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

REPORT OF THE PANEL

*BCI deleted, as indicated [[\*\*\*]]*

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### EXHIBITS REFERRED TO IN THIS REPORT

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

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

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

### ABBREVIATIONS USED IN THIS REPORT

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

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<sup>1</sup> For the POI considered by the USDOC, see fn 57; for the POI considered by the USITC, see para. 7.197.

## **1 INTRODUCTION**

### **1.1 Complaint by Indonesia**

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

- a. the anti-dumping and countervailing duties imposed by the United States on imports of certain coated paper (CCP) from Indonesia; and
- b. Section 771(11)(B) of the Tariff Act of 1930, as amended, codified at Title 19 of the United States Code, Section 1677(11)(B).<sup>2</sup>

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

### **1.2 Panel establishment and composition**

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

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

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

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

Chairperson: Mr Hanspeter Tschäni

Members: Mr Martin Garcia  
Ms Enie Neri de Ross

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

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<sup>2</sup> Request for consultations by Indonesia, WT/DS491/1.

<sup>3</sup> Request for the establishment of a panel by Indonesia, WT/DS491/2.

<sup>4</sup> Request for the establishment of a panel by Indonesia WT/DS491/3 (hereinafter Indonesia's panel request).

<sup>5</sup> DSB, Minutes of the meeting held on 28 September 2015, WT/DSB/M/368.

<sup>6</sup> Constitution of the Panel, WT/DS491/4.

### **1.3 Panel proceedings**

#### **1.3.1 General**

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

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

#### **1.3.2 Additional working procedures concerning BCI**

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

#### **1.3.3 Request for a preliminary ruling**

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

#### **1.3.4 Requests of a procedural nature by certain third parties**

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

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

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<sup>7</sup> Panel's Working Procedures, Annex A-1.

<sup>8</sup> Communication from the Panel, WT/DS491/5.

<sup>9</sup> Additional Working Procedures of the Panel concerning Business Confidential Information, Annex A-2.

<sup>10</sup> On 16 September 2016, the United States submitted corrections to its first written submission. At the request of the Panel, on 6 October 2016 the United States submitted a corrected, consolidated version of its first written submission. In this Report, the Panel refers to the corrected, consolidated, version of the United States' first written submission dated 6 October 2016.

<sup>11</sup> United States' first written submission, paras. 33-40.

<sup>12</sup> Indonesia's response to the United States' preliminary ruling request.

<sup>13</sup> Indonesia's opening statement at the first meeting of the Panel, paras. 14-17; response to Panel question Nos. 4 and 6; second written submission, paras. 11-16; and opening statement at the second meeting of the Panel, paras. 4-7. United States' opening statement at the first meeting of the Panel, paras. 6-8; response to Panel question Nos. 3, 5, and 7; second written submission, paras. 10-18; and opening statement at the second meeting of the Panel, para. 3.

<sup>14</sup> Panel communication to the parties and third parties dated 16 September 2016.



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

## 2 FACTUAL ASPECTS AND MEASURES AT ISSUE

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

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

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

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

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

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

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<sup>15</sup> Indonesia's first written submission, paras. 1, 15, and 16 (referring to Anti-Dumping Duty Order, (Exhibit IDN-1); and Countervailing Duty Order, (Exhibit IDN-2)).

<sup>16</sup> Indonesia's first written submission, para. 5.

<sup>17</sup> Petition, (Exhibit US-80).

<sup>18</sup> Initiation of Anti-Dumping Duty Investigations, (Exhibits IDN-3/US-66 (exhibited twice)); Initiation of Countervailing Duty Investigation, (Exhibits IDN-4/US-65 (exhibited twice)); and USITC Final Determination, (Exhibit US-1), p. I-1.

<sup>19</sup> The respondent APP/SMG companies were PT. Pabrik Kertas Tjiwi Kimia Tbk (Tjiwi Kimia or TK), PT. Pindo Deli Pulp and Paper Mills (Pindo Deli or PD), and PT. Indah Kiat Pulp & Paper, Tbk (Indah Kiat or IK).

<sup>20</sup> Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)).

<sup>21</sup> Final Countervailing Duty Determination, (Exhibits IDN-6/US-47 (exhibited twice)). The accompanying USDOC Issues and Decision Memorandum, (Exhibits IDN-10/US-31), is dated 20 September 2010. Indonesia's exhibit contains excerpts of the Issues and Decision Memorandum whereas Exhibit US-31 includes the entire document. For this reason, in our findings, we generally refer to the latter rather than to Exhibit IDN-10.

<sup>22</sup> Final Countervailing Duty Determination, (Exhibits IDN-6/US-47 (exhibited twice)), p. 59211; USDOC Issues and Decision Memorandum, (Exhibit US-31). On the same date, the USDOC issued its final determinations in the parallel countervailing duty investigation on coated paper from China and anti-dumping investigations on coated paper from Indonesia and from China. (Final Anti-Dumping Determination, (Exhibits IDN-7/US-67 (exhibited twice)); Final Anti-Dumping Determination on Coated Paper from China, (Exhibit US-69); and Final Countervailing Duty Determination on Coated Paper from China, (Exhibit US-68)).

<sup>23</sup> USITC Notice of Preliminary Determination, (Exhibit IDN-8).

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

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

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

- a. With respect to the USDOC's subsidy determination, that<sup>26</sup>:
  - i. the USDOC's findings that the GOI provides standing timber for less than adequate remuneration and that the GOI log export ban confers a benefit are inconsistent with Article 14(d) of the SCM Agreement because the USDOC made a *per se* determination of price distortion based solely on the predominant market share of standing timber from public forests;
  - ii. the USDOC's finding, based on an adverse inference, that the GOI "knowingly allowed an affiliate of a debtor to buy back its own debt in contravention of Indonesian law" is inconsistent with Article 12.7 of the SCM Agreement;
  - iii. the USDOC's findings of specificity are inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC did not determine that the collection of stumpage fees, the log export ban, or the alleged forgiveness of debt were part of a plan or scheme intended to confer a benefit;
  - iv. the USDOC's finding of specificity in connection with the debt forgiveness is inconsistent with Article 2.1 of the SCM Agreement because the USDOC "did not identify the jurisdiction allegedly providing a benefit, thereby calling into question the specificity analysis"<sup>27</sup>;
- b. With respect to the USITC's threat of injury determination, that<sup>28</sup>:
  - i. the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors;
  - ii. the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement because the USITC based its threat findings on conjecture and remote possibility; and
  - iii. the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise special care.

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

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

<sup>26</sup> Indonesia's first written submission, paras. 3 and 166; second written submission, paras. 2-5.

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

<sup>28</sup> Indonesia's first written submission, paras. 4 and 166; second written submission, paras. 6-9.



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

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

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

#### **4 ARGUMENTS OF THE PARTIES**

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

#### **5 ARGUMENTS OF THE THIRD PARTIES**

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

#### **6 INTERIM REVIEW**

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

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

#### **7 FINDINGS**

##### **7.1 Introduction**

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

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<sup>29</sup> Indonesia's first written submission, paras. 5 and 166; second written submission, para. 10.

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

<sup>31</sup> United States' first written submission, para. 355.

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

### **7.2.1 Treaty interpretation**

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

### **7.2.2 Standard of review**

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

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

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

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

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

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

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

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

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<sup>32</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

<sup>33</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.

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

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

### 7.2.3 Burden of proof

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

### 7.3 Special and differential treatment

7.9. Article 12.11 of the DSU provides that:

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

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

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

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

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

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<sup>34</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)

<sup>35</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

<sup>36</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>37</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>38</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>39</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>40</sup> See below, paras. 7.120 and 7.346.

<sup>41</sup> See above, para. 1.10.

<sup>42</sup> United States' first written submission, paras. 33-40.

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

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

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

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

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

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

<sup>45</sup> United States' first written submission, para. 40; response to Panel question No. 7(c).

<sup>46</sup> United States' first written submission, paras. 35-36; response to Panel question No. 5(a).

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

<sup>48</sup> United States' second written submission, para. 18.

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

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

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

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

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

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

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<sup>49</sup> United States' first written submission, para. 40.

<sup>50</sup> Indonesia's response to the United States' preliminary ruling request, paras. 4-7.

<sup>51</sup> We note that one of the rulings the United States seeks, in the alternative, is for the Panel to find that Indonesia's Article 14(d) and Article 2.1(c) claims with respect to the log export ban are in fact financial contribution claims that are outside the Panel's terms of reference, on the basis that Indonesia's arguments are limited to arguing that an export ban cannot constitute a financial contribution (see para. 7.15 above). In our view, Indonesia's arguments in support of its Article 14(d) and Article 2.1(c) claims are not limited to those objected to by the United States, and the United States' argument in this regard is without merit.

<sup>52</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120.

<sup>53</sup> See above, para. 7.6.

<sup>54</sup> Article 22.3, in particular, requires that the public notice of a final determination (or separate report) set forth in sufficient detail the findings and conclusions reached on all issues of fact and law the investigating authority considered material.

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

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

### 7.5.1 Introduction

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

- a. Article 14(d) of the SCM Agreement because the USDOC's benefit determinations with respect to the provision of standing timber and the log export ban are based on a *per se* determination of price distortion based solely on the GOI's predominant market share of standing timber from public forests;
- b. Article 12.7 of the SCM Agreement because the USDOC found, based on an adverse inference, that the GOI "knowingly allowed an affiliate of a debtor to buy back its own debt in contravention of Indonesian law"; and
- c. Article 2.1(c) of the SCM Agreement because, in its findings of *de facto* specificity, the USDOC failed to determine that the collection of stumpage fees, the log export ban, and the debt forgiveness were each part of a plan or scheme intended to confer a benefit; and the chapeau of Article 2.1 of the SCM Agreement because, with respect to the debt forgiveness, the USDOC also failed to identify "the jurisdiction allegedly providing a benefit".

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

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

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

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

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

<sup>59</sup> CFS Final Countervailing Duty Determination, (Exhibit US-74), p. 60644.



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

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

### **7.5.2.1 Introduction**

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

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

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

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<sup>60</sup> USITC Final Determination, (Exhibit US-1), p. I-5.

<sup>61</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 7 and 11-14.

<sup>62</sup> According to Indonesia, the type of logs used in pulp production differs based on whether they are harvested from plantations or natural forests. (Indonesia's first written submission, para. 12).

<sup>63</sup> The USDOC used the term "stumpage fees" to refer to fees paid for harvesting standing timber.

<sup>64</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6 (referring to CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 69).

<sup>65</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7.

<sup>66</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

<sup>67</sup> Joint Decree of the Ministry of Forestry and the Ministry of Industry and Trade No. 1132/Kpts-II/2001 and No. 292/MPP/Kep/10/2001. (Log Export Ban, (Exhibit IDN-30)).

<sup>68</sup> CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 27. In the CFS investigation, the USDOC had also found that the GOI had imposed export bans on eight categories of products that included "Forestry Products," under which logs and chipwood were listed. (Ibid.). See also Log Export Ban, (Exhibit IDN-30), Article 1(1).

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

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

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

7.29. The United States requests that the Panel reject Indonesia's claims.<sup>75</sup>

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

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

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

*Article 14*  
*Calculation of the Amount of a Subsidy in Terms*  
*of the Benefit to the Recipient*

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

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<sup>69</sup> Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), appendix 1, pp. 1-2.

<sup>70</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

<sup>71</sup> The USDOC made certain adjustments to this data to arrive at the benchmarks it used; to establish the benchmark for the provision of standing timber, the USDOC adjusted the WTA prices for logs to remove the Indonesian costs of harvesting the standing timber and to add an amount for profit for harvesting. (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 11).

<sup>72</sup> Indonesia's first written submission, paras. 41-42 and 45.

