Pub. 4192 (Exhibit US-1) at 29.

⁵⁶³ USITC Pub. 4192 (Exhibit US-1) at 30-31.

⁵⁶⁴ USITC Pub. 4192 (Exhibit US-1) at 38.

2.5 percent in 2012.⁵⁶⁵ There was no projected increase in demand that could absorb the likely increase in subject imports.

268. It was also reasonable for the Commission to find 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 volume trends during the POI. Specifically, the Commission found that the significant increase in subject import volume between 2007 and 2009 came partly at the domestic industry's expense, as the increase coincided with a decline in the domestic industry's U.S. shipments.⁵⁶⁶ Moreover, of the 12.8 percentage point decline in subject import market share between interim 2009 and interim 2010 due to the pendency of the investigations, the domestic industry captured 6.8 percentage points and nonsubject imports captured 6.0 percent.⁵⁶⁷ Given this, the Commission reasoned that subject imports would compete to regain the market share lost to both the domestic industry and nonsubject imports during the interim period, such that the likely increase in subject import market share would come partly at the industry's expense.⁵⁶⁸ It stands to reason that subject producers would focus on recouping customers lost to domestic producers and nonsubject imports in interim 2010, in the absence of relief, due to their preexisting relationships with such customers and evidence that the prevalence of spot sales would allow such customers to switch back to subject imports with relative ease.⁵⁶⁹ Thus, the Commission had ample factual basis for its conclusion that the likely increase in subject import volume and market share would take sales from current suppliers, including the domestic industry.

269. The Commission's finding that the likely increase in subject import volume would take sales from the domestic industry did not conflict with its recognition that subject import market share increased at the same time that nonsubject import market share declined during the POI,⁵⁷⁰ as Indonesia mistakenly contends.⁵⁷¹ Contrary to Indonesia's argument, the increase in subject import volume between 2007 and 2009 did not come entirely at the expense of nonsubject imports, but also coincided with a decline in the domestic industry's U.S. shipments.⁵⁷² This evidence supported the Commission's finding that the likely significant increase in subject imports volume in the imminent future, which Indonesia does not deny, would also take sales from the domestic industry.

⁵⁶⁵ USITC Pub. 4192 (Exhibit US-1) at 38; Petitioner's Posthearing Brief, Question 3 to Commissioner Pinkert, Exhibit 1 (Exhibit US-4).

⁵⁶⁶ USITC Pub. 4192 (Exhibit US-1) at 26-27.

⁵⁶⁷ USITC Pub. 4192 (Exhibit US-1) at 39.

⁵⁶⁸ USITC Pub. 4192 (Exhibit US-1) at 39.

⁵⁶⁹ See USITC Pub. 4192 (Exhibit US-1) at 29 (finding that the U.S. market was "well understood by certain coated paper producers in China and Indonesia," particularly after APP's investment in Eagle Ridge, and that the prevalence of spot sales allows purchasers to switch between suppliers with relative ease).

⁵⁷⁰ USITC Pub. 4192 (Exhibit US-1) at 36.

⁵⁷¹ Indonesia's FWS, para. 129.

⁵⁷² USITC Pub. 4192 (Exhibit US-1) at 26-27.

270. Lending further evidentiary support to the Commission’s analysis was RISI’s projection of a moderate decline in U.S. CCP demand through 2012, and the subject producers’ loss of 6.8 percentage points of market share to domestic producers in interim 2010 due to the pendency of the investigations. As already discussed, the projected demand decline supported the Commission’s finding that the increase in subject import volume would have to come at the expense of current suppliers. The subject producers’ loss of market share to the domestic industry during the interim period supported the Commission’s finding that subject producers could not compete to recoup this lost market share, as was likely, without taking sales from the domestic industry. These facts supported the Commission’s finding that the likely significant increase in subject import volume would come partly at the expense of domestic producers, and not solely at the expense of nonsubject imports.⁵⁷³

271. Furthermore, as the Commission explained, the increase in Chinese CCP capacity of at least 1.5 million short tons through 2011, coupled with APP’s establishment of Eagle Ridge in the second half of 2009, strengthened the subject producers’ ability and incentive to increase exports to the United States in the imminent future.⁵⁷⁴ These clearly foreseen and imminent changes in circumstances placed subject producers in an even better position to rapidly increase their penetration of the U.S. market than during the period of investigation, when subject imports increased significantly. These facts lend further support to the Commission’s finding that the likely significant increase in subject import volume and market share would take sales from both the domestic industry and nonsubject imports.

272. Similarly unfounded is Indonesia’s argument that the Commission was somehow required to analyze the degree to which subject imports would capture market share from nonsubject imports instead of the domestic industry.⁵⁷⁵ The Commission had no need to pinpoint the precise volume of sales that subject producers were likely to capture from domestic producers in the imminent future to conclude that the likely significant increase in subject imports would take sales from current suppliers, including domestic producers, as already discussed. In particular, the fact that subject imports lost more market share to the domestic industry, 6.8 percentage points, than to nonsubject imports, 6.0 percentage points, in interim 2010 supported the Commission’s finding that subject imports were likely to compete on price to and take market share from both the domestic industry and nonsubject imports.⁵⁷⁶ In sum, there is no merit to Indonesia’s contention that the Commission inadequately supported its conclusion that subject imports would displace domestic production absent an order.

⁵⁷³ USITC Pub. 4192 (Exhibit US-1) at 38.

⁵⁷⁴ USITC Pub. 4192 (Exhibit US-1) at 28-29.

⁵⁷⁵ Indonesia’s FWS, para. 129.

⁵⁷⁶ USITC Pub. 4192 (Exhibit US-1) at 39.

b. The Commission’s Analysis of Likely Price Effects Was Based on Facts and Clearly Foreseen and Imminent Changes in Circumstances

273. The Commission also possessed ample factual support for its finding that the likely significant increase in subject import volume, driven by significant subject import underselling, would pressure domestic producers to lower their prices, thereby depressing or suppressing domestic prices. Indonesia contests neither the Commission’s finding that subject import volume is likely to increase significantly nor its finding that significant subject import underselling is likely to continue. Instead, Indonesia takes issue only with the Commission’s conclusion that these two factors together – significantly increased subject import volume at prices that significantly undersell the domestic like product – would likely depress or suppress domestic like product prices. Contrary to Indonesia’s claims, the Commission’s analysis of likely price effects was based on facts, and identified clearly foreseen and imminent changes in circumstances, consistent with ADA Article 3.7 and SCMA article 15.7.

274. The Commission in no way “reversed course” in finding that subject imports would likely depress domestic prices to a significant degree, as Indonesia claims, but rather based the finding in part on evidence that significant subject import underselling had depressed domestic prices during the POI to some extent. Specifically, the Commission found that subject imports pervasively undersold the domestic like product during the period of investigation, in 48 of 58 quarterly comparisons, by margins ranging from 1.5 to 25.2 percent.⁵⁷⁷ Additionally, the Commission observed that average underselling margin for all products was particularly high in 2009, at 12.3 percent, when subject import volumes peaked.⁵⁷⁸ The Commission found subject import underselling to be significant during the period of investigation in light of the moderately high interchangeability between the subject imports and the importance of price in purchasing decisions.⁵⁷⁹

275. The Commission also found that subject imports had depressed domestic like product prices at least to some extent during the period of investigation, based on the significance of subject import underselling and the relationship between subject import and domestic prices for products 1 and 4 during the period.⁵⁸⁰ For both products 1 and 4, the Commission explained, 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

⁵⁷⁷ USITC Pub. 4192 (Exhibit US-1) at 31. Although both sides agreed that the domestic like product historically commanded a price premium over subject imports, the Commission emphasized that the average underselling margins of between 7.2 and 19.1 percent exceeded the historic price premium of between three to six percent, depending on the pricing product in question. *Id.*

⁵⁷⁸ USITC Pub. 4192 (Exhibit US-1) at 31.

⁵⁷⁹ USITC Pub. 4192 (Exhibit US-1) at 31.

⁵⁸⁰ USITC Pub. 4192 (Exhibit US-1) at 33. To conduct its underselling analysis, the Commission collected quarterly sales volume and prices data from domestic producers and importers covering sales of five strictly-defined products. *Id.* at V-3. The Commission noted that product 1 accounted for the majority of reported sales of Chinese subject imports, and that product 4 accounted for a significant quantity of such sales. *Id.*

2009.⁵⁸¹ 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 4.⁵⁸²

276. The Commission found that declining domestic prices in 2009 resulted in part from declining subject import prices.⁵⁸³ 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.⁵⁸⁴ 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.⁵⁸⁵ Based on this evidence, the Commission concluded that subject imports depressed domestic prices at least to some extent during the period of investigation.⁵⁸⁶

277. The Commission made no finding of significant price depression or suppression by reason of subject imports, however, because it was unable to gauge whether there were significant effects attributable to the subject imports in the face of factors other than subject imports that also contributed importantly to lower prices during the POI.⁵⁸⁷ Specifically, the Commission cited to the facts that domestic prices were also adversely impacted by depressed CCP demand, which declined 14.7 percent between 2008 and 2009, as well as by the black liquor tax credit, which reduced pulp prices and thus the cost of producing CCP by spurring greater pulp production by domestic producers.⁵⁸⁸ The Commission also observed that domestic prices remained low, and the industry's cost-of-goods-sold ("COGS") to net sales ratio elevated, even after subject imports left the market in interim 2010.⁵⁸⁹ Because factors other than subject imports obscured the contribution of subject imports to lower domestic prices, the Commission found, notwithstanding some evidence that subject imports depressed domestic prices, there was not significant price depression or suppression by reason of subject imports during the POI.⁵⁹⁰

278. Rather than "reversing course" in its threat analysis, the Commission explained that while subject import underselling was likely to continue in the imminent future, as a means for subject imports to capture market share, the factors that obscured the contribution of the underselling to

⁵⁸¹ USITC Pub. 4192 (Exhibit US-1) at 32.

⁵⁸² USITC Pub. 4192 (Exhibit US-1) at 32.

⁵⁸³ USITC Pub. 4192 (Exhibit US-1) at 32.

⁵⁸⁴ USITC Pub. 4192 (Exhibit US-1) at 32 (citing Hearing Tr. (Exhibit US-11) at 56 (Stewart), 119 (Van Ert), 131 (Miller), and 134 (Nelson)), V-12-14.

⁵⁸⁵ USITC Pub. 4192 (Exhibit US-1) at 32 n. 214.

⁵⁸⁶ USITC Pub. 4192 (Exhibit US-1) at 33.

⁵⁸⁷ USITC Pub. 4192 (Exhibit US-1) at 33.

⁵⁸⁸ USITC Pub. 4192 (Exhibit US-1) at 33.

⁵⁸⁹ USITC Pub. 4192 (Exhibit US-1) at 33.

⁵⁹⁰ USITC Pub. 4192 (Exhibit US-1) at 33.

lower domestic prices during the POI would not continue in the imminent future.⁵⁹¹ The Commission found significant subject import underselling likely based on the significant subject import underselling during the period of investigation and particularly in 2009, when demand was depressed.⁵⁹² The Commission also emphasized APP's willingness, evidenced by its late 2008 proposal to Unisource, to cut its already-low prices in an effort to increase substantially its exports to the United States.⁵⁹³

279. Further, as the Commission explained, the likely significant increase in subject import volume, coupled with significant subject import underselling, would likely depress or suppress domestic prices to a significant degree, due to several changes in circumstances that had begun to occur and would continue into the imminent future.⁵⁹⁴ Specifically, the Commission found that the two factors other than subject imports that depressed domestic prices in 2009, sharply declining demand and the black liquor tax credit, would play a reduced or no role in the imminent future.⁵⁹⁵ As the Commission explained, the projected decline in domestic consumption of 3.3 percent between 2010 and 2011 was modest compared to the 14.7 percent drop in consumption between 2008 and 2009.⁵⁹⁶ Expiration of the black liquor tax credit in 2009, and the likelihood that it would not be renewed, meant that the program would no longer depress domestic prices.⁵⁹⁷ With the reduced influence of these factors over prices, the Commission reasoned that subject import volume and prices would become a key driver of prices in the U.S. market in the imminent future, leading domestic prices downward as they did in late 2008 and early 2009.⁵⁹⁸

280. The Commission also cited two additional changes in circumstances that made significant price depression or suppression by subject imports likely for threat purposes. The Commission found that the subject producers' substantial new capacity coming on line in the imminent future, well in excess of home market demand growth, would likely spur them to regain market share lost in interim 2010 through aggressive underselling, leveraging their familiarity with the U.S. market.⁵⁹⁹ As further evidence of this likelihood, the Commission cited APP's stated determination to use low prices to increase exports to the United States, and its establishment of

⁵⁹¹ USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹² USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹³ USITC Pub. 4192 (Exhibit US-1) at 34; Petitioner's Posthearing Brief, Exhibit 1 (Exhibit US-2).

⁵⁹⁴ USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹⁵ USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹⁶ USITC Pub. 4192 (Exhibit US-1) at 34; Petitioners' Public Posthearing Brief, Responses to Commissioner Questions, Commissioner Pinkert Question 3, Exhibit 1 at 21 (Exhibit US-4). We note that the demand projections redacted in the Commission's public determinations were publicly disclosed in petitioners' posthearing brief. (Exhibit US-4).

⁵⁹⁷ USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹⁸ USITC Pub. 4192 (Exhibit US-1) at 34.

⁵⁹⁹ USITC Pub. 4192 (Exhibit US-1) at 34.

Eagle Ridge as a conduit for such exports, towards the end of the period of investigation.⁶⁰⁰ Based on these factors, as well as the prevalence of spot sales and the propensity of purchasers to quickly change suppliers, the Commission concluded that subject import competition would likely pressure domestic producers to cut their prices to compete for sales in a depressed market, thereby depressing domestic prices to a significant degree in the imminent future. As evident from the foregoing, the Commission relied on a panoply of factual evidence, and several clearly foreseen and imminent changes in circumstances, in support of its determination that subject imports were likely to depress or suppress domestic like product prices to a significant degree.

281. Indonesia challenges as speculative the Commission’s findings that subject imports would likely become “a key driver of domestic market prices in the imminent future,” and would likely suppress domestic prices to a significant degree.⁶⁰¹ Neither of these objections to the Commission’s analysis withstands scrutiny.

282. First, the Commission’s finding that subject imports would likely become “a key driver of domestic prices” in the imminent future was based on facts and not speculation, contrary to Indonesia’s argument. There is simply no basis for Indonesia’s bald assertion that subject import market share was unlikely to increase in the imminent future any more rapidly than during the period of investigation, thus remaining too low to adversely affect domestic prices.⁶⁰² As an initial matter, Indonesia has not contested that subject import volume was likely to increase significantly in the imminent future. Indonesia, moreover, ignores the changes in circumstances identified by the Commission that gave subject producers the ability and incentive to increase their penetration of the U.S. market in the imminent future more rapidly than during the period of investigation. As discussed above, in the course of the Commission investigation, respondents themselves acknowledged that APP’s and other Chinese coated paper capacity would imminently increase by 1.5 million short tons, equivalent to 75 percent of apparent U.S. consumption in 2009.⁶⁰³ Moreover, towards the end of the period of investigation, APP stated its determination to double its exports to the United States by cutting its already low prices, and established Eagle Ridge as a means of doing so.⁶⁰⁴ Further incentivizing subject producers to increase their exports to the United States were the higher prices available in the U.S. market relative to Asian markets.⁶⁰⁵ The Commission had ample factual support for its conclusion that subject producers had the ability and incentive to rapidly increase their exports to the United States in an effort to recoup the 12.8 percentage points of market share lost in interim 2010, and would likely do so in the imminent future absent relief. Indonesia likewise does not contest the Commission’s finding that the U.S. market for CCP was likely to contract in the immediate future, although to a much lesser extent than during the POI.⁶⁰⁶ Taken together with the amply-

⁶⁰⁰ USITC Pub. 4192 (Exhibit US-1) at 34; Petitioner’s Posthearing Brief, Exhibit 1 (Exhibit US-2).

⁶⁰¹ *See* Indonesia’s FWS, paras. 126-27.

⁶⁰² *See* Indonesia’s FWS, para. 126.

⁶⁰³ USITC Pub. 4192 (Exhibit US-1) at 28.

⁶⁰⁴ USITC Pub. 4192 (Exhibit US-1) at 28-29; Petitioners’ Posthearing Brief at Exhibit 1 (Exhibit US-2).

⁶⁰⁵ USITC Pub. 4192 (Exhibit US-1) at 29 & n.188.

⁶⁰⁶ USITC Pub. 4192 (Exhibit US-1) at 34.

supported finding that subject producers were likely to rapidly increase exports to the United States, this leaves no basis to question the Commission’s conclusion that subject import market share would also rapidly increase – at a rate much greater than during the POI – in the imminent future.

283. Similarly misplaced is Indonesia’s claim that subject import market share would likely remain too low in the imminent future to adversely impact domestic prices.⁶⁰⁷ Indonesia does not contest the Commission’s finding that the significant subject import underselling that prevailed during the period of investigation was likely to continue in the imminent future.⁶⁰⁸ Nor does Indonesia contest the Commission’s finding that there was a moderately high degree of substitutability between subject imports and the domestic like product, and that price was an important factor in purchasing decisions.⁶⁰⁹ Based on these factors, and the relationship between subject import and domestic prices between 2008 and 2009,⁶¹⁰ the Commission explained that a change in circumstances, namely the moderation of declining demand and expiration of the black liquor tax credit, made it likely that subject import competition would become a key driver of domestic market prices in the imminent future.⁶¹¹ Based on these factually-supported findings, and the likely increase in volume and market share of aggressively-priced subject imports,⁶¹² the Commission properly found that subject imports were likely to depress domestic prices in the imminent future.⁶¹³

284. Nor is there any merit to Indonesia’s contention that even a 12 percentage point increase in subject import market share in the imminent future (to 22 percent) could have no significant adverse impact on domestic prices, allegedly because such an increase could have no effect on prices in the other 78 percent of the market.⁶¹⁴ Indonesia’s argument is based on the fallacy that

⁶⁰⁷ Indonesia’s FWS, para. 126.

⁶⁰⁸ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶⁰⁹ USITC Pub. 4192 (Exhibit US-1) at 24-25, 31.

⁶¹⁰ As noted above, the Commission explained that 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. USITC Pub. 4192 (Exhibit US-1) at 32. 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. USITC Pub. 4192 (Exhibit US-1) at 32. 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. USITC Pub. 4192 (Exhibit US-1) at 32 & n.214. Based on this and other evidence, including hearing testimony, the Commission concluded that subject imports depressed domestic prices at least to some extent in 2009. USITC Pub. 4192 (Exhibit US-1) at 32-33.

⁶¹¹ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶¹² USITC Pub. 4192 (Exhibit US-1) at 34-35. *See also* Unisource affidavit (Exhibit US-2). The Unisource affidavit noted, in particular, that APP’s price to Unisource was significantly below that of NewPage, and that APP offered to adjust its price even lower to facilitate its desired significant increase of sales to Unisource. Unisource affidavit (Exhibit US-2) at paras 3-4.

⁶¹³ USITC Pub. 4192 (Exhibit US-1) at 34-35.

⁶¹⁴ Indonesia’s FWS, para. 126.

subject imports could adversely affect domestic prices only by capturing market share. As the Commission explained, however, “subject imports will put pressure on domestic producers to lower prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share.”⁶¹⁵ In other words, to the extent that domestic producers are able to maintain their market share, it will be by lowering their prices to meet low-priced subject import competition. Indeed, the Commission found evidence that subject imports depressed domestic prices to some extent between 2008 and 2009 without taking any market share from the domestic industry.⁶¹⁶ This evidence consisted of the correlation between subject import and domestic price movements, testimony from domestic producers that they lowered prices to compete with subject imports, and the questionnaire responses of numerous purchasers reporting that domestic producers had lowered their prices to meet subject import prices.⁶¹⁷ These facts supported the Commission’s finding that continued subject import underselling would likely force domestic producers to lower their prices to defend their sales and market share. Given this, and the changes in circumstances discussed above, the Commission had ample factual support for its finding that the significant subject import underselling that was likely, as subject producers sought to recapture the 12.8 percentage points of market share that was lost to domestic producers and nonsubject imports in interim 2010, would likely depress domestic prices to a significant degree.

285. Finally, Indonesia is mistaken that the Commission made a finding that subject imports were likely to suppress domestic prices – i.e., prevent their increase – in the imminent future, which it failed to explain.⁶¹⁸ In actuality, the Commission found that “subject imports are likely to enter the U.S. market imminently at prices that will have a significant *depressing* effect” – i.e., a lowering effect – “on domestic prices for certain coated paper,” for the reasons discussed above.⁶¹⁹ Although the Commission subsequently made reference to “significant price depression or suppression,”⁶²⁰ the Commission did so to couch its likely-price-effects finding in terms of the U.S. statute, which requires the Commission to consider “whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports.”⁶²¹ The Commission takes this approach in every affirmative threat determination to make clear that it has considered this statutory threat factor and concluded that subject imports were likely to have “a significant depressing or suppressing effect on domestic prices.” From the Commission’s actual analysis in this case, however, it is clear that the likely adverse price effect found by the Commission was price depression and not price suppression.

⁶¹⁵ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶¹⁶ USITC Pub. 4192 (Exhibit US-1) at 22, 33.

⁶¹⁷ USITC Pub. 4192 (Exhibit US-1) at 32.

⁶¹⁸ Indonesia’s FWS, para. 127.

⁶¹⁹ USITC Pub. 4192 (Exhibit US-1) at 35. (Emphasis added).

⁶²⁰ See USITC Pub. 4192 (Exhibit US-1) at 35, 39.

⁶²¹ 19 U.S.C. § 1677(7)(F)(i)(IV) (emphasis added) (Exhibit US-12).

286. For all the foregoing reasons, the Commission provided ample evidentiary support for its finding that subject imports were likely to depress or suppress domestic prices to a significant degree.⁶²² The Panel should therefore reject Indonesia’s challenge to the finding.

C. The Commission Properly Established a Causal Link Between Subject Imports and the Threat of Material Injury to the Domestic Industry, Consistent with ADA Article 3.5 and SCMA article 15.5

1. The Non-Attribution Requirement

287. Indonesia limits its challenge to the Commission’s analysis of the causal link between subject imports and the threat of material injury to the domestic industry to the non-attribution requirements under Article 3.5 of the ADA and Article 15.5 of the SCM Agreement. Article 3.5 of the Antidumping Agreement states in relevant part:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. . . . The authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

A similar provision in Article 15.5 of the SCM Agreement applies to subsidized imports.