<sup>73</sup> Indonesia's first written submission, paras. 3 and 29.

<sup>74</sup> Indonesia's first written submission, para. 29.

<sup>75</sup> United States' first written submission, para. 355; opening statement at the first meeting of the Panel, para. 2; and second written submission, para. 186.



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

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

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

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

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

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<sup>76</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.45.

<sup>77</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.149.

<sup>78</sup> Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.154; *US – Softwood Lumber IV*, para. 90.

<sup>79</sup> Indonesia's first written submission, para. 31; United States' first written submission, para. 48.

<sup>80</sup> The panel in *US – Softwood Lumber IV* considered that, "in these situations, the only remaining possibility would appear to be the construction of some sort of a proxy for, or estimate of, the market price for the good in that country". (Panel Report, *US – Softwood Lumber IV*, para. 7.57 (quoted in Appellate Body Report, *US – Softwood Lumber IV*, para. 98)).

<sup>81</sup> Appellate Body Reports, *US – Softwood Lumber IV*, paras. 100-101; *US – Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446; *US – Carbon Steel (India)*, para. 4.155; and *US – Countervailing Measures (China)*, para. 4.50.

<sup>82</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 439 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

<sup>83</sup> Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.156; *US – Anti-Dumping and Countervailing Duties (China)*, para. 443; and *US – Softwood Lumber IV*, para. 100.

<sup>84</sup> Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.59; *US – Carbon Steel (India)*, para. 4.156.

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

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

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

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

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

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<sup>85</sup> Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.51-4.52 and 4.86; *US – Carbon Steel (India)*, paras. 4.153 and 4.157 and fn 754.

<sup>86</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.52 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444).

<sup>87</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156.

<sup>88</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446.

<sup>89</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453.

<sup>90</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 446 and 453 (emphasis added). In that dispute the Appellate Body considered that in a situation where the government has a 96.1% market share, the position of the government in the market is much closer to a situation where the government is the sole supplier of the goods than to a situation where it is merely a significant supplier of the goods. The Appellate Body was of the view that this makes it likely that the government, as the predominant supplier, has the market power to affect through its own pricing the pricing by private providers for the same goods, and induce them to align with government prices. The Appellate Body further considered that, in such a situation, evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a "significant" presence in the market. (Ibid. para. 455).

<sup>91</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.153 and 4.157.

<sup>92</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 106.

<sup>93</sup> Indonesia's first written submission, paras. 3, 27, 29, and 42; opening statement at the first meeting of the Panel, para. 30.

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

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

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

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

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<sup>94</sup> Indonesia's first written submission, para. 42 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.101).

<sup>95</sup> Indonesia's response to Panel question Nos. 11, 15, and 17.

<sup>96</sup> United States' first written submission, paras. 43, 59, 61, and 67; response to Panel question No. 23.

<sup>97</sup> United States' first written submission, paras. 52 and 65.

<sup>98</sup> United States' second written submission, paras. 30-34.

<sup>99</sup> Indonesia's opening statement at the first meeting of the Panel, paras. 18-22; response to Panel question No. 8; and second written submission, paras. 17-18. Indonesia argues that 93% of the timber at issue during the POI was planted, grown, and harvested from a plantation and was not pre-standing, and that concession holders must perform a number of services at their own expense. These include forest management planning, seed and seedling procurement and planting, maintenance, fire and forest protection, social and environmental obligations, and infrastructure development. Indonesia also argues that the GOI does not control or influence the price at which concession holders sell timber harvested from the plantations they operate.

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

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

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

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

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

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

<sup>101</sup> Appellate Body Report, *Brazil – Aircraft*, para. 157.

<sup>102</sup> Indonesia's panel request, para. 1; response to Panel question No. 2. See also para. 3.1 of this Panel Report.

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

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

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

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

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

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

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

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

<sup>106</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 8.

<sup>107</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.

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

<sup>109</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 8-10.

<sup>110</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.52 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444).

<sup>111</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.

<sup>112</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453.

<sup>113</sup> United States' first written submission, paras. 43 and 58; response to Panel question Nos. 9, 12, and 23.

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

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

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

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

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

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

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<sup>114</sup> Indonesia's opening statement at the first meeting of the Panel, paras. 30-33.

<sup>115</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.

<sup>116</sup> Indonesia submits that since the stumpage fees were determined with reference to domestic market prices for logs, they were market-driven. (Indonesia's opening statement, para. 22). Indonesia, however, has not persuaded us that the USDOC erred in concluding that the stumpage fees were not market-determined in light of undisputed evidence that the government set the percentage to be applied to the reference price, which was also based on the domestic prices for logs subject to the log export ban.

<sup>117</sup> CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 19.

<sup>118</sup> Indonesia's opening statement at the second meeting of the Panel, para. 16. Indonesia maintains that this evidence showed that APP/SMG paid higher fees for acacia harvested from a GOI concession than from the private forest. (Indonesia's response to Panel question No. 11, fn 13 (referring to Excerpt from APP/SMG Initial Questionnaire Response, pp. 1, 25, 27, 29, and 30, (Exhibit IDN-25 (BCI)), pp. 27 and 29)).

<sup>119</sup> Indonesia's response to Panel question No. 78.

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

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

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

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<sup>120</sup> United States' response to Panel question Nos. 10-11.

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

<sup>122</sup> GOI Initial Questionnaire Response, (Exhibit US-32), pp. 17-18.

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

<sup>124</sup> Question (d) at pp. 27 and 28 asked APP/SMG the following:

For each concession arrangement for public timber held by your company or a cross-owned company, and each arrangement to harvest private timber, please provide the following information for the POI:

1. For each species, the stumpage fee and the total quantity harvested and the value of fees and charges paid to the administering authority or owner.

(APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), pp. 27-28)

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

<sup>125</sup> Specifically, APP/SMG responded:

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

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

<sup>126</sup> APP/SMG Initial Questionnaire Response, (Exhibit US-91 (BCI)), pp. 28-34.

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

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

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

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

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<sup>127</sup> Indonesia's response to Panel question Nos. 10-11.

<sup>128</sup> United States' response to Panel question No. 11.

<sup>129</sup> Para. 7.55.

<sup>130</sup> Indonesia relies on the Appellate Body Report, *US – Countervailing Measures (China)*, for the proposition that the USDOC erred by not having explained "whether and how the mentioned market shares held by ... [the GOI] actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers [of standing timber] aligned their prices with those of the government-provided goods". (Indonesia's first written submission, para. 42 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.101)). The *US – Countervailing Measures (China)* dispute involved the provision of inputs by state-owned enterprises (SOEs). In this context, the Appellate Body found that the USDOC failed to explain "whether and how the mentioned market shares held by SOEs actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods". Thus, the Appellate Body dealt with a particular situation in which goods were provided by SOEs, requiring a demonstration that "market shares held by SOEs actually resulted in the government's possession and exercise of market power" (emphasis added). We do not understand the Appellate Body to have concluded that a similar demonstration is required in other circumstances such as where the government itself is a supplier of the goods at issue.



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

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

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

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

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

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

<sup>134</sup> Indonesia's opening statement at the first meeting of the Panel, para. 25.

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

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

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

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

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

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

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

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

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

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

<sup>141</sup> See also para. 7.12 above, concerning the United States' request for a preliminary ruling in this respect.

<sup>142</sup> United States' first written submission, paras. 84-91.

<sup>143</sup> Para. 7.26.

<sup>144</sup> USDOC, Issues and Decision Memorandum, (Exhibit US-31), p. 13.

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

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

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

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

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

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

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

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

<sup>148</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

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

<sup>150</sup> Indonesia's response to Panel question No. 6; opening statement at the second meeting of the Panel, para. 23.

<sup>151</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.57 (quoted in Appellate Body Report, *US – Softwood Lumber IV*, para. 98).

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

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

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

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

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

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

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

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<sup>153</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

<sup>154</sup> CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 32. (emphasis original)

<sup>155</sup> Indonesia's response to Panel question No. 6.

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

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

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

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

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

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<sup>156</sup> See para. 7.64 and fn 136.

<sup>157</sup> Panel Reports, *US – Export Restraints*, para. 8.21; *China – GOES*, para. 7.90; and *US – Countervailing Measures (China)*, para. 7.401.

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

domestic market, the distortion will affect any private sales, that is, both private sales of domestically-produced logs and imported logs.<sup>159</sup>

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

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

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

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<sup>159</sup> United States' response to Panel question No. 70(a).

<sup>160</sup> Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10769 (emphasis added). See para. 7.66 above.

<sup>161</sup> As indicated above, para. 7.27 and 7.66, the USDOC relied on an out-of-country benchmark to determine the benefit conferred by the log export ban. The USDOC used as the basis for determining the benchmark Malaysian export prices for acacia pulpwood and mixed tropical hardwood, exclusive of shipments to Indonesia (i.e. log imports to Indonesia were excluded).

<sup>162</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 28, 32, 34, 36, and 40.

<sup>163</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 31-32.

<sup>164</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 27 and 32. The USDOC considered that, given the distortion in import prices into Indonesia, "it should not be surprising that figures based on shipments to Indonesia are obviously lower than prices for goods shipped elsewhere, such as the WTA data, based on Malaysian shipments to all destinations besides Indonesia, indicates". (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 40).

<sup>165</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 27.

<sup>166</sup> We note that in the *US – Anti-Dumping and Countervailing Duties (China)* dispute, in which the government's market share amounted to 96.1%, the Appellate Body, in its assessment whether the USDOC acted inconsistently with Article 14(d), appears to have given some positive consideration to the fact the USDOC had considered the role of imports in the market, noting that the USDOC had concluded that import quantities (3% of the market) were small relative to domestic production. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455).

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

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

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

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

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

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

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

##### **7.5.3.1 Introduction**

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

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

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<sup>167</sup> Indonesia's opening statement at the first meeting of the Panel, paras. 27 and 36; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 24 and 27.

<sup>168</sup> United States' opening statement at the first meeting of the Panel, paras. 17-20.

<sup>169</sup> Indonesia's first written submission, paras. 3 and 28.

<sup>170</sup> Excerpt from Part Two of GOI First Supplemental Questionnaire Response, pp. 22-38, (Exhibit IDN-14), p. 25; Indonesia's first written submission, para. 47; and United States' first written submission, para. 120.

<sup>171</sup> According to the GOI, IBRA sold 300,000 non-performing loans. (CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 44).

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

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

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

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

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<sup>172</sup> GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), responses to question No. 4, pp. 5-6, and No. 22(c), p. 16.

<sup>173</sup> GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 9, p. 9.

<sup>174</sup> GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 3(a), p. 3. Unlike the other companies in the PPAS programme, APP/SMG's asset portfolio did not include any equity.

<sup>175</sup> Exhibit 33 to Part Two of the GOI First Supplemental Questionnaire Response, (Exhibit IDN-41 (BCI)), p. 6), Article 1.1(15). Petitioners alleged that the value of APP/SMG's asset portfolio, and of the price paid by Orleans amounted, respectively, to approximately USD 880 million and 214 million. (USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 17). Before the USDOC, the GOI stated that Orleans had paid USD [[\*\*\*]] for APP/SMG's debt, which totalled USD [[\*\*\*]] at the time of the purchase. (Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), internal exhibit 21, Appendix 4, question (e)).

<sup>176</sup> Exhibit 1 to GOI Third Supplemental Questionnaire Response, (Exhibit US-84).