288. The purpose of the non-attribution requirements is to ensure the existence of an unsevered causal link between the dumped or subsidized imports and the injury to the domestic industry. As the Appellate Body explained in *EC-Pipe*:

This [non-attribution requirement] obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, “causing injury” to the domestic industry.⁶²³

⁶²² There is no requirement under the ADA and SCM Agreements that investigating authorities find both likely significant price depression and likely significant price suppression by reason of subject imports in making an affirmative threat determination. ADA Article 3.7(iii) requires investigating authorities to “consider, inter alia, such factors as . . . whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.” (Emphasis added.) SCMA article 15.7(iv) is identical. The word “or” between the terms “depressing” and “suppressing” in these articles makes clear that investigating authorities may find that subject imports are likely to have either a significant price depressing effect or a significant price suppressing effect on domestic prices, but need not find a likelihood of both effects. Accordingly, the Commission’s finding that subject imports would likely depress domestic prices to a significant degree was sufficient to support its affirmative threat determination.

⁶²³ *EC – Pipe (AB)*, para. 188.

In other words, an investigating authority’s non-attribution analysis ensures that dumped and subsidized imports are causing material injury to the domestic industry, and that the injury attributed to subject imports is not in fact caused by other known factors.

289. Neither Article 3.5 of the ADA nor Article 15.5 of the SCM Agreement require investigating authorities to utilize any particular methodology in examining other known causal factors. As the Appellate Body put it in *United States – Hot-Rolled Steel* “the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*.”⁶²⁴ In *EC-Pipe*, moreover, the Appellate Body explained that:

We underscored in *US-Hot-Rolled Steel* . . . that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the “causal relationship” between dumped imports and injury.⁶²⁵

Accordingly, in finding the Commission’s non-attribution methodology WTO-consistent, the panel in *U.S. – DRAMS* recognized “that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.”⁶²⁶ There is no requirement under the ADA or SCMA that investigating authorities utilize “an elementary economic construct or model to approximate the actual effects of” other known causal factors, as Indonesia mistakenly contends.⁶²⁷ Rather, investigating authorities have discretion to establish their own methodologies to examine other known causal factors and ensure that any injurious effects caused by those factors are not attributed to the dumped or subsidized imports.⁶²⁸

290. In *U.S. – DRAMS*, the Commission’s non-attribution methodology “demonstrated that subsidized imports had their own injurious effects, independent from the injurious effects of other factors.”⁶²⁹ Addressing the Commission’s analysis of nonsubject imports as another known causal factor, the Panel found this methodology consistent with the non-attribution requirement under SCMA article 15.5:

⁶²⁴ *US – Hot-Rolled Steel (AB)*, para. 223-24.

⁶²⁵ *EC-Pipe (AB)*, para. 189 (citing *US-Hot-Rolled Steel (AB)*), para. 224.

⁶²⁶ *US – Countervailing Duty Investigation on DRAMs (Panel)*, para. 7.353.

⁶²⁷ Indonesia’s FWS, para. 115.

⁶²⁸ See, e.g., *EC-Pipe (AB)*, paras. 177, 178, and 193 (Appellate Body’s description of the EC’s methodology, which is similar to that employed by the Commission in this proceeding, found consistent with obligations under the covered Agreements.).

⁶²⁹ *US – Countervailing Duty Investigation on DRAMs (Panel)*, para. 7.354.

[W]e note that the ITC found that the “primary negative impact” on the domestic industry resulted from lower prices . . . By ascertaining that the price underselling frequency by non-subject imports was lower than, and increased less than, the underselling frequency of alleged subsidized imports between 2000 and 2002, and that the injurious price effects of non-subject imports were less pronounced than their absolute and relative volumes might otherwise indicate, the ITC effectively separated and distinguished the injurious price effects of alleged subsidized imports from the injurious price effects of the larger volume of non-subject imports. In other words, the ITC demonstrated that alleged subsidized imports had injurious price effects independent of those of the larger volume of non-subject imports. Given that there is no obligation under Article 15.5 to quantify the amount of injury caused by alleged subsidized and nonsubject imports respectively, the ITC has done all that it was required to do.⁶³⁰

As discussed below, the Commission’s non-attribution methodology in this case was identical to its non-attribution methodology in *U.S. – DRAMS*, and thus no less consistent with ADA Article 3.5 and SCMA article 15.5.

2. The Commission’s Vulnerability Analysis Did Not Attribute Injury from Other Known Factors to Subject Imports

291. In challenging the Commission’s non-attribution analysis, Indonesia argues that the Commission somehow attributed injury caused by declining demand and expiration of the black liquor tax credit to subject imports by finding that both factors had contributed to the vulnerability of the domestic industry to material injury at the end of the period of investigation.⁶³¹ Through its vulnerability analysis, the Commission considers whether the condition of a domestic industry at the end of the period of investigation makes it more or less susceptible to material injury in the imminent future. Contrary to Indonesia’s argument, the Commission’s consideration of the domestic industry’s vulnerability was not part of its non-attribution analysis, but rather a prelude to its threat analysis. In *Egypt—Steel Rebar*, the Panel

⁶³⁰ *US – Countervailing Duty Investigation on DRAMs (Panel)*, para. 7.360. Indonesia suggests that the Commission’s analysis must have been insufficient due to a statement in an introductory section of the determination on domestic law standards that “The Commission must examine factors other than subject imports to ensure that it is not attributing injury from other factors to the subject imports, thereby inflating an otherwise tangential cause of injury into one that satisfies the material injury threshold,” but that in so doing, the Commission need not “isolate” the injury caused by other factors from injury caused by subject imports. Indonesia’s FWS, para. 120 (citing USITC Pub. 4192 (Exhibit US-1) at 38). As discussed above, there is no “isolation” requirement separate from the need to distinguish injury caused or threatened by subject imports from that caused by other sources, so as to ensure that subject imports are in fact causing injury. And regardless of how the Commission framed a domestic legal requirement, it did separate and distinguish (“isolate” in the sense the word was used by the Appellate Body in *US – Hot Rolled Steel* (para. 226)) the likely effects of subject imports from other known factors. The Commission’s use – in a section of its determination far separated from its other-factors analysis – of the term “isolate” was, moreover, in context fully consistent with what the Appellate Body has said about consideration of other factors, the effects of which need not be ascertained, or compared with the effects of subject imports, with perfect precision.

⁶³¹ Indonesia’s FWS, paras. 108-109.

recognized that investigating authorities could not conduct a threat analysis without first assessing the present condition of a domestic industry:

Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits, and other indicators are low and/or declining.⁶³²

In other words, an investigating authority's finding that an industry is vulnerable to material injury would reduce the magnitude of the change in circumstances necessary to cause the industry to experience present material injury in the imminent future. For the reasons cited by the panel in *Egypt—Steel Rebar*, the Commission has traditionally considered the vulnerability of the domestic industry when threat is an issue.

292. In this case, the Commission had ample factual support for its finding that “the industry is vulnerable to material injury,”⁶³³ and Indonesia does not claim otherwise. Specifically, the Commission found that the industry had experienced double-digit percentage declines in many indicators from 2007 to 2009, including production, shipments, capacity utilization, net sales, production workers, and capital expenditures.⁶³⁴ Operating income fell from \$144.0 million in 2007 to \$95.1 million in 2008 and then to \$61.8 million in 2009.⁶³⁵ The Commission observed that 2009 financial performance would have been worse but for the black liquor tax credit.⁶³⁶ Even as demand increased and subject imports left the market in interim 2010, the Commission noted, the domestic industry's ratio of COGS to net sales increased and its number of production workers and operating income declined relative to interim 2009.⁶³⁷ Based on these facts, the Commission concluded that the domestic industry was vulnerable to material injury, and reasonably weighed the industry's dire condition “heavily” in its “consideration of the impact of subject imports in the imminent future.”⁶³⁸

293. Contrary to Indonesia's argument, in recognizing that declining demand and expiration of the black liquor tax credit contributed to the domestic industry's vulnerability, the Commission made clear that it was in no way attributing their effects to subject imports. As the Commission

⁶³² *Egypt – Steel Rebar*, para. 7.91.

⁶³³ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶³⁴ *See* USITC Pub. 4192 (Exhibit US-1) at 38; *see also id.* at 35-37.

⁶³⁵ USITC Pub. 4192 (Exhibit US-1) at 37.

⁶³⁶ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶³⁷ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶³⁸ USITC Pub. 4192 (Exhibit US-1) at 38.

explained, “[t]he deterioration in almost all of the domestic industry’s performance indicators between 2007 and 2009 coincided with the economic downturn and a sharp decline in demand for CCP.”⁶³⁹ The Commission also found that expiration of the black liquor tax credit in 2009 meant that “any benefit that the domestic industry received from it in 2009 will not continue into the imminent future.”⁶⁴⁰ In other words, going forward, the black liquor tax credit would not exist, and would therefore have no effect on the domestic industry’s performance, positive or negative.⁶⁴¹ The Commission cited both factors merely to establish the baseline condition of the domestic industry for purposes of the threat analysis that followed. Nowhere in the Commission’s analysis of vulnerability did the Commission mention subject imports, much less attribute the vulnerability stemming from depressed demand and expiration of the black liquor tax credit to subject imports. As discussed below, it was in the next step of the Commission’s analysis, considering whether the domestic industry was threatened with material injury by reason of subject imports, that the Commission considered other known causal factors and ensured that any injury caused by such factors was not attributed to subject imports.

3. The Commission’s Non-Attribution Analysis Complied with Article 3.5 of the ADA and Article 15.5 of the SCM Agreement

294. The Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports, consistent with ADA Article 3.5 and SCMA article 15.5, by demonstrating that subject imports had injurious effects independent of those factors. Indeed, Indonesia does not directly challenge the Commission’s demonstration of a causal link between subject imports and the imminent threat of material injury to the domestic industry under ADA Article 3.5 and SCMA article 15.5, but rather limits its claims under those articles to the non-attribution requirement.⁶⁴² Yet, as the Panel recognized in *China – HP-SSST*, “[b]efore it becomes relevant or necessary for an investigating authority to separate and distinguish the injury caused by other factors from the injury caused by subject imports, the investigating authority must first properly establish that the dumped imports have caused material injury”⁶⁴³ By first demonstrating a strong causal link between subject imports and the threat of material injury to the domestic industry, and then explaining how other known causal factors did not detract from the link, the Commission demonstrated that subject

⁶³⁹ USITC Pub. 4192 (Exhibit US-1) at 37.

⁶⁴⁰ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶⁴¹ While recognizing 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,” the Commission also found that the black liquor tax credit “likely placed negative pressure on domestic prices during the period of investigation.” USITC Pub. 4192 (Exhibit US-1) at 34. The Commission found that it did so by “spur[ing] 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.” *Id.* at 33. Indonesia itself recognizes that the black liquor tax credit contributed to the depression of domestic prices in 2009. *See* Indonesia’s FWS, para. 106. Whether the net effect of the black liquor tax credit on the domestic industry was positive or negative, the effect was limited to 2009, which was the only year that domestic producers applied for and received tax credits under the program. *Id.* at 25.

⁶⁴² *See* Indonesia’s FWS, paras. 99-121.

⁶⁴³ *China – HP-SSST (Panel)*, para. 7.201.

imports had injurious effects independent of those factors, in satisfaction of the non-attribution requirement.

295. In demonstrating a causal link between subject imports and the threat of material injury, the Commission expressly drew upon its findings that the domestic industry was vulnerable, that subject import volume and market share was likely to increase significantly, and that significant subject import underselling was likely to depress domestic prices to a significant degree. As the Commission explained, subject producers had significantly undersold the domestic like product to increase their exports to the United States significantly during the period of investigation, despite declining demand.⁶⁴⁴ The Commission found it likely that such behavior would continue in the imminent future due to the significant new capacity in China, APP's establishment of Eagle Rock in 2009, and the attractiveness of the U.S. market.⁶⁴⁵ Indeed, the record showed that APP's and other producers' Chinese capacity was projected to increase by at least 1.5 million short tons through 2011, that APP had established Eagle Ridge to further its stated intention of doubling exports to the United States using low prices, and that prices in the U.S. market were \$100 per short ton higher than in Asian markets.⁶⁴⁶

296. Noting that demand was projected to decline 3.3 percent in 2011 and 2.5 percent in 2012, the Commission reasoned that the likely significant increase in subject import volume in the imminent future would necessarily take sales from current suppliers such as the domestic industry, rather than satisfy additional demand.⁶⁴⁷ In this regard, the Commission explained that subject Indonesian and Chinese producers were likely to use aggressive underselling in an effort to recoup the 12.8 percentage points of market share lost to domestic producers and nonsubject imports in interim 2010, thereby pressuring domestic producers to lower their prices to compete.⁶⁴⁸

297. Given the domestic industry's vulnerable condition, the Commission concluded that the likely significant increase in low-priced subject imports in the imminent future would have a significant adverse impact on the domestic industry, in terms of lower employment levels, net sales, operating income, and profitability.⁶⁴⁹ Through these findings, and the others discussed above, the Commission demonstrated a strong causal link between subject imports and the threat of imminent material injury to the domestic industry, consistent with ADA Article 3.5 and SCMA article 15.5.

298. The Commission next examined other known causal factors, specifically declining demand and nonsubject imports, and explained that subject imports had injurious effects

⁶⁴⁴ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶⁴⁵ USITC Pub. 4192 (Exhibit US-1) at 28-29 & n.188; Petitioners' Posthearing Brief, Exhibit 1 (Exhibit US-2).

⁶⁴⁶ *See* USITC Pub. 4192 (Exhibit US-1) at 28-29 & n.188.

⁶⁴⁷ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶⁴⁸ USITC Pub. 4192 (Exhibit US-1) at 34-35.

⁶⁴⁹ USITC Pub. 4192 (Exhibit US-1) at 38.

independent of the factors. Specifically, the Commission found that the modest decline in apparent U.S. consumption between 2010 and 2011 projected by RISI, 3.3 percent, would likely limit domestic producer sales opportunities and restrain potential price increases to some degree, but would not render insignificant the likely effects of subject imports.⁶⁵⁰ In drawing this conclusion, the Commission necessarily relied upon its analysis of demand projections and the likely volumes and prices of subject imports found in preceding sections of the determination. As the Commission explained in its likely volume analysis, depressed demand in the United States was unlikely to discourage subject producers from significantly increasing their penetration of the U.S. market in the imminent future, given their aggressive pursuit of market share gains during the period of investigation and the attractiveness of the U.S. market.⁶⁵¹

299. In its likely price effects analysis, the Commission explained that “sluggish demand will likely restrain price recovery to some degree, [but] there are no projections of a sharp falloff in consumption similar to the one in 2009,” when the CCP demand declined 14.7 percent.⁶⁵² While finding evidence that subject imports depressed domestic prices in 2009, the Commission found that significantly depressed demand and the black liquor tax credit, which had depressed domestic prices at the same time, obscured the contribution of subject imports to price depression.⁶⁵³ Based on two changes in circumstances, namely the moderation of declining demand and expiration of the black liquor tax credit, the Commission found that the significant increase in aggressively-priced subject imports would be a key driver of domestic prices in the imminent future, likely depressing domestic prices to a significant degree.⁶⁵⁴

300. The Commission also explained that the moderate decline in demand projected for 2011 and 2012 would likely exacerbate the adverse impact of subject imports on the domestic industry in the imminent future. Due to the moderately declining demand that was projected, the Commission found that the U.S. market could not accommodate the likely significant increase in subject import volume without inflicting material injury on the domestic industry.⁶⁵⁵ Because the likely increase in subject import volume would not satisfy increased demand, the Commission reasoned, the increase would necessarily take sales from current suppliers, including domestic producers.⁶⁵⁶ Based on all of these findings, the Commission demonstrated that subject imports would have adverse effects on the domestic industry independent of the moderate decline in demand that was projected, and therefore complied with the non-attribution requirement under ADA Article 3.5 and SCMA article 15.5.

301. The Commission also demonstrated that subject imports had injurious effects on the domestic industry independent of nonsubject imports. Indeed, the Commission identified no

⁶⁵⁰ USITC Pub. 4192 (Exhibit US-1) at 38-39.

⁶⁵¹ USITC Pub. 4192 (Exhibit US-1) at 29.

⁶⁵² USITC Pub. 4192 (Exhibit US-1) at 34.

⁶⁵³ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶⁵⁴ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶⁵⁵ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶⁵⁶ USITC Pub. 4192 (Exhibit US-1) at 38.

injurious effects caused by nonsubject imports during the period of investigation. As the Commission explained, nonsubject import market share declined from 25.4 percent in 2007 to 16.1 percent in 2009, as both subject imports and the domestic industry gained market share from nonsubject imports.⁶⁵⁷ Although nonsubject imports gained 6.0 percentage points of market share from subject imports during the interim period, due to the pendency of the investigation, this did not prevent the domestic industry from also gaining 6.8 percentage points of market share from subject imports.⁶⁵⁸ The Commission also observed that nonsubject imports were generally priced higher than subject imports, overselling subject imports in 41 of 59 quarterly price comparisons and selling for a consistently higher average unit value than subject imports.⁶⁵⁹ Absent relief, the Commission found, subject imports were likely to compete on price to recoup the market share lost to both the domestic industry and nonsubject imports in interim 2010, resulting in a more price-competitive market.⁶⁶⁰ Based on all of these considerations, the Commission concluded that the likely effects of nonsubject imports on the domestic industry were not of a magnitude that would render insignificant the likely effects of subject imports.⁶⁶¹

302. By demonstrating that subject imports had their own injurious effects, independent from the likely modest effects of the moderate decline in demand that was projected and from nonsubject imports, the Commission complied fully with the non-attribution requirement under ADA Article 3.5 and SCMA article 15.5.

4. The Indonesia Has Failed to Show that the Commission Did Not Act Consistently with ADA Article 3.5 and SCMA Article 15.5

303. Indonesia argues that the Commission’s non-attribution analysis was inconsistent with ADA Article 3.5 and SCMA article 15.5 because the analysis was insufficiently “concrete” and did not “isolate” the precise injurious effects that were likely from declining demand and nonsubject imports.⁶⁶² Contrary to Indonesia’s argument, however, the Agreements do not prescribe any particular degree of “concreteness” or require investigating authorities to “isolate” the injurious effects of other causal factors with precision.

304. In both *U.S. – Hot-Rolled Steel* and *EC – Pipe*, the Appellate Body stressed that investigating authorities are “free to choose the methodology [they] will use in examining the ‘causal relationship’ between dumped imports and injury.”⁶⁶³ Based on these Appellate Body findings, the panel in *U.S. – DRAMS* recognized “that the ITC was not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of

⁶⁵⁷ USITC Pub. 4192 (Exhibit US-1) at 22, 39.

⁶⁵⁸ USITC Pub. 4192 (Exhibit US-1) at 22, 39.

⁶⁵⁹ USITC Pub. 4192 (Exhibit US-1) at 39.

⁶⁶⁰ USITC Pub. 4192 (Exhibit US-1) at 39.

⁶⁶¹ USITC Pub. 4192 (Exhibit US-1) at 39.

⁶⁶² Indonesia’s FWS, paras. 116, 120.

⁶⁶³ *EC-Pipe (AB)*, para. 189 (citing *US-Hot-Rolled Steel (AB)*, para. 224).

the alleged subsidized imports,” but need only “demonstrate that subsidized imports had their own injurious effects, independent from the injurious effects of other factors.”⁶⁶⁴ The Panel in *EC – Countervailing Measures on DRAM Chips* reached the same conclusion, recognizing that SCMA article 15.5 requires only “a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports,” notwithstanding that Panel’s preference that investigating authorities “quantify the impact of other known factors . . . using elementary economic constructs or models.”⁶⁶⁵ There is simply no requirement in the WTO Agreements to use “an elementary economic construct or model to approximate the actual effects of”⁶⁶⁶ other factors on domestic industry. The Panel in *U.S. – DRAMs* found the Commission’s non-attribution analysis consistent with SCMA article 15.5, and the Commission utilized the same methodology in this case. By demonstrating that subject imports had their own injurious effects, independent from the injurious effects of declining demand and nonsubject imports, the Commission in the current case did all that was required under ADA Article 3.5 and SCMA article 15.5.

305. Apart from failing to recognize that the Commission’s non-attribution methodology was WTO-consistent, Indonesia predicates its argument that the Commission’s analysis of the projected decline in demand was insufficiently “concrete” on the misapprehension that the analysis consisted of a few sentences in the impact section of the Commission’s determination.⁶⁶⁷ As is clear from the summary of the Commission’s determination and discussion in the preceding section above, however, the Commission’s analysis distinguishing the effects of subject imports from the effects of the projected decline in demand and nonsubject imports spanned the volume, price, and impact sections of the determination. In describing the likely effects of subject imports, the Commission thoroughly explained that the likely significant increase in subject import volume into a declining market, coupled with the likely significant subject import underselling, would cause material injury to the domestic industry in the imminent future, given the industry’s vulnerable condition. In distinguishing these effects from the likely effects of the projected decline in demand, the Commission explained that the 3.3 percent decline in demand projected for 2011 would likely restrain price recovery to some degree but would not prevent the likely significant increase in aggressively-priced subject imports from being a key driver of domestic prices in the imminent future, in the way that the 14.7 percent decline in demand had obscured the price depressing effects of subject imports in 2009.⁶⁶⁸ The Commission therefore concluded that the projected demand decline was not of a magnitude that would render insignificant the likely injurious effects of subject imports.⁶⁶⁹ Through these findings, and others discussed above – including the Commission’s finding concerning the price-depressing effect of subject imports⁶⁷⁰ and its findings concerning the incentives and intentions

⁶⁶⁴ *US – Countervailing Duty Investigation on DRAMs (Panel)*, para. 7.353-54.

⁶⁶⁵ *US – Countervailing Duty Investigation on DRAMs (Panel)*, para. 7.405.

⁶⁶⁶ Indonesia’s FWS, para. 115.

⁶⁶⁷ Indonesia’s FWS, para. 116.

⁶⁶⁸ USITC Pub. 4192 (Exhibit US-1) at 34, 39.

⁶⁶⁹ USITC Pub. 4192 (Exhibit US-1) at 39.

⁶⁷⁰ USITC Pub. 4192 (Exhibit US-1) at 32.

of subject producers with respect to the U.S. market⁶⁷¹ – the Commission demonstrated that subject imports would likely have their own injurious effects, independent from the likely modest effects of declining demand and nonsubject imports, in accordance with the non-attribution requirement under ADA Article 3.5 and SCMA article 15.5.