<sup>177</sup> Excerpt from Part Two of GOI First Supplemental Questionnaire Response, pp. 22-38, (Exhibit IDN-14)/ Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), pp. 28, and 33-35; and [[\*\*\*]]

<sup>178</sup> [[\*\*\*]]

<sup>179</sup> [[\*\*\*]]

<sup>180</sup> Exhibit 1 to GOI Third Supplemental Questionnaire Response, (Exhibit US-84), Article 3. As discussed below, during the course of the investigation, the GOI indicated that to the best of its knowledge, IBRA did not exercise this provision with regard to either the sale of APP/SMG's debt to Orleans, or the other assets sales, and that it relied on the buyers' statements of non-affiliation.

<sup>181</sup> CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), pp. 40-46.



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

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

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

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

<sup>183</sup> GOI Initial Questionnaire Response, (Exhibit US-32), response to question No. E, pp. 29-30.

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

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

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

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

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

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

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

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

<sup>189</sup> GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 5, pp. 6-7).

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

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

<sup>192</sup> GOI Fifth Supplemental Questionnaire, (Exhibit US-42), question Nos. 3, 4, 5, and 8.

<sup>193</sup> GOI Verification Outline, (Exhibit US-77).

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

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

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

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

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

### **7.5.3.2 Legal standard under Article 12.7 of the SCM Agreement**

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

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

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

<sup>195</sup> Letter to GOI regarding Verification, (Exhibit US-76).

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

<sup>197</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 52-55.

<sup>198</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

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

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

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

### 7.5.3.3 Whether the conditions for resorting to facts available were met

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

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

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

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<sup>199</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

<sup>200</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

<sup>201</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report *Mexico – Anti-Dumping Measures on Rice*, paras. 293-294). (emphasis by the Appellate Body in *US – Carbon Steel (India)*)

<sup>202</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>203</sup> Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 295; *US – Carbon Steel (India)*, paras. 4.423 and 4.425.

<sup>204</sup> Indonesia's first written submission, para. 55; opening statement at the first meeting of the Panel, para. 46; and closing statement at the first meeting of the Panel, para. 5.

<sup>205</sup> Indonesia's first written submission, para. 65.

<sup>206</sup> Indonesia's first written submission, paras. 62-65 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 101).

search for the missing documents and would make them available at verification if they could be located.<sup>207</sup>

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

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

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

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

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

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<sup>207</sup> Indonesia's first written submission, paras. 57-59 and 63.

<sup>208</sup> Indonesia's response to Panel question No. 87.

<sup>209</sup> United States' first written submission, para. 150.

<sup>210</sup> United States' comments on Indonesia's response to Panel question No. 87.

<sup>211</sup> United States' first written submission, paras. 136-140 and 150-156.

<sup>212</sup> United States' first written submission, paras. 136-140 and 150-156.

<sup>213</sup> Winning bidder's articles of association, certificates of incorporation, and certifications that the winning bidder was not affiliated with the original debtor.

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

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

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

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<sup>214</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 48-55.

<sup>215</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

<sup>216</sup> See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

<sup>217</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.155.

<sup>218</sup> In this respect, we agree with the *EC – Countervailing Measures on DRAM Chips* panel's statement that:

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

(Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245 (emphasis added))

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

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

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

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

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

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

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<sup>220</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 517.

<sup>221</sup> Emphasis added.

<sup>222</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 99. (emphasis original)

<sup>223</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 100.

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

<sup>225</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 101.

<sup>226</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 102. (emphasis original)



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

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

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

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

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

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<sup>227</sup> Article 12.11 of the SCM Agreement and Article 6.13 of the Anti-Dumping Agreement provide that: "The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable."

<sup>228</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.

<sup>229</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.

<sup>230</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

<sup>231</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 54-55.

<sup>232</sup> Indonesia's first written submission, paras. 50-53, and 65; response to Panel question No. 32.

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

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

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

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

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

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

<sup>235</sup> Article 12.1.1 and fn 40 of the SCM Agreement.

<sup>236</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 31. (underline original)

<sup>237</sup> GOI Third Supplemental Questionnaire, (Exhibit US-41), cover letter; GOI Fifth Supplemental Questionnaire, (Exhibit US-42), cover letter.

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

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

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

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

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

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

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

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

<sup>241</sup> Paragraph 7 of Annex VI provides that:

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

<sup>242</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.74.

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

investigating authorities, if they are to rely on information from a secondary source, do so with special circumspection.<sup>244</sup>

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

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

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

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<sup>244</sup> Indonesia's first written submission, paras. 66-71; opening statement at the first meeting of the Panel, para. 42; and second written submission, para. 32.

<sup>245</sup> United States' response to Panel question No. 87.

<sup>246</sup> United States' first written submission, paras. 119, 141, and 158-165.

<sup>247</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. (emphasis added)

<sup>248</sup> Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 293; *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 293-294).

<sup>249</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.

<sup>250</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.418, 4.424, and 4.431. The Appellate Body explained that the extent of the evaluation of the "facts available" that is required, and the form it may take, will "depend on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation". (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.421-4.422).

<sup>251</sup> See, in particular, Appellate Body Report, *US – Carbon Steel (India)* para. 4.426.

<sup>252</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.417 and 4.428.

<sup>253</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.426 and 4.468.

<sup>254</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.

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

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

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

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

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

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

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<sup>255</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80; see also *ibid.* para. 7.61.

<sup>256</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6; see also *ibid.* pp. 48-55.

<sup>257</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6. (fn omitted)

<sup>258</sup> See above, para. 7.112.

<sup>259</sup> We note in this respect that the USDOC indicated that it determined that Orleans was affiliated with APP/SMG:

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

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

See also *ibid.* p. 53:

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

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

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

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

##### **7.5.4.1 Introduction**

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

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

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

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

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

<sup>262</sup> Indonesia's first written submission, para. 3.

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

<sup>264</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

<sup>265</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

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

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

...

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

(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.

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

chapeau of Article 2.1 because the USDOC failed to "identify the jurisdiction allegedly providing a benefit".<sup>267</sup>

7.138. The United States requests that the Panel reject Indonesia's claims.<sup>268</sup>

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

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

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

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

#### *Article 2 Specificity*

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

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

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

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

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

<sup>268</sup> United States' opening statement at the first meeting of the Panel, para. 43.

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

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

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

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

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

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

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

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<sup>271</sup> Emphasis added; fns omitted.

<sup>272</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21.

<sup>273</sup> Emphasis added.

<sup>274</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

<sup>275</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140 (referring to Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 750).

<sup>276</sup> By contrast, Article 2.2 establishes principles relevant to determine whether a subsidy is regionally-specific.

<sup>277</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367.

<sup>278</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.

<sup>279</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 877.

<sup>280</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.

<sup>281</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374.

<sup>282</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.

<sup>283</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.



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

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

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

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

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

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

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

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

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<sup>284</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32).

<sup>285</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141. The Appellate Body held, in addition, that "[a]n examination of the existence of a plan or scheme regarding the use of the subsidy at issue may also require assessing the operation of such plan or scheme over a period of time." (Ibid. para. 4.142).

<sup>286</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.988.

<sup>287</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

<sup>288</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.165-4.166. This is because if the granting authority is a regional or local government, a subsidy available to enterprises throughout the territory over which that regional or local government has jurisdiction would not be specific; conversely, if the granting authority is the central government, a subsidy available to the same enterprises would be specific.

<sup>289</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.167.

<sup>290</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.169.

<sup>291</sup> Indonesia's first written submission, para. 3; response to Panel question No. 26; and opening statement at the second meeting of the Panel, para. 31.

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

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

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

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

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

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

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

<sup>295</sup> Indonesia's response to Panel question Nos. 27(b) and 27(c).

<sup>296</sup> Indonesia's second written submission, paras. 46-48.

<sup>297</sup> Indonesia's response to Panel question No. 27(b).

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

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

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

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

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

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

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

<sup>300</sup> Indonesia's second written submission, para. 47.

<sup>301</sup> Indonesia first written submission, para. 79 (referring to Panel Reports, *US – Export Restraints*, para. 8.75; *China – GOES*, para. 7.90; and *US – Countervailing Measures (China)*, para. 7.401).

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

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

<sup>304</sup> United States' second written submission, para. 90.

<sup>305</sup> United States' second written submission, paras. 89 and 96.

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

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

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

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

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

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

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

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

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

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

<sup>309</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

<sup>310</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.242; Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.149.

<sup>311</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>315</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7 and 11.

<sup>316</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

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

<sup>318</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

<sup>319</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 5.

<sup>320</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

<sup>321</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.

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

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

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

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

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

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

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

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

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<sup>323</sup> Indonesia's first written submission, para. 83.

<sup>324</sup> The chapeau of Article 2.1 provides that a subsidy is specific where access to the subsidy is limited to "certain enterprises". This term includes a single company or a firm. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373).

<sup>325</sup> Indonesia's first written submission, para. 3.

<sup>326</sup> Indonesia's first written submission, paras. 94-95; response to Panel question No. 30; and second written submission, para. 49.

<sup>327</sup> Indonesia's second written submission, para. 49; opening statement at the second meeting of the Panel, para. 34.

<sup>328</sup> Indonesia's first written submission, paras. 93-95.

<sup>329</sup> Indonesia's response to Panel question No. 30; second written submission, para. 49.

<sup>330</sup> United States' first written submission, para. 221 (referring to USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20).



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

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

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

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

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

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

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<sup>331</sup> United States' second written submission, para. 110.

<sup>332</sup> USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 17-20.

<sup>333</sup> We find support for this proposition in the Appellate Body's statement in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, that:

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

(Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 756 (emphasis original))

<sup>334</sup> See Articles 4 and 7 of the International Law Commission's (ILC) Articles on Responsibility for Internationally Wrongful Acts. In particular, Article 7 provides that:

*Article 7. Excess of authority or contravention of instructions*

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

In the Commentary on Article 7, the ILC indicates that:

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.

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



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

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

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

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

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

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

<sup>336</sup> Indonesia's opening statement at the first meeting of the Panel, para. 57; second written submission, para. 49.

<sup>337</sup> Indonesia's second written submission, paras. 50-51.

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

<sup>339</sup> United States' response to Panel question No. 31 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140).

<sup>340</sup> United States' second written submission, paras. 102 and 107-109.

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

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

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

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

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

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

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

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

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

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

<sup>343</sup> Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>344</sup> Indonesia's panel request, para. 1(c)(i).

<sup>345</sup> Indonesia's panel request, para. 1(c)(ii).

<sup>346</sup> Indonesia's response to Panel question No. 86; comments on the United States' response to Panel question No. 86.

<sup>347</sup> United States' response to Panel question No. 31; second written submission, paras. 107-109.

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

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

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

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

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

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

<sup>350</sup> Petitioners' General Factual Information Submission, (Exhibit US-40), exhibit 24, p. 13. (emphasis added)

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

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

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

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

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

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

#### **7.6.1 Introduction**

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

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

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<sup>353</sup> USITC Final Determination, (Exhibit US-1), pp. 15-17.

<sup>354</sup> USITC Final Determination, (Exhibit US-1), p. 3. We note that "APP" in the USITC investigation refers to both the Indonesian and Chinese corporate entities affiliated with the APP/SMG group. It is therefore not the same entity as "APP/SMG" in the USDOC investigation. The USITC indicated that, in 2009, the large majority of subject merchandise was produced and exported by Chinese and Indonesian producers under the corporate umbrella of APP. (Ibid. p. 24).

<sup>355</sup> USITC Final Determination, (Exhibit US-1), p. 13.

<sup>356</sup> USITC Final Determination, (Exhibit US-1), pp. 1 and 39. Five Commissioners determined that the domestic industry was threatened with injury. One of the Commissioners made an affirmative determination of present injury. (USITC Final Determination, (Exhibit US-1), pp. 41-47). In our findings, we consider the views of the majority as being those of the USITC.