306. Similarly unpersuasive is Indonesia’s claim that the Commission somehow breached the non-attribution requirement by failing to reconcile its finding that the likely increase in subject imports would take sales from the domestic industry with its alleged recognition that subject imports increased solely at the expense of nonsubject imports during the period of investigation.⁶⁷² As an initial matter, the Commission did not find that subject imports increased solely at the expense of nonsubject imports during the POI, as Indonesia mistakenly claims. On the contrary, the Commission observed that the significant increase in subject import volume between 2007 and 2009 coincided with a decline in the domestic industry’s U.S. shipments.⁶⁷³ Accordingly, there is no inconsistency between the Commission’s analysis of the increase in subject import volume during the POI and its finding that the likely increase in subject import volume would take sales from the domestic industry.

307. The more fundamental problem with Indonesia’s argument is that it is unrelated to the non-attribution requirement under ADA Article 3.5 and SCMA article 15.5. Indonesia does not claim that nonsubject imports are a “known factor[] other than the dumped imports which at the same time are injuring the domestic industry” within the meaning of those articles. On the contrary, Indonesia claims that nonsubject imports would have benefitted the domestic industry by serving as a buffer between the industry and the likely increase in subject import volume, which in Indonesia’s view would have taken sales only from nonsubject imports.⁶⁷⁴ Having made no argument that nonsubject imports would injure the domestic industry in any way, Indonesia fails to make a *prima facie* case that the Commission attributed injury from nonsubject imports to subject imports in breach of the non-attribution requirement.

308. Furthermore, as discussed in section II.B.2.a. above, the Commission thoroughly explained its finding that the likely significant increase in subject imports would take sales from the domestic industry in the imminent future, and supported the finding with facts. In particular, the Commission explained that the likely significant increase in subject imports would necessarily come at the expense of current suppliers in light of the moderate decline in demand projected for 2011.⁶⁷⁵ The Commission also explained that subject imports would likely take sales from the domestic industry, and not just nonsubject imports, because 6.8 percentage points of the 12.8 percentage points of market share lost by subject imports in interim 2010 were lost to the domestic industry, and subject producers were likely to use low prices in an effort to recoup

⁶⁷¹ USITC Pub. 4192 (Exhibit US-1) at 28-29, 34; *see also* Unisource affidavit (Exhibit US-2).

⁶⁷² Indonesia’s FWS, paras. 110, 117.

⁶⁷³ USITC Pub. 4192 (Exhibit US-1) at 26-27.

⁶⁷⁴ Indonesia’s FWS, paras. 110, 117.

⁶⁷⁵ USITC Pub. 4192 (Exhibit US-1) at 38; Petitioner’s Posthearing Brief, Question 3 to Commissioner Pinkert, Exhibit 1 (Exhibit US-4).

this market share in the imminent future.⁶⁷⁶ These and other facts supported the Commission’s conclusion that the likely significant increase in subject imports would take sales from current suppliers such as the domestic industry,⁶⁷⁷ consistent with ADA Article 3.7 and SCMA article 15.7.

309. Finally, Indonesia is mistaken that the Commission somehow attributed injurious effects of the black liquor tax credit’s expiration in 2009 to subject imports by “not attempting to estimate what price effects expiration of the credit is likely to have” or its likely impact on the domestic industry.⁶⁷⁸ Having expired in 2009, the black liquor tax credit was no longer a “known factor” that was “injuring the domestic industry at the same time as the dumped imports” in the imminent future for purposes of the Commission’s non-attribution analysis under ADA Article 3.5 and SCMA article 15.5. Contrary to what Indonesia asserts,⁶⁷⁹ moreover, the Commission did not take the position that expiration of the credit would have the effect of lowering prices – a conclusion that would have been inconsistent with the conclusion that the credit itself lowered prices for a key input in CCP.⁶⁸⁰ Rather, the Commission logically concluded that the credit would not have a price-lowering effect going forward because it was unlikely to be renewed.⁶⁸¹ During the investigations, respondents did not argue that expiration of the black liquor tax would likely injure the domestic industry in the imminent future, or even make the industry vulnerable to material injury.⁶⁸² As the Appellate Body recognized in *EC—Pipe*, “once . . . [a] factor claimed . . . to be ‘injuring the domestic industry’ had effectively been found *not* to exist . . . there was no ‘factor’ for the [investigating authority] to ‘examine’ further pursuant to Article 3.5.”⁶⁸³

⁶⁷⁶ USITC Pub. 4192 (Exhibit US-1) at 39.

⁶⁷⁷ USITC Pub. 4192 (Exhibit US-1) at 38.

⁶⁷⁸ Indonesia’s FWS, para. 114-15.

⁶⁷⁹ Indonesia’s FWS, para. 114.

⁶⁸⁰ USITC Pub. 4192 (Exhibit US-1) at 33-34.

⁶⁸¹ USITC Pub. 4192 (Exhibit US-1) at 34.

⁶⁸² See APP’s Prehearing Brief at 110-64 (Exhibit US-13); APP’s Posthearing Brief at 12-15 (arguing “[n]or is the domestic industry vulnerable in 2010,” among other things) (Exhibit US-14); APP’s Final Comments at 20 (Exhibit US-15). Such a contention would have made little sense. As the temporary credit was in existence for less than three years and was used by domestic producers only in one, its expiration would not constitute a source of injury but logically, the removal of a temporary external factor that briefly obscured the industry’s performance. USITC Pub. 4192 (Exhibit US-1) at 25. The Commission sensibly considered the credit in this manner. USITC Pub. 4192 (Exhibit US-1) at 33-34. Moreover, removal of the credit could not logically have been a source of injury through price depression. Respondents argued that the credit’s *existence* during the POI was a cause of lower prices. USITC Pub. 4192 (Exhibit US-1) at 25 (*citing* APP’s Prehearing Brief (Exhibit US-13) at 49-53). The Commission agreed that the credit did contribute to lower prices for fiber/pulp, an input in CCP. USITC Pub. 4192 (Exhibit US-1) at 33. If the credit lowered prices, then its removal would cause an increase in prices, which would not be a source of potential injury.

⁶⁸³ *EC – Pipe (AB)*, para. 178.

D. The Commission Complied With the Special Care Requirements Under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement.

310. Indonesia’s argument that the Commission’s threat analysis was inconsistent with the special care requirement under ADA Article 3.8 and SCMA article 15.8 is purely derivative of its specific claims that certain aspects of the Commission’s analysis were inconsistent with ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7.⁶⁸⁴ In other words, Indonesia argues that each aspect of the Commission’s threat analysis that it alleges to be inconsistent with those specific obligations should also, for the same reasons, be found inconsistent with the special care requirement. In *U.S. – Softwood Lumber VI*, the Panel recognized that violations of the special care requirements will generally result from violations of the more specific obligations under ADA Article 3.7 and SCMA article 15.7:

The Agreements require, as noted above, an objective evaluation based on positive evidence in making any injury determination, including one based on threat of material injury. . . . It is not clear to us what the parameters of such “special care” in the context of an objective evaluation based on positive evidence would be. 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.⁶⁸⁵

In this dispute, Indonesia has made no independent argument that the Commission breached the special care requirements beyond its arguments in support of the specific breaches.⁶⁸⁶

311. Accordingly, for the same reasons that Indonesia fails to establish a *prima facie* case that the Commission violated ADA Articles 3.5 and 3.7 and SCMA articles 15.5 and 15.7, discussed above, Indonesia fails to make a *prima facie* case that the Commission breached the special care requirement under ADA Article 3.8 and SCMA Article 15.8. Above, the United States explained that the Commission complied with ADA Article 3.7 and SCMA Article 15.7 by

⁶⁸⁴ See Indonesia’s FWS, para. 131-32.

⁶⁸⁵ *US – Softwood Lumber VI (Panel)*, para. 7.34.

⁶⁸⁶ See Indonesia’s FWS, paras. 131-32. Indonesia’s argument that the Commission somehow breached the special care requirement by failing to reconcile its negative injury determination with its affirmative threat determination is nothing more than a recapitulation of its arguments in support of the specific violations. See *id.* at para. 132. Moreover, to the extent that Indonesia is suggesting that a determination’s analysis of threat of injury must necessarily be longer or more detailed than any analysis of present injury contained in the same determination, or may not build upon analysis previously undertaken in consideration of present injury, there is nothing in ADA Article 3.8 or SCMA Article 15.8 to support such a position. These articles simply require “special care” in connection with threat determinations, not any particular relationship between a determination’s threat analysis and analysis of any other issue.

basing its analysis of likely volume and likely price effects on myriad facts, as well as several clearly foreseen and imminent changes in circumstances. The United States explained that the Commission complied with the non-attribution requirement under ADA Article 3.5 and SCMA article 15.5 by demonstrating that subject imports had their own adverse effects on the domestic industry, independent of the adverse effects caused by declining demand and nonsubject imports. The United States has further explained why there is no merit to Indonesia’s various arguments in support of its allegations that the Commission breached Articles 3.5/15.5 and 3.7/15.7. Having complied with these obligations in a thorough and heavily footnoted determination, the Commission clearly exercised the degree of special care contemplated by ADA Article 3.8 and SCMA article 15.8.

VII. The Tie Vote Provision of the U.S. Statute Is Not Inconsistent, As Such, with Article 3.8 of the ADA and Article 15.8 of the SCM Agreement

312. Articles 3 of the ADA and 15 of the SCMA set out substantive obligations that the decision-maker must abide by in conducting the injury analysis. Nothing in these provisions curbs the discretion of an individual Member regarding its framework for assigning these responsibilities and for counting votes.

313. There is accordingly no merit to Indonesia’s claim that the “tie vote” provision of the U.S. statute, 19 U.S.C. § 1677(11)(B), conflicts with the obligation under Article 3.8 of the ADA and Article 15.8 of the SCMA that investigating authorities consider and decide threat of injury with “special care.” The tie vote provision is concerned solely with the treatment of tie votes by the U.S. International Trade Commission, where half of the participating Commissioners vote in the affirmative and half vote in the negative. This is strictly a matter of internal decision making, and the Appellate Body in *U.S. – Line Pipe* made clear that the internal decision making process of a Member is entirely within the discretion of that Member.⁶⁸⁷ The obligation to take “special care” concerns an investigating authority’s substantive analysis of the threat factors and other requirements for making affirmative threat determinations under the ADA and SCMA, as set forth in the resulting public notice explaining the determinations. Those Commissioners voting in the affirmative based on threat will have already exercised special care in considering and deciding the matter, irrespective of the tie vote provision.

A. The Tie Vote Provision Concerns the Internal-Decision Making Procedure of the United States, which the AD and SCM Agreements Leave to the Discretion of Individual Members

1. The Tie Vote Provision Concerns the Internal Decision-Making Procedure of the United States

314. The tie vote provision of U.S. law, titled “Affirmative determinations by divided Commission,” provides that tie votes by the Commission be treated as affirmative determinations:

⁶⁸⁷ *US – Line Pipe (AB)*, para. 158.

If the Commissioners voting on a determination by the Commission, including a determination under section 1675 of this title [concerning sunset and changed circumstances reviews], are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is—

- (A) Material injury to an industry in the United States,
- (B) Threat of material injury to such an industry, or
- (C) Material retardation of the establishment of an industry in the United States,

By reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.