<sup>357</sup> The parties have submitted to the Panel the public version of the USITC Final Determination as Exhibits IDN-18 and US-1. The version of the determination submitted by Indonesia contains the views of the USITC but does not contain the Staff Report (which compiles the data the USITC relied upon and is an integral part of the USITC's Report) contained in Parts I to VII or the appendixes to the determination. Since the exhibit submitted by the United States (Exhibit US-1) is the complete version of the USITC Report, and Indonesia has also referred to the US version of the USITC Final Determination in its submissions to the Panel, in this Report we refer to the exhibit submitted by the United States. In addition, the Panel requested that the United States provide the confidential version of the USITC's final determination, which contains confidential data redacted from the public version. In response, the United States stated that due to confidentiality concerns, it was not in a position to submit the confidential version of the determination to the Panel. (United States' response to Panel question No. 68). In addition, only the public versions of several exhibits, in particular those containing submissions made by interested parties to the USITC, were provided to the Panel by the parties. The Panel requested that the parties submit the confidential versions of these exhibits; for most documents, the parties indicated that they were not in a position to do so. That is the case, for instance, for APP Pre-hearing Brief to USITC, (Exhibit IDN-45) and APP Final Comments to USITC, (Exhibit US-105). We base our analysis on the record evidence that was submitted to the Panel; in any event, Indonesia has not made any specific representations that suggest to us that information contained in the confidential version of relevant documents is germane to our resolution of Indonesia's claims.

other factors would not render insignificant the likely effects of subject imports as found by the USITC.<sup>358</sup>

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

- a. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to subject imports adverse effects attributable to "other factors" causing injury to the domestic industry at the same time as subject imports;
- b. Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement because the USITC based certain of its findings in its threat of injury determination on conjecture and remote possibility; and
- c. Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise "special care" in the underlying investigation.

7.200. The United States requests that the Panel reject Indonesia's claims.<sup>359</sup>

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

### **7.6.2.1 Introduction**

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

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

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

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<sup>358</sup> USITC Final Determination, (Exhibit US-1).

<sup>359</sup> United States' second written submission, para. 113.

<sup>360</sup> Indonesia's first written submission, para. 4.

<sup>361</sup> Indonesia's first written submission, para. 99; second written submission, para. 53. In response to a question from the Panel as to whether it considers "non-attribution" and "isolation of other factors" to be distinct concepts, Indonesia explained that, in its view, the principle of non-attribution prohibits the investigating authority from attributing injury or threat of injury caused by other factors to subject imports, and the principle of "isolation of other factors" requires for the investigating authority to identify what factors other than subject imports exist in the market that may be affecting the domestic industry's performance. (Indonesia's response to Panel question No. 44).

<sup>362</sup> Indonesia's second written submission, para. 63.

<sup>363</sup> Indonesia's response to Panel question No. 92(a).

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

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

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

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

Article 15.5 of the SCM Agreement provides as follows:

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

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[\*fn original]<sup>47</sup> As set forth in paragraphs 2 and 4.

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

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

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<sup>364</sup> United States' first written submission, paras. 294-297; opening statement at the second meeting of the Panel, para. 54.

<sup>365</sup> Emphasis added.

<sup>366</sup> Emphasis added.

<sup>367</sup> We recall in this regard that "injury" as used in these Articles means, *inter alia*, threat of material injury to a domestic industry. (Anti-Dumping Agreement, fn 9; and SCM Agreement, fn 45).

<sup>368</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

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

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

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

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

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<sup>369</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

<sup>370</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

<sup>371</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

<sup>372</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189.

<sup>373</sup> See, e.g. Panel Report, *EU – Footwear (China)*, para. 7.483.

<sup>374</sup> Indonesia's first written submission, paras. 111-113 (quoting Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405).

<sup>375</sup> Indonesia's first written submission, para. 114; opening statement at the first meeting of the Panel, para. 61; response to Panel question No. 43(b); and second written submission, paras. 57-58. Indonesia asserts that the USITC used less precise measurements in its threat of injury analysis than in its present injury analysis. Indonesia argues that the latter contains "a volume analysis consisting of precise measurements of the volume of subject imports, non-subject imports, domestic industry shipments, and market share", "a pricing analysis based on four pricing products", and "an impact analysis that is based on several trade and financial performance indicators" while the former "appl[ies] less precise, amorphous standards phrased in general terms like 'increasing volumes of low-priced imports,' 'will take sales from current suppliers such as the domestic industry,' and 'will gain additional U.S. market share in the imminent future'". (Indonesia's second written submission, para. 58 (fns omitted); Indonesia made similar assertions in its opening statement at the first meeting of the Panel, para. 62). As noted below, para. 7.326, Indonesia also argues that the fact that the USITC allegedly conducted a more concrete and rigorous present injury analysis than threat of injury analysis is inconsistent with Articles 3.8 and 15.8.

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

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[\*fn original]<sup>282</sup> Appellate Body report, *US – Hot-Rolled Steel*, para. 226.

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

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

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<sup>376</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405. (emphasis added)

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

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

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

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



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

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

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

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

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

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

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

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<sup>379</sup> USITC Final Determination, (Exhibit US-1), pp. 26-27.

<sup>380</sup> USITC Final Determination, (Exhibit US-1), p. 27.

<sup>381</sup> USITC Final Determination, (Exhibit US-1), p. 29.

<sup>382</sup> USITC Final Determination, (Exhibit US-1), p. 33:

[D]emand for certain coated paper was significantly depressed, with apparent U.S. consumption dropping by 14.7 percent from 2008 to 2009. The black liquor tax credit spurred greater pulp production by domestic producers in 2009, contributing to lower prices for fiber/pulp which is a key input to production of coated paper. We find that the failure of domestic prices to rebound significantly in interim 2010 even after subject imports largely ceased in March 2010 indicates the important role that factors other than subject imports played in the market. Accordingly, although we find some evidence of price depression by subject imports, we do not find that cumulated subject imports from China and Indonesia significantly depressed prices of the domestic like product in the U.S. market. (fns omitted)

<sup>383</sup> USITC Final Determination, (Exhibit US-1), p. 33.

<sup>384</sup> USITC Final Determination, (Exhibit US-1), p. 33.

<sup>385</sup> USITC Final Determination, (Exhibit US-1), p. 33.

<sup>386</sup> USITC Final Determination, (Exhibit US-1), p. 34.

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

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

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

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

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

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<sup>387</sup> USITC Final Determination, (Exhibit US-1), p. 34:

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

<sup>388</sup> USITC Final Determination, (Exhibit US-1), p. 35.

<sup>389</sup> USITC Final Determination, (Exhibit US-1), p. 35.

<sup>390</sup> USITC Final Determination, (Exhibit US-1), p. 36.

<sup>391</sup> USITC Final Determination, (Exhibit US-1), p. 37. The USITC also described a certain lack of temporal correlation between movements in import volumes and the situation of the domestic industry.

<sup>392</sup> USITC Final Determination, (Exhibit US-1), p. 38

<sup>393</sup> USITC Final Determination, (Exhibit US-1), p. 38.

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

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

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

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

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

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

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

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

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

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

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

(Ibid. p. 39)

<sup>395</sup> USITC Final Determination, (Exhibit US-1), pp. 38-39.

<sup>396</sup> USITC Final Determination, (Exhibit US-1), p. 39.

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

<sup>398</sup> United States' first written submission, fn 630.

however, the Commission need not isolate the injury caused by other factors from injury caused by unfairly traded imports. Nor does the "by reason of" standard require that unfairly traded imports be the "principal" cause of injury or contemplate that injury from unfairly traded imports be weighed against other factors, such as nonsubject imports, which may be contributing to overall injury to an industry. It is clear that the existence of injury caused by other factors does not compel a negative determination.

Assessment of whether material injury to the domestic industry is "by reason of" subject imports "does not require the Commission to address the causation issue in any particular way" as long as "the injury to the domestic industry can reasonably be attributed to the subject imports" and the Commission "ensure{s} that it is not attributing injury from other sources to the subject imports." Indeed, the Federal Circuit has examined and affirmed various Commission methodologies and has disavowed "rigid adherence to a specific formula."<sup>399</sup>

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

#### 7.6.2.5 The USITC's finding of vulnerability

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

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<sup>399</sup> USITC Final Determination, (Exhibit US-1), pp. 18-19. (emphasis added; fns omitted)

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

The United States contends that the panel in *United States – Atlantic Salmon Anti-Dumping Duties* correctly stated that there is no need to "isolate" the injurious effects of the other factors from the injurious effects of the dumped imports. We are not certain what the panel, in that dispute, intended to imply through the use of the word "isolation". Nevertheless, we agree with the United States that the different causal factors operating on a domestic industry may interact, and their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry. We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 228 (emphasis original))

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

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

<sup>402</sup> Indonesia's first written submission, paras. 109 and 116; response to Panel question No. 92(a).

analysis, determined whether a threat of injury was likely in view of the condition of the industry unaffected by such other factors.<sup>403</sup>

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

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

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

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

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

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<sup>403</sup> Indonesia's second written submission, para. 62; response to Panel question No. 41.

<sup>404</sup> United States' second written submission, para. 115.

<sup>405</sup> United States' first written submission, paras. 296-299.

<sup>406</sup> United States' first written submission, para. 293.

<sup>407</sup> United States' opening statement at the first meeting of the Panel, para. 52 (referring to Panel Reports, *Egypt – Steel Rebar*, para. 7.91; and *Mexico – Corn Syrup*, para. 7.140); second written submission, para. 114 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.91).

<sup>408</sup> United States' opening statement at the first meeting of the Panel, para. 53; second written submission, paras. 119-120; and opening statement at the second meeting of the Panel, para. 36.

<sup>409</sup> Indonesia's opening statement at the first meeting of the Panel, para. 60; second written submission, para. 54.

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

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

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

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

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

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<sup>410</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.91. See also Panel Report, *Mexico – Corn Syrup*, para. 7.131:

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

<sup>411</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.469. (fn omitted; emphasis original)

<sup>412</sup> USITC Final Determination, (Exhibit US-1), p. 38.

<sup>413</sup> USITC Final Determination, (Exhibit US-1), p. 37.

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

<sup>415</sup> USITC Final Determination, (Exhibit US-1), p. 38.

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

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

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

#### **7.6.2.6 Projected decline in demand**

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

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

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

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

<sup>418</sup> Indonesia's response to Panel question No. 92(c).

<sup>419</sup> Indonesia's first written submission, paras. 109 and 116.

<sup>420</sup> United States' first written submission, para. 300; opening statement at the first meeting of the Panel, para. 55.



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

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

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

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

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

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

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<sup>421</sup> United States' first written submission, paras. 300 and 305.

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

<sup>423</sup> USITC Final Determination, (Exhibit US-1), pp. 38-39.

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

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

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

<sup>425</sup> USITC Final Determination, (Exhibit US-1), p. 33.

<sup>426</sup> USITC Final Determination, (Exhibit US-1), e.g. pp. 22 and C-6 (table C-3).



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

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

#### 7.6.2.7 Expiration of the "black liquor" tax credit

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

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<sup>427</sup> USITC Final Determination, (Exhibit US-1), p. 38.

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

<sup>429</sup> USITC Final Determination, (Exhibit US-1), table C-3 on p. C-6.

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

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

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

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

<sup>434</sup> USITC Final Determination, (Exhibit US-1), p. 25.

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

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

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

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

<sup>436</sup> Indonesia's second written submission, para. 55.

<sup>437</sup> Indonesia's opening statement at the first meeting of the Panel, para. 61.

<sup>438</sup> Indonesia's response to Panel question No. 47.

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

<sup>440</sup> United States' second written submission, paras. 117 and 125.

<sup>441</sup> United States' first written submission, para. 309; second written submission, para. 125.

<sup>442</sup> USITC Final Determination, (Exhibit US-1), p. 33.

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

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

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

#### **7.6.2.8 Non-subject imports**

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

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

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

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

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

<sup>447</sup> USITC Final Determination, (Exhibits IDN-18/US-1), p. 39:

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

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

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

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

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

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

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

##### **7.6.3.1 Introduction**

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

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<sup>448</sup> Indonesia's first written submission, paras. 110 and 117; response to Panel question No. 48(b).

<sup>449</sup> United States' first written submission, paras. 301 and 306-308; second written submission, fn 218.

<sup>450</sup> United States' first written submission, paras. 301 and 306-308.

<sup>451</sup> See Indonesia's response to Panel question No. 48(b): "To the extent subject imports gained market share from nonsubject imports, this would reduce the likelihood of an adverse impact on the domestic industry." This suggests that Indonesia's position is not that non-subject imports threatened injury, i.e. were an "other known factor [threatening to cause] injury" but rather that they would mitigate any injury caused by subject imports by losing market share to those imports.

<sup>452</sup> We also note that there is no indication in the record evidence submitted to the Panel that arguments were made before the USITC to the effect that non-subject imports were causing, or would in the future cause, injury to the domestic industry.

<sup>453</sup> Indonesia's first written submission, para. 4.

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

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

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

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

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[\*] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

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[fn original]<sup>10</sup> One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

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

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

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<sup>454</sup> Indonesia's first written submission, para. 124 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), pp. 38-39).

<sup>455</sup> Indonesia first written submission, para. 124; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.

<sup>456</sup> United States' first written submission, para. 259.

<sup>457</sup> Prior panels have concluded that decisions concerning Article 3.7 instruct the understanding of Article 15.7 and vice versa. See, e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2159. Any differences between the two provisions are not pertinent to the issues in this dispute.

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

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

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

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

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

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

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<sup>458</sup> Indonesia's first written submission, para. 122; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.

<sup>459</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 96 (quoting Appellate Body Report, *US – Lamb*, para. 136). See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85; and Panel Report, *Japan – DRAMs (Korea)*, para. 7.415.

<sup>460</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 96 (referring to Appellate Body Report, *US – Lamb*, para. 136). See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85.

<sup>461</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 109.

<sup>462</sup> Panel Report, *Mexico – Corn Syrup*, paras. 7.125-7.126.

<sup>463</sup> See above, para. 7.231 and fn 410.

<sup>464</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, fn 59 and para. 56).

<sup>465</sup> Panel Report, *US – Softwood Lumber VI*, para. 7.57.

<sup>466</sup> Indonesia's first written submission, para. 124 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 38); opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.



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

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

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

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

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

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

<sup>468</sup> USITC Final Determination, (Exhibit US-1), pp. 30-31.

<sup>469</sup> USITC Final Determination, (Exhibit US-1), p. 27.

<sup>470</sup> USITC Final Determination, (Exhibit US-1), p. 26.

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

<sup>472</sup> USITC Final Determination, (Exhibit US-1), p. 28.

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

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

7.269. Moreover, the USITC also found that subject imports would cause adverse price effects – specifically, price underselling and price depression – in the imminent future.<sup>476</sup>

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

Subject producers have already shown the ability and willingness to lower prices for subject merchandise that was already underselling the domestic like product in order to significantly increase their exports to the United States, even in a contracting market. We believe that this behavior will continue in the imminent future, particularly in light of the significant new capacity in China, the establishment of Eagle Ridge in 2009, and the attractiveness of the U.S. market.

The U.S. market cannot accommodate growth in subject imports without material injury to the U.S. industry. Although apparent U.S. consumption recovered somewhat in interim 2010 from its lowest levels in 2009, RISI projects a decline of [3.3] percent in apparent U.S. consumption from 2010 to 2011 and a further reduction of [2.5<sup>479</sup>] percent in 2012. Accordingly, future volumes of subject imports will not be in response to growing U.S. demand for CCP, but will take sales from current suppliers such as the domestic industry.

Given that the industry is already in a weakened state, we conclude that, unless antidumping duty and countervailing duty orders are issued, significant volumes of dumped and subsidized imports will gain additional U.S. market share in the imminent future and material injury by reason of subject imports will occur.<sup>480</sup>

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<sup>474</sup> USITC Final Determination, (Exhibit US-1), p. 29.

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

<sup>476</sup> USITC Final Determination, (Exhibit US-1), pp. 34-35.

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

<sup>478</sup> USITC Final Determination, (Exhibit US-1), p. 38.

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

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



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

#### **7.6.3.3.1 Market share trends during the POI**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>486</sup> See para. 7.6 of this Report.

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

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

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

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

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

<sup>492</sup> USITC Final Determination, (Exhibit US-1), p. 39.

<sup>493</sup> USITC Final Determination, (Exhibit US-1), p. 27 and table C-3.

<sup>494</sup> USITC Final Determination, (Exhibit US-1), pp. 22, 23, and 39, and table C-3.

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

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

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

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

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

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

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<sup>496</sup> USITC Final Determination, (Exhibit US-1), pp. 26-27. The domestic industry's US shipments declined from 1,737,222 short tons in 2007, to 1,648,972 short tons in 2008 and 1,477,233 short tons in 2009, and non-subject imports volume declined from 727,306 short tons in 2007, to 611,626 short tons in 2008 and 363,472 short tons in 2009. While subject imports volume declined from 398,309 short tons in 2007 to 382,245 short tons in 2008, subject imports increased "sharply" to 413,593 short tons in 2009, for an overall increase of 3.8% during the period 2007-2009.

<sup>497</sup> USITC Final Determination, (Exhibit US-1), p. 27.

<sup>498</sup> USITC Final Determination, (Exhibit US-1), pp. 26-27. See also *ibid.* table C-3.

<sup>499</sup> Indonesia's opening statement at the first meeting of the Panel, para. 67.

<sup>500</sup> Indonesia's opening statement at the first meeting of the Panel, para. 67; second written submission, para. 68.

<sup>501</sup> Indonesia's opening statement at the second meeting of the Panel, para. 44.

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

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

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

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<sup>502</sup> Indonesia's first written submission, para. 128; response to Panel question No. 48(b).

<sup>503</sup> USITC Final Determination, (Exhibit US-1), pp. 38-39.

<sup>504</sup> Indonesia's response to Panel question No. 48(b).

<sup>505</sup> See for instance Indonesia's opening statement at the second meeting of the Panel, para. 48.

<sup>506</sup> Indonesia's first written submission, para. 121 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), pp. 37-38); response to Panel question No. 41; and second written submission, para. 72 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 37). Indonesia also argues that there was no correlation between movements of subject import volumes and the condition of the domestic industry. (Indonesia's opening statement at the first meeting of the Panel, para. 70; second written submission, paras. 64 and 72; and opening statement at the second meeting of the Panel, para. 47). These arguments pertain to the causal relationship between subject imports and the threat of injury to the domestic industry, and are not directly relevant to our consideration of the USITC's findings concerning likely future increases in subject imports volumes and market share.

<sup>507</sup> USITC Final Determination, (Exhibit US-1), p. 38, quoted above para. 7.270.

<sup>508</sup> Indonesia's first written submission, para. 126 (referring to Excerpt from USITC Final Determination, pp. 3-39 and C-3-C-7, (Exhibit IDN-18), p. 38).

<sup>509</sup> Indonesia's opening statement at the second meeting of the Panel, para. 52.

<sup>510</sup> See below, paras. 7.297 and 7.307.

<sup>511</sup> In addition, contrary to Indonesia's suggestion, reading the determination as a whole suggests that the USITC's finding was not that subject imports would regain the 12.9 percentage points of market share lost in interim 2010, but rather that subject import volumes would increase significantly in the imminent future to levels higher than those recorded during the POI. (See for instance USITC Final Determination, (Exhibit US-1), pp. 27, 29, and 30-31). Moreover, we note that the USITC considered that the decrease in subject imports' volume in interim 2010 resulted from the investigations, and that absent these investigations, the volume of subject imports would likely have been greater in interim 2010. (USITC Final Determination, (Exhibit US-1), p. 27). Indonesia appears to agree that this decrease was caused by the pendency of the investigations. (Indonesia's opening statement at the first meeting of the Panel, para. 72; second written submission, para. 78).

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

#### **7.6.3.3.2 The likely increase in production capacity in China**

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

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

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

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

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

<sup>514</sup> USITC Final Determination, (Exhibit US-1), p. 28 and fn 181. The USITC noted that:

RISI projects that capacity to produce coated woodfree and coated mechanical paper in China will grow from 7.2 million metric tons in 2009 to 9.0 million metric tons in 2011, or by 1.8 million metric tons. RISI projects that Chinese consumption of these products will grow from 5.4 million metric tons in 2009 to 6.3 million metric tons in 2011, or by 900,000 metric tons. The excess of capacity growth over consumption growth is 900,000 metric tons. Respondents' Prehearing Brief at Ex. 28.

Although the combination of the RISI categories of coated woodfree and coated mechanical paper is likely to be somewhat broader than the paper defined by Commerce's scope, we consider the data to be probative of the likely relative growth of China's capacity and consumption of in-scope products.

Consumption growth in the rest of Asia is not projected to absorb the excess of Chinese capacity over consumption. Excluding Japan (which is projected to shed some capacity but increase its production), RISI projects consumption growth from 2009 to 2011 to exceed capacity growth in the rest of Asia by 160,000 tons, well below the excess of projected Chinese capacity growth

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

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

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

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

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

<sup>515</sup> Indonesia's opening statement at the second meeting of the Panel, paras. 41 and 52.

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

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

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

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

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

<sup>521</sup> APP Pre-hearing Brief to USITC, (Exhibit IDN-45), pp. 122, 134, and 136.

<sup>522</sup> APP Post-hearing Brief to USITC, (Exhibit US-104), p. 13.

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

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

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

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<sup>523</sup> Indonesia's opening statement at the second meeting of the Panel, fn 63.

<sup>524</sup> USITC Final Determination, (Exhibit US-1), fn 181.

<sup>525</sup> This is particularly clear from the USITC's statement that RISI projected that the growth in capacity would be "approximately double the growth of Chinese consumption". (USITC Final Determination, (Exhibit US-1), p. 28).

<sup>526</sup> Indonesia's opening statement at the first meeting of the Panel, paras. 68 and 71; second written submission, paras. 70 and 73.

<sup>527</sup> USITC Final Determination, (Exhibit US-1), p. 28.

<sup>528</sup> USITC Final Determination, (Exhibit US-1), fn 188.

<sup>529</sup> APP Pre-hearing Brief to USITC, (Exhibit IDN-45), p. 121, where APP states that "[t]here can be little dispute that China is the most important global market for subject coated paper suppliers. RISI flat out proclaims that the resurgence in the coated paper market will be driven by China". See also APP Post-hearing Brief to USITC, (Exhibit US-104), p. 13, where APP states that "[t]he Chinese industry has explained that these

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

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

#### **7.6.3.3.3 The Unisource affidavit and the establishment of Eagle Ridge**

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

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

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

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

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

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

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

<sup>533</sup> USITC Final Determination, (Exhibit US-1), p. 28.



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

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

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

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

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

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

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<sup>534</sup> USITC Final Determination, (Exhibit US-1), pp. 28-29; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), p. 1. (fns omitted)

<sup>535</sup> United States' response to Panel question No. 95.

<sup>536</sup> Indonesia's opening statement at the second meeting of the Panel, para. 39.

<sup>537</sup> Indonesia's comments on the United States' response to Panel question No. 95.

<sup>538</sup> Indonesia's comments on the United States' response to Panel question No. 95.

<sup>539</sup> United States' response to Panel question No. 95.