The Commission, which is the investigating authority responsible for making injury determinations under U.S. law, is composed of up to six Commissioners, each nominated by the President of the United States and confirmed by a majority vote of the U.S. Senate to a nine year term.⁶⁸⁸ No more than three Commissioners of the same political party (*i.e.*, Republican or Democrat) may serve on the Commission at the same time.⁶⁸⁹ Commissioners cannot be reappointed and cannot be removed from office by the President.⁶⁹⁰ The Commission's independence from the political branches of government and the Commissioners' long, fixed term of office help to ensure that injury determinations are unaffected by bias or political considerations.

315. In every investigation, each Commissioner is charged with examining all record evidence, considering party arguments, and rendering his or her own determination, which can be negative, affirmative on the basis of present material injury, affirmative on the basis of threat, or affirmative on the basis of material retardation. No matter the outcome, each Commissioner is obligated under established U.S. law and case precedent, to explain the basis for his or her factual findings and legal conclusions.⁶⁹¹

⁶⁸⁸ 19 U.S.C. §§ 1330(a) & (b) (Exhibit US-16). The Commission can be composed of fewer than six Commissioners if Commissioners who leave the Commission are not promptly replaced. *See id.* at § 1330(c)(6). In addition, fewer than six Commissioners may vote in a particular investigation if Commissioners recuse themselves or elect not to participate. *Id.*

⁶⁸⁹ 19 U.S.C. § 1330(a) (Exhibit US-16).

⁶⁹⁰ 19 U.S.C. § 1330 (Exhibit US-16).

⁶⁹¹ *See* 19 U.S.C. § 1677f(i) (Exhibit US-17); *Altx, Inc. v. United States*, 370 F.2d 1108, 1119-20 (Fed. Cir. 2004) (“In addition to containing the requirement that the Commission address all relevant arguments made by the parties, 19 U.S.C. § 1677f(i)(2)(B) instructs that the Commission's determination must include ‘the primary reasons for the determination’ and ‘considerations relevant to the determination of injury.’ If these statutory criteria are not met in a clearly discernible manner, the Court of International Trade properly may remand for necessary explanation.”) (Exhibit US-18).

316. The Commission’s practice is to hold a public vote in each of its injury investigations. At a pre-announced meeting held in the Commission’s main hearing room, and in the presence of anyone who wishes to attend, the Commission Secretary takes a roll call at which each Commissioner sequentially announces his or her vote, either negative or affirmative. After each Commissioner has announced his or her individual vote – based on his or her thorough analysis of the facts in the record – the Commission Secretary tallies the votes and announces whether the Commission’s determination is affirmative or negative. If there are an equal number of affirmative votes and negative votes, the statute instructs that the Commission determination will be deemed to be an affirmative determination.

317. The reasons for each Commissioner’s determination are detailed in the subsequent written opinion of the Commission, generally issued within a brief time after the vote. In determining whether an industry in the United States is threatened with material injury, the Commission is required to consider, among other relevant economic factors, at least nine considerations set out by statute.⁶⁹² These include all of the considerations set out in Article 3.7 of the ADA and 15.7 of the SCMA. U.S. law, like the ADA and SCMA, requires analysis of the considerations as a whole, with none individually being necessarily decisive.⁶⁹³ And like the ADA and SCMA, U.S. law prohibits determinations on the basis of conjecture or supposition.⁶⁹⁴

318. U.S. law also provides for domestic judicial review of all final Commission determinations, which includes affirmative determinations based on a finding of threat of material injury.⁶⁹⁵ An initial level of review can occur in the United States Court of International Trade⁶⁹⁶ – composed of independent, life-tenured judges⁶⁹⁷ – and a decision of the Court of International Trade can be appealed to a panel of the United States Court of Appeals for the Federal Circuit⁶⁹⁸ – again composed of independent, life-tenured judges.⁶⁹⁹ These procedures protect the rights of both petitioners and respondents against unsupported decisions by the Commission.

319. In sum, the tie vote provision addresses one procedural aspect of the way that decisions are made, not the substance or rationale of any decision, and U.S. decision-making procedures concerning the substantive outcome of determinations of threat of injury fully ensure fairness to both petitioners and respondents.

⁶⁹² 19 U.S.C. § 1677(7)(F) (Exhibit US-12).

⁶⁹³ 19 U.S.C. § 1677(7)(F)(ii) (Exhibit US-12); ADA Art. 3.7; SCMA Art. 15.7.

⁶⁹⁴ 19 U.S.C. § 1677(7)(F) (Exhibit US-12); ADA Art. 3.7; SCMA Art. 15.7.

⁶⁹⁵ 19 U.S.C. § 1516a(a) (Exhibit US-5); 28 U.S.C. § 1581(c) (Exhibit US-6).

⁶⁹⁶ 19 U.S.C. § 1516a(a) (Exhibit US-5); 28 U.S.C. § 1581(c) (Exhibit US-6).

⁶⁹⁷ 28 U.S.C. §§ 251-252 (Exhibit US-19).

⁶⁹⁸ 28 U.S.C. §§ 46, 1295 (Exhibits US-20 and US-21).

⁶⁹⁹ 28 U.S.C. § 44 (Exhibit US-22).

2. The ADA and SCMA Do Not Discipline the Internal Decision-Making Procedure that a Member uses to Assess Injury or Threat

320. As noted, the tie vote provision is concerned solely with the treatment of tie votes by the Commission, where half of the participating Commissioners vote in the affirmative and half vote in the negative. This is a matter of internal decision making. The WTO Agreement does not impose obligations on Members with respect to such internal decision making procedures, and the Appellate Body explicitly confirmed this in *U.S. – Line Pipe*. In particular, the Appellate Body found that the internal decision making process of a Member is entirely within the discretion of that Member, as an exercise of its sovereignty:

We note also that we are not concerned with how the competent authorities of WTO Members reach their determination in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or – as here – six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards.⁷⁰⁰

In that dispute, the Appellate Body reversed the panel’s finding that investigating authorities must issue discrete safeguard determinations based on either serious injury or threat of serious injury, holding that the Commission’s split affirmative determination in that case, with three Commissioners finding serious injury and two a threat of serious injury, was consistent with the Safeguards Agreement.⁷⁰¹

321. While the Appellate Body was considering the Safeguards Agreement in *U.S. – Line Pipe*, the same considerations apply to the AD and SCM Agreements, which are also silent on the internal decision-making process for rendering antidumping and countervailing duty determinations. Like the Safeguards Agreement, neither the ADA nor the SCMA require investigating authorities comprised of multiple decision-makers that decide injury investigations by vote, much less any particular approach to resolving issues arising from differences of opinion between individual members of a multi-member investigating authority, such as differences between whether injury is present or threatened or tie votes occurring when the authority has an even number of individual members. Both the ADA and SCMA leave the internal decision-making process to WTO Members, including the identification of what constitutes an affirmative determination under each Member’s laws, provided that the determination, “however it is decided domestically,” satisfies the requirements of the Agreements. The ADA and SCMA, like the Safeguards Agreement, instead prescribe

⁷⁰⁰ *US – Line Pipe (AB)*, para. 158.

⁷⁰¹ *US – Line Pipe (AB)*, paras. 2, 171.

substantive considerations to be examined when making determinations of injury or threat thereof.⁷⁰²

322. The “special care” provisions of each agreement, moreover, come at the end of articles – SCMA Article 15 and ADA Article 3 – both of which concern the necessary substantive considerations that must be taken into account when examining whether subject imports cause material injury or threat thereof 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.

323. 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

⁷⁰² Compare Safeguards Agreement, Art. 4.2, with SCMA Art. 15 and ADA Art. 3. For instance, ADA Article 3.1 provides for an examination based on positive evidence and an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products; Article 3.2 provides for consideration for whether there has been a significant increase in dumped imports and significant price undercutting by the dumped imports or whether the effect of such imports is otherwise to depress prices to a significant degree; Article 3.3 provides that investigating authorities may cumulatively assess the effects of imports from more than one country only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product; Article 3.4 provides that examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, and actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments; Article 3.5 provides that demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities, and that the authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports; Article 3.6 provides that effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers’ sales and profits, and that if such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided; and Article 3.7 provides that a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility, that the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent, and that in making a threat determination authorities consider such factors as a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation, sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports, whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports, and inventories of the product being investigated. The provisions of SCMA Article 15.1-15.7, are mutatis mutandis, essentially the same.

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*.⁷⁰³

324. 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.”⁷⁰⁴ 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.”⁷⁰⁵ 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.

325. In sum, the internal decision-making process of a WTO Member has nothing to do with whether the Member’s investigating authority has complied with the “special care” obligation under ADA Article 3.8 or SCMA article 15.8 in making a particular threat determination. Evidence that an investigating authority has exercised special care in making a threat determination cannot be found in the internal process for reaching a determination, but only in the written views of an investigating authority explaining the reasons for its threat determination.

B. “Special Care” is about the Substantive Analysis Used to Make a Threat Determination. Nothing About the Tie Vote Procedure Affects the Substantive Analysis on Which A Determination Rests.

326. Indonesia also fails to establish a *prima facie* case that the tie vote provision conflicts, as such, with the “special care” requirement under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement.⁷⁰⁶ Contrary to Indonesia’s argument, the “special care” obligation does not apply to the internal decision making process of a WTO Member, which is within each Member’s exercise of their sovereignty, but to the analysis contained in an investigating authority’s affirmative threat determination explaining the reasons for the determination. Because the tie vote has no effect on the Commission’s substantive analysis in antidumping and countervailing duty investigations, Indonesia does not and cannot establish a *prima facie* case

⁷⁰³ *US – Line Pipe (AB)*, para. 158.

⁷⁰⁴ ADA, Art. 5.5.

⁷⁰⁵ ADA, Art. 6.1, SCMA, Art. 12.1.

⁷⁰⁶ Indonesia does not and cannot make a *prima facie* case that the tie vote provision conflicts with U.S. obligations as applied because the provision did not apply to the Commission’s vote for Coated Paper from China and Indonesia. All six Commissioners made affirmative determinations, with five voting in the affirmative on the basis of threat and one voting in the affirmative on the basis of present material injury. USITC Pub. 4192 at 1 & n.2; *see also* Vote Transcript (Exhibit US-25). Because the Commission reached a unanimous affirmative determination in the Coated Paper investigations, the tie vote provision did not apply.

that the tie vote provision prevents the Commission from exercising special care in making threat determinations. This section first addresses the panel’s decision in *Softwood Lumber VI*, which shows that the special care provisions of the ADA and SCMA concern an investigating authority’s substantive analysis, not its decision-making procedures. It next shows how the drafting history of the provisions confirms this point. The section then turns to U.S. law, explaining how provisions governing the Commission’s substantive analysis of threat of injury ensure the application of special care, and that nothing about the tie vote provision – which concerns only decision-making procedure – could preclude, or even effect, the application of special care.