<sup>540</sup> In Indonesia's view, even if APP possessed emails and other information refuting what was said in the Unisource affidavit, it could not have submitted that information, nor could it have submitted its own affidavit challenging what was said in the Unisource affidavit. (Indonesia's response to Panel question No. 94).

<sup>541</sup> Indonesia's opening statement at the first meeting of the Panel, para. 66; second written submission, para. 65; and opening statement at the second meeting of the Panel, paras. 38 and 52.

<sup>542</sup> See above, para. 7.7.

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

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

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

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

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

<sup>545</sup> As indicated before, subject imports were at their peak in the period 2008-2009.

<sup>546</sup> In its final comments APP stated that:

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

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

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

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

<sup>549</sup> Indonesia argues that before losing Unisource as a customer, from 2008 to 2009 imports from China increased by 7% and imports from Indonesia increased by 15% – hardly doubling, and that after Eagle Ridge was established subject import volumes decreased. (Indonesia's opening statement at the second meeting of the Panel, paras. 38 and 52).

threat of injury was based on a conclusion that APP would in fact double its exports to the United States. Rather, as we have indicated above, the USITC concluded that subject producers had the ability and the incentive to increase significantly shipments to the US market.<sup>550</sup>

7.307. For the foregoing reasons, based on the explanations given by the USITC in light of the evidence that was on the record concerning the Unisource affidavit and the establishment of Eagle Ridge, we find that Indonesia has not demonstrated that the USITC based its conclusion regarding subject producers' interest in the US market merely on conjecture or speculation.

7.308. We now address Indonesia's allegation regarding the USITC's price effects analysis.

#### **7.6.3.4 The USITC's finding that subject imports would have adverse effects on domestic prices**

7.309. Indonesia argues that the USITC's finding that subject imports would have adverse effects on domestic prices in the imminent future was based on conjecture or speculation regarding events which were not clearly foreseen and imminent.<sup>551</sup> The United States submits that, on the contrary, the USITC had sufficient factual evidence to conclude that the future significant increase in subject import volume, driven by the underselling by those imports found during the POI, would pressure domestic producers to lower their prices, thereby depressing or suppressing them.<sup>552</sup>

7.310. In finding that subject imports were likely to have significant adverse effects on domestic producers' prices in the imminent future by causing price depression, the USITC first noted that subject imports undersold domestically-produced coated paper to a significant degree throughout the POI, particularly in 2009 when demand was depressed.<sup>553</sup> The average margin of underselling for all types of product was 12.3% in 2009, when the volume of subject imports was at its peak.<sup>554</sup> Moreover, the USITC found that pricing trends, particularly from the first quarter of 2009, together with the significant underselling by subject imports, showed that subject imports depressed domestic prices "at least to some extent" for part of the POI.<sup>555</sup> The USITC did not make a finding

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<sup>550</sup> Whereas Indonesia asserts that the volume of subject imports declined after Eagle Ridge was established (Indonesia's opening statement at the second meeting, paras. 38 and 52), record evidence shows that subject imports increased in the months following the establishment of Eagle Ridge. We recall that, the parties agree before this Panel, and record evidence submitted to the Panel shows, that APP lost the Unisource account in May 2009 and Eagle Ridge started operating in the United States in October 2009 (Excerpt from USITC Conference Transcript, pp. 45-48 and 179-180, (Exhibit US-108), p. 179; Indonesia's response to Panel question No. 93; and United States' response to Panel question No. 93). The USITC noted that APP's loss of business with Unisource did not result in a substantial reduction in the volume of overall subject imports in 2009 or the first two months of 2010. (USITC Final Determination, (Exhibit US-1), pp. 29-30 and fn 193). Moreover, subject imports volume was relatively stable from April 2009 – the month before APP's loss of the Unisource account – to October 2009 – when APP opened Eagle Ridge (33,084 short tons in April; 35,575 short tons in May; 32,972 short tons in June; 36,198 short tons in July; 36,698 short tons in August; 36,227 short tons in September; and 29,323 short tons in October). From October 2009 until January 2010, subject import volumes increased – from 29,323 short tons in October, to 31,542 short tons in November, and to 33,099 short tons in December of 2009; in January 2010, subject imports were 34,326 short tons. From February 2010, subject imports started decreasing, and this decrease was accentuated from March 2010 when preliminary countervailing duties were applied: 29,837 short tons in February; 5,365 short tons in March; 6,318 short tons in April; 3,852 short tons in May; and 5,334 short tons in June. (Monthly Import Statistics, (Exhibit US-102), p. 2).

<sup>551</sup> Indonesia's first written submission, paras. 124-126.

<sup>552</sup> United States' first written submission, para. 273.

<sup>553</sup> USITC Final Determination, (Exhibit US-1), p. 34.

<sup>554</sup> USITC Final Determination, (Exhibit US-1), p. 31. The USITC collected pricing data for five products. The data showed that prices of cumulated imports undersold the domestic like product in 48 out of 58 quarterly comparisons by margins ranging from 1.5% to 25.2%.

<sup>555</sup> In this regard, the USITC considered, in particular, movements in the prices of the domestic product and of subject imports from China for two types of coated paper over the POI (Product 1 – which accounted for the majority of the sales of Chinese subject imports for which prices were reported, and accounted for a significant quantity of sales of the domestic product – and Product 4 – for which reported prices represented a significant volume of subject imports from China). The USITC found that the prices of subject imports from China for Products 1 and 4 began to fall in the fourth quarter of 2008, when domestic prices for these products were rising (modestly, in the case of Product 1), which led to an increase in the underselling margins in the first quarter of 2009, as subject import prices continued to decline. For Product 1, domestic prices continued to decline in the second quarter of 2009 and the price of subject imports from China levelled off; for Product 4, both domestic prices and the price of subject imports continued to decline in the second and third quarters of 2009. The USITC considered that there was an indication that the drop in domestic prices starting in the first

of significant price depression, however, because other factors that were occurring in the US market "likely also contributed importantly to lower prices" and thus the USITC concluded that it was unable "to gauge whether there [were] significant effects attributable to subject imports". The USITC did not find evidence that subject imports prevented price increases which otherwise would have occurred to a significant degree (i.e. the USITC did not make a finding of "price suppression" by reason of subject imports).<sup>556</sup>

7.311. The USITC next considered the likely price effects of subject imports in the imminent future. The USITC concluded that significant underselling would continue and was likely to be significant in the imminent future.<sup>557</sup> In addition, the USITC found that subject imports were likely to have significant adverse effects on domestic producers' prices in the imminent future. Specifically, the USITC found that subject imports were likely to put pressure on domestic producers to lower prices, i.e. subject imports would cause price depression in the imminent future. The USITC considered that the other factors that placed negative pressure on domestic prices during the POI, namely falling consumption and increased pulp production due to black liquor subsidies, would not play the same role in the imminent future.<sup>558</sup> The USITC also noted that domestic producers' prices were relatively flat in interim 2010. The USITC found that any increase in subject imports would not be absorbed by an increase in US demand, because while in interim 2010 demand was higher than in interim 2009, demand was nonetheless depressed compared to its earlier levels and was projected to decline moderately over the next two years. In light of this, the USITC anticipated that a key driver of domestic market prices would be the significant volumes of subject imports. The USITC also noted that subject imports led domestic prices downward in late 2008 and early 2009. The USITC further noted that the domestic product and subject imports had moderately high interchangeability and that price was an important consideration in purchasing decisions.<sup>559</sup> The USITC concluded that:

[I]n the imminent future, the aggressive price competition and underselling by subject imports during the bulk of the period examined will continue, and the introduction of increased quantities of subject imports, priced aggressively in an effort to gain market share, will put pressure on domestic producers to lower prices in a market recovering from severely depressed demand. As subject imports cause domestic sales volumes and prices to deteriorate, the domestic industry will likely experience significant price depression or suppression.

In sum, we conclude that subject imports are likely to have significant adverse effects on domestic producers' prices in the imminent future.<sup>560</sup>

7.312. Indonesia's central allegation is that the USITC's conclusion that subject imports would depress domestic prices in the imminent future was speculative because, despite significant underselling, the USITC did not reach that conclusion with respect to the POI.

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quarter of 2009 was not only subsequent to, but was in response to, the decline in subject import prices. It noted that domestic producers had testified that they lowered prices to compete with falling prices of subject imports from China, and that numerous purchasers had confirmed that domestic producers lowered prices over the POI to meet the prices of subject imports. (USITC Final Determination, (Exhibit US-1), pp. 32-33).

<sup>556</sup> USITC Final Determination, (Exhibit US-1), p. 33.

<sup>557</sup> The USITC found that underselling by subject imports was likely to increase the attractiveness of those imports to domestic purchasers compared with domestic production, and that the underselling was likely to increase demand for further subject imports. (USITC Final Determination, (Exhibit US-1), p. 34).

<sup>558</sup> USITC Final Determination, (Exhibit US-1), p. 34.

<sup>559</sup> USITC Final Determination, (Exhibit US-1), p. 31.

<sup>560</sup> USITC Final Determination, (Exhibit US-1), p. 35 (emphasis added). The USITC also relied on the following considerations: (a) absent anti-dumping or countervailing duty orders, the likely increasing and significant volumes of subject imports would need to enter the US market priced aggressively in an effort to regain market share lost in interim 2010; (b) subject producers had substantial new capacity coming on-line in the imminent future that could not be absorbed by home market demand; (c) subject producers were likely to find the United States an attractive market; (d) Chinese producers had shown a willingness to cut their already low prices further in order to greatly increase their shipments to an already depressed US market; (e) with the establishment of Eagle Ridge in 2009, subject producers would have added ability and incentive to increase shipments to the US market quickly; and (f) given that many of the coated paper sales were on a spot basis, and purchasers had a history of quickly switching suppliers, subject imports would put pressure on domestic producers to lower prices in a market with depressed demand in order to compete for sales and prevent an accelerated erosion of their market share. (USITC Final Determination, (Exhibit US-1), pp. 34-35; Redacted excerpts of USITC Final Determination and APP Final Comments to USITC, (Exhibit US-107), p. 2).

7.313. We see nothing in Article 3.7 and Article 15.7 that would require an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future. Indeed, it is the essence of a threat determination that the situation existing during the POI is predicted to change such that there will be injury in the imminent future, if measures are not imposed. The lack of present material injury caused by subject imports may be a consequence of their volumes during the POI, their price effects, their impact during the POI or the injurious effects of other factors. What is important in a determination of threat of injury is that the investigating authority adequately explains, based on the evidence before it, why the situation it predicts can be projected to occur.

7.314. We recall that, in the present case, the USITC found that subject imports had some negative effects on domestic prices during the POI. The USITC noted that subject imports depressed domestic prices "to some extent" for part of the POI, particularly from the first quarter of 2009, which it found, *inter alia*, on the basis of a certain correlation in the pricing trends for subject imports and the domestic product.<sup>561</sup> While the USITC did not make a finding of significant price depression by reason of subject imports because it found that, during the POI, factors other than subject imports, namely decreasing demand and the black liquor tax credit, had likely placed negative pressure on domestic prices, the USITC went on to explain why these factors would not have the same consequences in the future. The USITC explained that the black liquor tax credit had ended in 2009 and that the decline in demand was expected to be less in the near future than it had been during the POI. In other words, whereas the decline in demand and the black liquor tax credit were factors that affected the USITC's analysis of price effects in the context of present injury, in the context of its threat of injury analysis, the USITC had to predict how subject imports would perform in a market where these factors were not operating to lower prices. The USITC determined that these other factors would not play the same role in the imminent future and that, absent these factors in the same magnitude as during the POI, a "key driver" of domestic market prices would be the significant volumes of subject imports. We find that the USITC's explanations, viewed in their totality, sufficiently support its conclusion with respect to the future price effects of subject imports.<sup>562</sup>

7.315. Indonesia also takes issue with the USITC's finding in the context of its threat analysis that subject imports would attempt to "regain market share lost in interim 2010" and would lower prices "aggressively" to do so.<sup>563</sup> Indonesia considers that it was speculative to conclude that "such a small portion of the market" would drive prices in the remaining market.<sup>564</sup> While the statements referred to by Indonesia are part of the considerations underlying the USITC's conclusion of adverse price effects, as we have indicated above<sup>565</sup>, a more comprehensive reading of the determination shows that the USITC's central finding was not that subject imports would attempt to regain the market share lost in interim 2010 (i.e. 12.9 percentage points), but that subject import volume would increase significantly in the imminent future to levels higher than those in the POI. The USITC took into account the situation that existed during the POI, when subject imports increased significantly in absolute and relative terms, in a context of substantial decline in demand, and concluded that subject producers would continue to increase their penetration of the US market despite sluggish apparent US consumption because they had both the ability and the incentive to increase shipments to the United States.<sup>566</sup> Moreover, we note that the USITC's conclusion that significant volumes of subject imports would be a "key driver" of domestic prices did not stem from the magnitude of subject imports' market share at any specific point in time during the POI, but from the fact that the "other factors" that it considered had likely placed negative pressure on domestic prices during the POI were no longer present or would not be as relevant in the imminent future as they had been during the POI.<sup>567</sup> Finally, we consider that the

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<sup>561</sup> USITC Final Determination, (Exhibit US-1), pp. 32-33. See also fn 555.

<sup>562</sup> For the same reasons, we disagree with Indonesia that the USITC speculated when it found that other factors would no longer obscure the adverse effects of subject imports on domestic prices, and that the USITC lacked any basis to make a projection about how subject imports would perform in a market where such other factors were not operating to lower prices. (Indonesia's opening statement at the first meeting of the Panel, para. 69).

<sup>563</sup> USITC Final Determination, (Exhibit US-1), p. 34.

<sup>564</sup> Indonesia's first written submission, paras. 125-129.

<sup>565</sup> See above, para. 7.287.

<sup>566</sup> USITC Final Determination, (Exhibit US-1), pp. 27, 28, and 34.

<sup>567</sup> It is not clear whether the "small portion" referred to by Indonesia refers to the market share that subject imports occupied in interim 2010 (6.8%), the market share lost from interim 2009 to interim 2010, or the levels that they would reach if they regained all the market share lost (19.7% if the first half of 2009 is the

USITC's conclusion that subject imports would be "priced aggressively" in the imminent future was reasonable given the significant price underselling determined to exist by the USITC throughout the POI.<sup>568</sup>

7.316. In light of the above, we consider that the USITC provided adequate explanations for its determination that subject imports would, in the imminent future, be a key driver of domestic prices and would cause significant price depression or suppression.

7.317. Finally, we note that Indonesia initially challenged what it regarded as a USITC's finding of likely price suppression, on the basis that the USITC made no finding of price suppression with respect to the POI.<sup>569</sup> The United States has indicated that the USITC only made reference to "significant price depression or suppression" to couch its likely-price-effects finding in terms of the US statute, and that likely price suppression was not a basis for the USITC's final determination of threat of material injury.<sup>570</sup> Indonesia did not, in subsequent submissions to the Panel, refer to the USITC's purported finding of price suppression. In any event, the United States' explanations are in line with our reading of the USITC's determination – although the determination concludes by stating that the domestic industry would be likely experiencing significant price depression or suppression in the future, the preceding analysis focuses on price depression, and there is no suggestion in the determination that the USITC considered or made a finding of likely future price suppression.

7.318. In sum, we find the USITC's finding of future price effects of subject imports to be reasonable and adequately explained in light of the evidence that was on the record. Indonesia has not presented any arguments or pointed to evidence in the record that undermines the reasonableness of these conclusions so as to demonstrate that an unbiased investigating authority could not have reached the conclusions or made the determination at issue before us. Therefore, we find that Indonesia has not demonstrated that the USITC's findings regarding the future price effects of subject imports were based on conjecture or speculation.

#### **7.6.3.5 Overall conclusion concerning Indonesia's claims under Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement**

7.319. We conclude that Indonesia has failed to establish that the USITC's findings that in the imminent future subject imports would gain market share at the expense of the domestic industry and would have adverse effects on US prices were based on conjecture and remote possibility. In light of the foregoing, we find that Indonesia has not demonstrated that, in reaching these findings, the USITC acted inconsistently with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

#### **7.6.4 Claims under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement ("special care")**

##### **7.6.4.1 Introduction**

7.320. Indonesia claims that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement because the USITC failed to exercise "special care".<sup>571</sup>

7.321. The United States requests that we reject Indonesia's claims.<sup>572</sup>

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baseline, or 18.3% if the whole of 2009 is the baseline). In any event, Indonesia has not made a convincing argument that it would have been unreasonable for the USITC to consider that import prices lowered to regain even a "small" portion of market share would have a negative impact on domestic prices.

<sup>568</sup> USITC Final Determination, (Exhibit US-1), pp. 34-35.

<sup>569</sup> Indonesia's first written submission, para. 127.

<sup>570</sup> United States' first written submission, para. 285 (referring to USITC Final Determination, (Exhibit US-1), pp. 35 and 39). (emphasis added)

<sup>571</sup> Indonesia's first written submission, para. 130; second written submission, para. 76.

<sup>572</sup> United States' first written submission, para. 353; second written submission, para. 176.

#### **7.6.4.2 Legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement**

7.322. With respect to the relevant legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, we refer to our interpretation of these provisions below in the section of this Report addressing Indonesia's "as such" claims. As explained in that section, we understand these provisions to require an investigating authority to apply a heightened level of attention in considering whether the domestic industry is threatened with injury.<sup>573</sup>

#### **7.6.4.3 Whether the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement**

7.323. Indonesia considers that arguments made under other Articles of the Anti-Dumping and SCM Agreements can also demonstrate a violation of Articles 3.8 and 15.8. Indonesia submits that the deficiencies it identified in the context of its claims under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement and of its claims under Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement equally and independently render the USITC's threat of injury determination inconsistent with Articles 3.8 and 15.8.<sup>574</sup>

7.324. The United States argues that Indonesia's "as applied" claims under Articles 3.8 and 15.8 are largely derivative of, and indistinguishable from, its claims under Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement and its claims under Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement. Consequently, for the United States, as Indonesia fails to establish a *prima facie* case of violation under the latter provisions, Indonesia also fails to establish a *prima facie* case of violation under Articles 3.8 and 15.8.<sup>575</sup>

7.325. We have, in the preceding sections of this Report, found that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Articles 3.5 of the Anti-Dumping Agreement and 15.5 of the SCM Agreement or with Articles 3.7 of the Anti-Dumping Agreement and 15.7 of the SCM Agreement. In doing so, we rejected Indonesia's arguments challenging aspects of the USITC's determination that Indonesia considered were inconsistent with these provisions. Indonesia has not presented any different or additional arguments in support of its contention that the same alleged inconsistencies are also, independently, inconsistent with the "special care" requirement in Articles 3.8 and 15.8. Thus, to the extent that Indonesia's claims under Articles 3.8 and 15.8 are premised on its claims of violation of the other provisions enumerated above, we find that Indonesia has failed to establish that the United States acted inconsistently with Articles 3.8 and 15.8.<sup>576</sup>

7.326. In addition, Indonesia argues that the USITC failed to exercise special care because of the cumulative effect of the alleged deficiencies it identified in its claims under the other provisions cited above. In essence, we understand Indonesia to assert that, cumulatively, the alleged deficiencies it identified in its other Article 3 and Article 15 claims resulted in a more robust and rigorous or precise and thorough present injury analysis by the USITC than threat of injury analysis, and that the USITC resolved the issues identified by Indonesia in its Article 3.5, 3.7,

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<sup>573</sup> See below, para. 7.346.

<sup>574</sup> Indonesia's first written submission, paras. 131-132; response to Panel question No. 56; and second written submission, para. 76.

<sup>575</sup> United States' first written submission, paras. 310-311; opening statement at the first meeting of the Panel, para. 56; second written submission, paras. 147-148 (referring to Panel Report, *US – Softwood Lumber VI*, para. 7.34); and response to Panel question Nos. 56 and 99.

<sup>576</sup> Our conclusion is consistent with the approach of the panel in *US – Softwood Lumber VI*: While we do not consider that a violation of the special care obligation **could** not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe *such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations*[.] (Panel Report, *US – Softwood Lumber VI*, paras. 7.34 (bold original; italics added))

15.5, and 15.7 claims against the Indonesian exporters, and for these reasons acted inconsistently with Articles 3.8 and 15.8.<sup>577</sup>

7.327. The United States argues that the Agreements require that an investigating authority resolve all issues before it based on an objective analysis of positive evidence, applying the relevant standards.<sup>578</sup> The United States considers that there is no basis for suggesting that Articles 3.8 and 15.8 require an investigating authority to resolve some percentage of issues, or "key" issues, in favour of respondents instead of resolving each based on an analysis of the facts and application of the applicable legal standards.<sup>579</sup>

7.328. We agree that the Anti-Dumping and SCM Agreements require an investigating authority's threat of injury determination to be based on an objective analysis of positive evidence and to be consistent with the relevant obligations under the applicable provisions of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, including Articles 3.5 and 15.5 and 3.7 and 15.7. Hence, the consistency of an investigating authority's threat of injury determination must be considered on its own terms, and not by comparison to the investigating authority's evaluation of the impact of dumped or subsidized imports on the domestic industry during the POI.<sup>580</sup> Thus, Indonesia's view that Articles 3.8 and 15.8 require that, in a given investigation, the investigating authority's threat of injury analysis be at least as "robust" or "rigorous" as its analysis of the situation of the domestic industry during the POI is without support in the text of the Agreements.<sup>581</sup>

7.329. Nor has Indonesia advanced any basis, in Articles 3.8 and 15.8 or any other applicable provision of the Agreements, for the proposition that Articles 3.8 and 15.8 require an investigating authority to resolve some issues, or "key" issues, in favour of respondents. Again, the relevant question is whether the USITC resolved each "issue" consistently with its obligations under the provisions at issue. Consequently, whether the investigating authority resolved some, or all, of the relevant "issues" in favour of foreign producers/exporters, or in favour of domestic producers, is not a relevant consideration. An investigating authority may well resolve all the "issues" before it in favour of either the domestic producers or in favour of foreign producers/exporters, so long as in doing so, it acts consistently with the provisions of the covered agreements. In the present case, we have found above that Indonesia has not established that the USITC's threat of injury determination is inconsistent with Articles 3.5 and 3.7 of the Anti-Dumping Agreement and with Articles 15.5 and 15.7 of the SCM Agreement.

7.330. On the basis of the foregoing, we find that Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

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<sup>577</sup> Indonesia's first written submission, paras. 130-132; opening statement at the first meeting of the Panel, para. 75; response to Panel question No. 56; and second written submission, para. 76.

<sup>578</sup> United States' second written submission, para. 148.

<sup>579</sup> United States' second written submission, para. 148; response to Panel questions No. 99 and 103; and comments on Indonesia's response to Panel question No. 103.

<sup>580</sup> Indonesia's position is also problematic in that it assumes that an investigating authority will, in all instances, make a fully analysed determination regarding both present injury and threat of injury. However, while an investigating authority considering the question of threat of injury would be expected to consider the present condition of the domestic industry in that context (see above, para. 7.231), we see no reason why that investigating authority would necessarily be required to consider all aspects required for a present injury determination. An investigating authority could, for instance, conclude that the domestic industry is not presently injured and may therefore go on to consider the question of threat of material injury without addressing the question of causation or non-attribution in the context of present (non)injury.