1. *Softwood Lumber VI* Shows that Special Care Concerns The Investigating Authority’s Substantive Analysis

327. The panel’s discussion in *Softwood Lumber VI* shows that the special care provisions concern the substantive analysis applied by an investigating authority. Articles 3.8 of the ADA and 15.8 of the SCM Agreement provide that “[w]ith respect to cases where injury is threatened by [dumped][subsidized] imports, the application of [anti-dumping][countervailing] measures shall be considered and decided with special care.” In the only dispute to squarely address the “special care” requirement, *United States – Softwood Lumber*, the panel explained:

The noun “care” is defined, *inter alia*, as “Serious attention, heed; caution, pains, regard.” Thus, it seems clear to us that a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury. We note that Articles 3.8 and 15.8 explicitly state that “the application of measures shall be considered and decided with special care” (emphasis added). Thus, it might be argued that the provision comes into play only after the investigation and consideration of all the relevant factors set out in other provisions of Articles 3 and 15 concerning the analysis of injury. However, we consider that such a conclusion is not appropriate in the context of Article 3.8 of the AD Agreement or Article 15.8 of the SCM Agreement. These provisions are part of the Article of each Agreement, Articles 3 and 15, which, governs the overall determination of injury, which under both Agreements is defined as including threat of material injury. Articles 3.7 and 15.7, set forth factors specific to the determination of threat of material injury, and state that investigating authorities shall base a determination of threat of material injury on facts and not allegation, conjecture or remote possibility. In our view, Articles 3.8 and 15.8 reinforce this fundamental obligation. Thus, we consider that Article 3.8 and Article 15.8 apply during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken.⁷⁰⁷

⁷⁰⁷ US – *Softwood Lumber VI* (Panel), para. 7.33.

328. The Panel further found that violations of the “special care” requirement will generally result from violations of “the more specific provisions of the Agreements governing injury determinations”:

The Agreements require, as noted above, an objective evaluation based on positive evidence in making any injury determination, including one based on threat of material injury. . . . It is not clear to us what the parameters of such “special care” in the context of an objective evaluation based on positive evidence would be. 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.⁷⁰⁸

329. Because investigating authorities must comply with the specific obligations under the ADA and SCM Agreements 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 that investigating authorities exercise special care under ADA Article 3.8 and SCMA article 15.8. Even if an independent breach of the special care obligation were possible, the demonstration of such a violation would require “additional or independent arguments,” which would necessarily have to relate to an investigating authority’s “establishment of whether the prerequisites for application of a measure exist” in its written determination.⁷⁰⁹ As the Appellate Body found in *U.S. – Line Pipe*, the appropriate focus for a Panel is “whether the determination, however it is decided domestically, meets the requirements of the” relevant agreement.⁷¹⁰

2. The Drafting History Confirms That “Special Care” Is About Substantive Analysis

330. The drafting history of the “special care” provisions underscores that they concern the substantive standards for a threat determination, not procedure. The idea for a special care provision first appeared during discussions of a possible Anti-Dumping Code during the Kennedy round. As early as August 1966, discussions pointed to inclusion of two paragraphs on threat of injury, foreshadowing the eventual structure of the ADA, with Articles 3.7 and 3.8 on threat, and the SCMA, which addresses threat in Articles 15.7 and 15.8. Similar to the eventual content of Article 3.7, the Secretariat’s August 1966 proposal for the first of the paragraphs on threat provided that:

A finding of threat of material injury shall be based on evidence and not merely on allegation, conjecture or remote possibility. The change which would create a

⁷⁰⁸ *US – Softwood Lumber VI (Panel)*, para. 7.34.

⁷⁰⁹ *US – Softwood Lumber VI (Panel)*, para. 7.33-7.34.

⁷¹⁰ *See US – Line Pipe (AB)*, para. 158.

situation in which the current dumping would cause material injury must be clearly foreseen, substantive and imminent. For instance, there is convincing circumstantial evidence that the foreign suppliers intend to export in the immediate future substantially increased quantities of the goods at dumped prices, that there is no reason why they should not succeed in this and that they have every incentive to do so.⁷¹¹

The second paragraph, the predecessor to the special care provision, provided that:

Because of the speculative nature of forecasts and the necessarily wide margin of error involved in predicting future results, governments shall apply to complaints based on "threat of injury" more rigid standards than might be considered sufficient to establish that injury has already taken place. Action under this heading shall thus be based on the forecast of a more serious effect on the future of the domestic industry than would be required in the case of present material injury.⁷¹²

The draft's reference to the more speculative nature of forecasting, and the margin of error involved in predictions requiring "more rigid standards" show clear intent to reference the substantive evidence necessary to establish threat of injury. Similarly, the requirement that threat determinations "be based on the forecast of a more serious effect on the future of the domestic industry than would be required in the case of present material injury" speaks to the substantive demonstration that needs to be made, not the number of individuals that need to be in agreement that the standard for such a determination has been met.

331. The next iteration of the proposed paragraphs circulated by the Secretariat contained shortened versions of each of these two paragraphs. The last sentence of the first paragraph was moved into a footnote. And the second sentence of the second paragraph was condensed to reference a need for special care:

Because of the speculative nature of forecasts and the necessarily wide margins of error involved in predicting future results, governments shall apply to complaints based on "threat of injury" more rigid standards than might be considered sufficient to establish that injury has already taken place. With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.⁷¹³

⁷¹¹ Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/13, 23 August 1966 (Exhibit US-26), p.6.

⁷¹² Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/13, 23 August 1966 (Exhibit US-26), p.6.

⁷¹³ Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Possible Elements to be Considered for Inclusion in an Anti-Dumping Code, TN.64/NTB/W/14, 9 December 1966 (Exhibit US-30), p.4.

By the conclusion of the original Antidumping Code the following summer, the language had been further shortened to:

With respect to cases where material injury threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.⁷¹⁴

When antidumping disciplines were updated in the Uruguay Round, this language was employed in nearly identical form in the ADA. The ADA language, moreover, was also brought into the new SCMA.

332. Accordingly, 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.

3. U.S. Law Confirms that the Commission Must Take Special Care in Determining Threat of Material Injury, and Nothing About the Tie Vote Procedure Precludes the Application of Special Care

333. U.S. law ensures that the Commission takes special care in its analysis of threat of material injury, extensively detailing what the Commission needs to consider in its analysis. The tie vote provision applies, if at all, only after the Commission has completed its analysis of the threat factors and reached its determination, and the tie vote provision could therefore have no effect on the substantive analysis contained in the Commission’s written determinations.

334. The Commission’s application of antidumping or countervailing duty measures in cases where material injury is threatened by dumped or subsidized imports is “considered and decided” pursuant to 19 U.S.C. § 1677(7)(F),⁷¹⁵ which provides as follows:

Threat of material injury

- (i) **In general** In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors—
 - (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies

⁷¹⁴ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, July 12 1967, L/2812 (Exhibit US-27).

⁷¹⁵ Exhibit US-12.

Agreement), and whether imports of the subject merchandise are likely to increase,

- (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
- (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
- (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
- (V) inventories of the subject merchandise,
- (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,
- (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),
- (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
- (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

(ii) Basis for determination

The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination. Such a determination may not be made on the basis of mere conjecture or supposition.

335. The U.S. statute governing the Commission’s consideration of threat closely parallels Article 3.7 of the ADA and Article 15.7 of the SCM Agreement. The statute requires the Commission to consider the same four threat factors that investigating authorities are required to consider under the ADA and SCM Agreements, among other threat factors. The statute provides that threat determinations “may not be made on the basis of mere conjecture or supposition,” just as the Agreements provide that such determinations “shall be based on facts and not merely on allegation, conjecture, or remote possibility.” The statute provides that “[t]he presence or absence of any factor . . . shall not necessarily give decisive guidance,” just as the Agreements provide that “[n]o one of these factors by itself can necessarily give decisive guidance . . .” It is in considering the threat factors enumerated under section 1677(7)(F) that the Commission must exercise “special care” under Article 3.8 of the ADA and Article 15.8 of the SCM Agreement.

336. Nothing under the separate tie vote provision could prevent the Commission from exercising such care, which is explicitly provided for in the substantive provisions of the U.S. statute. Indeed, the tie vote provision could have no effect on the Commission’s consideration of the threat factors because the provision only applies after all Commissioners have voted in an antidumping or countervailing duty investigation. Commissioners voting in the affirmative on the basis of a threat of material injury will have already completed their “process of investigation and determination of threat of material injury,” exercising the requisite “special care,” prior to voting. Regardless of the number of affirmative votes, moreover, in the event of an affirmative determination of threat of injury, the relevant special care will be reflected in the written determination. Because determinations of threat of injury made by three Commissioners can certainly reflect special care by the Commission – and because whether such determinations reflect special care is unrelated to the number of Commissioners voting in the affirmative – the tie vote provision is certainly not inconsistent as such with the special care provisions of the ADA or SCMA.

C. Indonesia’s Arguments Are Without Merit

337. Indonesia does not argue, much less establish, that the tie vote provision in any way impedes the Commission from exercising special care in examining the threat factors. Instead, Indonesia claims that the tie vote provision conflicts with the special care requirement simply by treating tie votes as affirmative determinations.

338. Indonesia asserts, without citation, that “[t]he ordinary meaning of ‘shall be decided’ with ‘special care’ . . . suggests, at a minimum, the following inherent corollary principles: basic

‘protection of interests,’ ‘even-handedness,’ and ‘reasonableness.’”⁷¹⁶ None of these “principles” can be found in the dictionary definition of the quoted text, which the panel in *U.S. – Softwood Lumber VI* found to mean simply “that a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury.”⁷¹⁷ Even if such principals were relevant to the “special care” obligation, they would apply only to the extent that the “special care” obligation applies: to the question of whether the substantive prerequisites for application of a measure exist – and not to the internal decision-making process of the United States.

339. Indonesia also claims, incorrectly, that the tie vote provision somehow violates a “concept of even-handed administration of discretion” that the Appellate Body allegedly “enunciated” in *U.S. – Hot-Rolled Steel*.⁷¹⁸ In that dispute, the Appellate Body considered whether Commerce’s “99.5 percent test” was based on a permissible interpretation of Article 2.1 of the ADA, providing that that normal value (*i.e.*, the price of the like product in the home market of the exporter or producer) must be established on the basis of sales made “in the ordinary course of trade.”⁷¹⁹ Under that test, if the weighted average sales price for an exporter’s sales to an individual affiliated party fell below 99.5 percent of the weighted average price of the exporter’s sales to all non-affiliated parties, USDOC would treat all of the sales to that affiliated party as being made outside “the ordinary course of trade” and disregard them in calculating normal value.⁷²⁰ By contrast, exporters bore the burden of demonstrating that sales to an affiliated party at an aberrationally high price should be excluded from Commerce’s calculation of normal value as outside “the ordinary course of trade.”⁷²¹ The Appellate Body found that the “lack of even-handedness in the two tests,” which “operated systematically to raise normal value,” “disadvantaged exporters” and was therefore not based upon a permissible interpretation of ADA Article 2.1.⁷²²

340. Contrary to Indonesia’s argument, the Appellate Body’s finding in *U.S. – Hot-Rolled Steel* was expressly limited to the question of how to address sales to affiliates when determining normal value:

Although we believe that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not “in the ordinary course of trade,” that discretion is not without limits. In particular, the discretion must be exercised in an even-handed way that is fair to all parties affected by an anti-dumping investigation. If

⁷¹⁶ Indonesia’s FWS, para. 142.

⁷¹⁷ *US – Softwood Lumber VI (Panel)*, para. 7.33.

⁷¹⁸ Indonesia’s FWS, para. 145.

⁷¹⁹ *US – Hot-Rolled Steel (AB)*, para. 138.

⁷²⁰ *US – Hot-Rolled Steel (AB)*, para. 132.

⁷²¹ *US – Hot-Rolled Steel (AB)*, para. 151.

⁷²² *US – Hot-Rolled Steel (AB)*, para. 154.

a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be “in the ordinary course of trade.”⁷²³

The Appellate Body found that because the term “the ordinary course of trade” was not defined by the ADA, WTO Members had discretion to determine how to comply with the requirement that sales not “in the ordinary course of trade” be excluded from the calculation of normal value, but had to do so in an even-handed manner.

341. Unlike Commerce’s 99.5 percent test, which the Appellate Body found inconsistent with ADA Article 2.1 because it “systematically” increased the margins of dumping published in USDOC determinations,⁷²⁴ the tie vote provision has no effect whatsoever on the analysis contained in the Commission’s affirmative threat determinations. The tie vote provision’s applicability in a particular case in no way lessens the Commission’s ability or duty to comply with all requirements under the ADA and SCM Agreements in its written determination, including the special care requirement in threat cases. The Commission’s affirmative threat determinations must comply with all requirements of the ADA and SCM Agreements whether drafted by three Commissioners voting in the affirmative or six or some number in between.

342. Whether or not other WTO members with investigating authorities comprised of multiple decision-makers may resolve tie votes differently⁷²⁵ than the United States – as Indonesia discusses in its submission – does not in any way suggest that the U.S. approach is invalid. As the Appellate Body emphasized in *U.S. – Line Pipe*, “the internal decision-making process for making [determinations] . . . is entirely up to WTO Members in the exercise of their sovereignty.”⁷²⁶ Moreover, all of the Acts cited by other countries in paragraph 162 of Indonesia’s First Written Submission post-date the AD and SCM Agreements and thus cannot have constituted context for that agreement. Further, they do not constitute subsequent practice. “[I]n international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern *implying the agreement of the parties* regarding its interpretation.”⁷²⁷ That four of the WTO’s 164 Members have differing procedural approaches preferred by Indonesia to the U.S. approach hardly constitutes a practice of such consistency as to imply the agreement of Members on anything.

343. In any event, the variety of approaches to resolving or avoiding tie votes taken by different Members reflects that the internal decision-making process is not prescribed by the ADA or SCM Agreements. Indonesia highlights Canada, which seeks to avoid tie votes by

⁷²³ *US – Hot-Rolled Steel (AB)*, para. 148.

⁷²⁴ *See US – Hot-Rolled Steel (AB)*, paras. 152, 154.

⁷²⁵ *See Indonesia’s FWS*, paras. 160-165.

⁷²⁶ *US – Line Pipe (AB)*, para. 158.

⁷²⁷ *Japan – Alcoholic Beverages II (AB)*, p.13.

providing for an odd number of decision makers, and South Africa, Turkey, and Argentina, which provide that tie votes be decided by a presiding decision-maker.⁷²⁸ Still other Members, which Indonesia overlooks, rely on unitary decision-making entities, such as China’s Ministry of Commerce.⁷²⁹ In South Korea, as in the United States, a tie in a multi-member decision-making body is treated as an affirmative determination.⁷³⁰ The fact that respondents must convince 100 percent of the investigating authority to secure a negative determination in China or Japan, but only 66 percent of the Commission (*i.e.*, four of six Commissioners), does not make the U.S. decision-making process any more or less WTO-compliant.

344. Indonesia’s reference to its developing country status⁷³¹ makes no sense in the context of its claim about the Commission’s tie vote provision. As an initial matter, Article 15 concerns neither the substantive standard for determinations of dumping or injury nor the procedures used in making such determinations. Rather, its plain text emphasizes that it relates to the “application” of antidumping measures⁷³² – *i.e.*, to the final decision whether to apply a final measure – and to sensitivity to the economic interests of developing country members in determining what measures to apply – and to what extent – following determinations of dumping and injury consistent with the AD Agreement. Indeed, the full text of Article 15 provides that:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

The two sentences of the Article cannot be read in isolation, as panels have confirmed in both *US – Steel Plate*, and *EC – Tube or Pipe Fittings*. As the Panel in *US – Steel Plate* explained, “the first sentence of Article 15 imposes no specific or general obligation on Members to undertake

⁷²⁸ Indonesia finds nothing objectionable about tie votes broken by the presiding member of an investigating authority, as under the internal decision-making processes of South Africa, Turkey, and Argentina. Indonesia’s FWS, para. 162. Yet, whether a tie vote is broken by the presiding member of an investigating authority or by operation of law, as in the United States, the resulting affirmative determination still represents the view of only half of the investigating authority. Nothing under the Agreements prohibits affirmative determinations, including affirmative threat determinations, supported by only half of the decision-makers in an investigating authority, as even Indonesia acknowledges with respect to South Africa, Turkey, and Argentina.

⁷²⁹ Regulations of the People’s Republic of China on Anti-Dumping, Art. 7, G/ADP/N/1/CHN/2/Suppl.3, 20 October 2004 (Exhibit US-28).

⁷³⁰ South Korea, Act on the Investigation of Unfair International Trade Practices and Remedy Against Injury to Industry, Art. 32 (Exhibit US-29).

⁷³¹ Indonesia’s FWS, para. 152.

⁷³² See *US – Steel Plate*, para. 7.111 (“the phrase ‘when considering the application of anti-dumping measures under this Agreement’ refers to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation.”).

any particular action.”⁷³³ Rather, the operative language delineating the specific obligation in Article 15 is found in the second sentence.⁷³⁴ Similarly, the panel in *EC – Tube or Pipe Fittings* noted that:

[T]here is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required.⁷³⁵

345. Certainly, nothing about Article 15 suggests a need for a different decision-making arrangement when assessing whether the substantive standards for injury or dumping have been established with respect to goods of a developing or developed country.⁷³⁶ And indeed, it would be illogical to do so – whether these standards have been met is a purely factual question on which the development status of an exporting country has no bearing. Moreover, because dumping investigations concern the activities of individual companies, not of countries, the development status of the country of origin of goods does not say anything about the respondent companies’ ability to respond fully and vigorously to an antidumping investigation.⁷³⁷ Indonesia’s suggestion that the development status of the country of origin of goods might impact the appropriateness of the voting procedures used by a multi-member decision-making body in a determination of threat of material injury not only fundamentally misunderstands ADA Article 15, the suggestion simply makes no sense.

346. Indonesia’s arguments about ADA Article 3.1 and GATT Article X.3 are similarly illogical. ADA Article 3.1 and SCMA Article 15.1 provide that an injury determination:

shall be based on positive evidence and involve an objective examination of both (a) the volume of the [dumped][subsidized] imports and the effect of the [dumped][subsidized] imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

347. These provisions require an evidentiary basis for injury determinations and set out some of the points that must be considered in an injury determination. They say nothing about the procedure to be used in making determinations; instead, they address the substantive analysis.

⁷³³ *US – Steel Plate*, para. 7.110.

⁷³⁴ *US – Steel Plate*, para. 7.110; *see also* GATT Panel Report, *EEC – Cotton Yarn*, para. 582.

⁷³⁵ *EC – Tube or Pipe Fittings (Panel)*, para. 7.68

⁷³⁶ *See US – Steel Plate*, para. 7.112 (“[W]e do not consider that Article 15 imposes any obligation to consider different choices of methodology for the investigation and calculation of anti-dumping margins in the case of developing country Members.”).

⁷³⁷ *See US – Steel Plate*, para. 7.110 (“Simply because a company is operating in a developing country does not mean that it somehow shares the “special situation” of the developing country Member.”).

There is simply no connection between a requirement for evidence to support an injury determination and a particular voting procedure. Regardless of how many decision-makers agree with an injury determination, the question under the ADA and SCMA will be whether the written determination is “based on positive evidence.”

348. GATT Article X:3⁷³⁸ is likewise completely inapposite. It concerns the “administ[r]ation” of measures, not measures themselves.⁷³⁹ The Appellate Body has explained that:

[T]o the extent that [a dispute] relates to the substantive content of the ... rules themselves, and not to their publication or administration, [it] falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.⁷⁴⁰

349. In any event, there is nothing partial or non-uniform about the manner in which the Commission resolves tie vote situations. A mechanism for resolving tie votes is required, and there is no allegation that 19 U.S.C. § 1677(11)(B) has not been applied in a consistent manner.

350. Similarly, the principle of “good faith” in no way suggests that a discipline on how investigating authorities comprised of multiple individuals must address tie vote situations can be read into the “special care” provisions of the ADA and SCMA. *U.S. – Hot-Rolled Steel*, to which Indonesia cites, addressed a provision of the ADA providing that requests that respondents provide information in a particular media that they do not otherwise use should not be maintained where the request would pose an “unreasonable extra burden.” It thus concerned a highly specific procedural discipline – concerning the media on which investigating authorities can make respondents provide information – and one that explicitly requires the situation be handled in a way that is not “unreasonable.” The Appellate Body’s reference to the principle of good faith in this context in no way suggests that the principle can be used to read into the ADA or SCMA new, highly-specific disciplines not articulated in the text, on the basis of a panel’s view of the most equitable way to handle a particular situation. This, however, is what Indonesia is requesting.

351. Indeed, Indonesia’s entire “special care” argument, and its points about ADA Article 3.1 and SCMA Article 15.1, GATT Article X:3, and the principle of good faith, in particular, reflect a vain search by Indonesia for some justification for the panel to invent a discipline on investigating authorities that simply does not exist in the ADA and SCMA. Yet Indonesia overlooks that the job of panels is to ascertain the disciplines actually provided for in the WTO agreements, not to invent new ones that Indonesia thinks might be equitable. Had Members

⁷³⁸ See Indonesia’s FWS, para. 150.

⁷³⁹ *EC – Bananas III (AB)*, para. 200 (“The text of Article X:3(a) clearly indicates that the requirements of ‘uniformity, impartiality and reasonableness’ do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings.”).

⁷⁴⁰ *EC – Poultry (AB)*, para. 115.

wished, when drafting the ADA and SCMA, to discipline the voting procedures used by multi-member investigating authorities when assessing threat or any other issue, the Members would have done so clearly.

352. As the Appellate Body explained in *U.S. – Line Pipe*, a WTO Panel must base its review of whether the Commission complied with WTO requirements, such as the special care requirement in threat cases, solely on the Commission’s written determination, irrespective of the internal decision-process that resulted in the determination.⁷⁴¹ An affirmative threat determination drafted by four, five, or six Commissioners that complies fully with the ADA and SCM Agreements, including the special care requirement, would be no less WTO-consistent if drafted by three Commissioners.

353. Whether the Commission has exercised such care is purely a question of the reasoning provided by the Commission in its affirmative threat determination. In sum, the tie vote provision represents a legitimate exercise of the United States’ sovereignty over the decision-making process in antidumping and countervailing duty investigations. The Panel should reject Indonesia’s as such challenge to the tie vote provision.

VIII. OTHER CLAIMS

354. Indonesia’s panel request asserts consequential claims under Article 1 of the AD Agreement, Article 10 of the SCM Agreement, and Article VI of the GATT 1994.⁷⁴² Indonesia has not repeated these claims in its First Written Submission and accordingly they should not be considered. Moreover, as discussed above, the allegations under other provisions that Indonesia articulates in its First Written Submission are meritless, and accordingly there could be no basis for any finding of a consequential breach.

IX. CONCLUSION

355. For the foregoing reasons, the United States respectfully requests that the Panel reject Indonesia’s claims.

⁷⁴¹ *US – Line Pipe (AB)*, para. 158.

⁷⁴² Request for the Establishment of a Panel by Indonesia, WT/DS491/3, circulated 21 August 2015.