<sup>581</sup> In paragraph 7.210 above, we reject a similar argument advanced by Indonesia to the effect that, in assessing consistency with the non-attribution requirement under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, a panel should compare the investigating authority's threat of injury analysis to its present injury analysis and determine whether the former is as robust as the latter. In our findings above, we also note that present injury determinations require consideration of actual data for the POI, whereas threat of injury determinations by definition in addition involve consideration of projections for an imminent future period.



**7.7 "As such" claims alleging inconsistency of Section 771(11)(B) of the US Tariff Act of 1930 ("tie vote" provision) with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement ("special care")**

**7.7.1 Introduction**

7.331. Indonesia challenges Section 771(11)(B) of the US Tariff Act of 1930 "as such" – i.e. independently of its application in specific instances – as it applies to threat of injury determinations, asserting that this provision is inconsistent with the "special care" obligation under Articles 3.8 of the Anti-Dumping Agreement and 15.8 of the SCM Agreement in threat of injury determinations.<sup>582</sup>

7.332. The United States requests that we reject Indonesia's claim.<sup>583</sup>

7.333. It is well established in WTO dispute settlement practice that a complaining party may challenge another Member's measures of general and prospective application "as such", i.e. independently of their application in specific instances.<sup>584</sup> Indonesia's claims concerning the "tie vote" provision are independent of its claims concerning the US measures on coated paper from Indonesia. The tie vote provision did not come into play in the coated paper investigation – all Commissioners cast an affirmative vote (five found that the domestic industry was threatened with injury, one found that it had suffered present injury).

7.334. There is no substantial disagreement between the parties concerning the interpretation and operation of Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)). This provision of US law provides that if there is an evenly split vote between the USITC Commissioners on whether dumped or subsidized imports are causing injury (whether present injury, threat of injury, or material retardation) in an anti-dumping or countervailing duty investigation, the USITC shall be considered to have made an affirmative determination:

If the Commissioners voting on a determination by the Commission, including a determination under section 1675 of this title, are evenly divided as to whether the determination should be affirmative or negative, the Commission shall be deemed to have made an affirmative determination. For the purpose of applying this paragraph when the issue before the Commission is to determine whether there is

(A) material injury to an industry in the United States,

(B) threat of material injury to such an industry, or

(C) material retardation of the establishment of an industry in the United States,

by reason of imports of the merchandise, an affirmative vote on any of the issues shall be treated as a vote that the determination should be affirmative.<sup>585</sup>

7.335. Moreover, we note that pursuant to this provision, a vote that any of the three "types" of injury (present material injury, threat of material injury, or material retardation) exists is considered to be an "affirmative" vote when compiling the votes of individual Commissioners. Indonesia's claim is, however, limited to instances in which an equal number of Commissioners<sup>586</sup> cast an affirmative vote of "threat of injury" by reason of subject imports and cast a negative vote (i.e. a vote finding no form of injury by reason of subject imports).<sup>587</sup>

7.336. Moreover, the parties agree that, under US law, the imposition of anti-dumping or countervailing measures automatically follows affirmative determinations by both the USDOC (on

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<sup>582</sup> Indonesia's first written submission, paras. 3 and 133-165.

<sup>583</sup> United States' first written submission, para. 353.

<sup>584</sup> See, e.g. Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.94.

<sup>585</sup> 19 U.S.C., Section 1677, (Exhibit US-12), Section 1677(11)(B).

<sup>586</sup> The parties agree that in some instances, fewer than six Commissioners will participate in the vote. (United States' response to Panel question No. 100 (referring to 18 U.S.C., Section 208, (Exhibit US-110))).

<sup>587</sup> Indonesia's first written submission, para. 135.

the existence and a non-*de minimis* amount of dumping and/or subsidization) and the USITC (on the existence of injury, in any of its forms, by reason of subject imports). When both agencies have made an affirmative determination, the USDOC is required, under US law, to issue an anti-dumping or countervailing duty order imposing duties.<sup>588</sup>

7.337. We first address our understanding of the "special care" requirement in Articles 3.8 and 15.8, before considering Indonesia's claims of inconsistency of the US tie vote provision.

### **7.7.2 Legal standard under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement**

7.338. Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement read as follows:

With respect to cases where injury is threatened by [dumped/subsidized] imports, the application of [anti-dumping/countervailing] measures shall be considered and decided with special care.

7.339. The parties disagree on the interpretation of Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement, in terms of both the scope of application of the "special care" obligation, and the content of that obligation.

7.340. Concerning the scope of application of Articles 3.8 and 15.8, Indonesia considers that the "special care" provision applies to all steps leading to the imposition of duties, and thus to both an investigating authority's consideration of the substantive requirements for the imposition of anti-dumping or countervailing measures and to the decision to apply duties that follows, including the decision-making or voting procedures pursuant to which that decision is made. In this respect, Indonesia argues that, pursuant to the principle of effective treaty interpretation (*effet utile*) and Article 31(1) of the Vienna Convention, meaning must be given to both the terms "considered" and "decided" in Articles 3.8 and 15.8. In Indonesia's view, if "considered" may refer to or even be limited to the USITC's substantive consideration of the requirements under the Agreements, the term "decided" unequivocally includes the way an investigating authority brings the question of applying or not applying measures in threat of injury situations "to a resolution or conclusion", including the way in which the investigating authority resolves a tie vote in those situations.<sup>589</sup> In addition, Indonesia considers that the use of the term "application" in Articles 3.8 and 15.8 results in the "special care" obligation applying to all steps leading up to the actual imposition of the duties.<sup>590</sup> Indonesia also argues that where the drafters wanted to refer to the final step of actually charging duties, they used the terms "impose", "imposition", "levying" or "collection" of duties, not the broader terms "application" or "measures".<sup>591</sup> Indonesia contends that the Appellate Body Report in *US – Line Pipe* does not stand for the general proposition that Members' internal-decision making processes are always within the discretion of Members.<sup>592</sup>

7.341. The United States, for its part, argues that the "special care" obligation in Articles 3.8 and 15.8 applies to an investigating authority's substantive analysis, i.e. its consideration of threat factors and other requirements concerning whether the domestic industry is threatened with injury by subject imports and its ultimate decision of whether such a threat exists.<sup>593</sup> The special care obligation does not, in the United States' view, discipline a Member's voting system or decision-making procedures.<sup>594</sup> The United States finds support for its interpretation of Articles 3.8 and 15.8 in the placement of these Articles as part of the provisions concerning the substantive requirements applicable to injury (including threat of injury) determinations, and argues that it is in the satisfaction of those obligations that investigating authorities exercise special care under

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<sup>588</sup> United States' response to Panel question No. 102(a); 19 U.S.C., Section 1671d, (Exhibit US-56), Section 1671d(c)(2); and 19 U.S.C., Section 1673d, (Exhibit US-60), Section 1673d(c)(2).

<sup>589</sup> Indonesia's opening statement at the first meeting of the Panel, para. 79; response to Panel question Nos. 58 and 59(c); and second written submission, para. 81.

<sup>590</sup> Indonesia's response to Panel question Nos. 59 (a), (b), and (c).

<sup>591</sup> Indonesia's response to Panel question No. 59(c).

<sup>592</sup> Indonesia's opening statement at the first meeting of the Panel, para. 80; response to Panel question No. 60; and second written submission, para. 83.

<sup>593</sup> United States' second written submission, paras. 155-156.

<sup>594</sup> United States' first written submission, para. 319.

Articles 3.8 and 15.8.<sup>595</sup> The United States also finds support for its position in Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement, concerning the imposition of duties. The United States notes that these Articles provide that it is desirable – but not required – for the imposition of duties to be permissive and that these Articles do not distinguish between cases involving present injury and those involving threat of injury. The United States also argues that interpreting "application" in Articles 3.8 and 15.8 as referring to a decision on whether to impose measures following a determination that the prerequisites for application have been met may prevent the automatic application of measures in cases involving threat of injury, contrary to the statement in Articles 9 and 19 that discretion is merely desirable.<sup>596</sup>

7.342. The United States further submits that where the Anti-Dumping and SCM Agreements discuss procedural matters, they do so explicitly, and nothing in the Anti-Dumping and SCM Agreements curbs Members' discretion regarding their framework for assigning responsibility for conducting injury investigations and for counting votes. The United States notes in this respect that the Appellate Body in *US – Line Pipe* held that panels and the Appellate Body are "concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement", and that a Member's internal decision-making process is entirely within the discretion of that Member.<sup>597</sup> The United States also asserts that Indonesia's interpretation of Articles 3.8 and 15.8 would imply structural requirements for investigating authorities and would require intrusive examination of their decision-making process.<sup>598</sup> Finally, the United States submits that the negotiating history of Articles 3.8 and 15.8 confirms that the "special care" language evolved from text about the forecasted level of effect of dumped imports on the domestic industry, demonstrating that the concept of special care relates to the substantive standards used to assess whether a threat of injury exists.<sup>599</sup>

7.343. With respect to the scope of application of the "special care" provision, we note that Articles 3.8 and 15.8 refer to the "application" of measures, which shall be "considered and decided" with special care. The use of the term "application", combined with the use of the term "decided"<sup>600</sup>, might, at first glance, suggest that the "special care" obligation concerns a Member's decision to apply duties once it has determined that all the substantive requirements for doing so have been met. We recall, however, that the provisions of the covered agreements are to be interpreted in accordance with the ordinary meaning of their terms, read in context and in light of the object and purpose of the relevant agreements.<sup>601</sup> Here, the context of both Articles 3.8 and 15.8 strongly suggests that they concern the *substantive requirements* for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports. In our view, Articles 3.7 and 15.7, which immediately precede Articles 3.8 and 15.8, provide the most relevant context for their interpretation. The fact that the two sets of provisions apply to determinations of threat of injury and the placement of Articles 3.8 and 15.8 immediately following Articles 3.7 and 15.7 suggests that the "special care" requirement relates to the obligations set out in those preceding provisions. In this respect, we agree with the

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<sup>595</sup> United States' first written submission, paras. 322 and 327-329 (quoting Panel Report, *US – Softwood Lumber VI*, paras. 7.33-7.34); second written submission, paras. 150 and 158; and response to Panel question No. 58 (referring to Panel Report, *US – Softwood Lumber VI*, para. 7.34).

<sup>596</sup> United States' response to Panel question No. 59(a).

<sup>597</sup> United States' first written submission, paras. 312-353; opening statement at the first meeting of the Panel, para. 58; and second written submission, paras. 150-151 (in both instances referring to Appellate Body Report, *US – Line Pipe*, para. 158).

<sup>598</sup> United States' second written submission, paras. 164-165.

<sup>599</sup> United States' first written submission, para. 330; second written submission, paras. 159-163 (referring to Group on Anti-Dumping Policies, Anti-Dumping Code draft (August 1966), (Exhibit US-26); Anti-Dumping Code (July 1967), (Exhibit US-27); and Group on Anti-Dumping Policies, Anti-Dumping Code draft (December 1966), (Exhibit US-30)).

<sup>600</sup> In the Anti-Dumping and SCM Agreements, the concept of "application" generally refers to a Member's imposition of duties, not including their final collection. See, e.g. Articles 7.1, 10.1, 10.2, and 15 of the Anti-Dumping Agreement and the corresponding provisions of the SCM Agreement. The ordinary meaning of the term "decided" suggests that it can be interpreted to refer to the overall conclusion reached, as a result of an investigating authority's "consideration" of a matter. The Shorter Oxford Dictionary, defines "decide" as, *inter alia*, "[s]ettle (a question, dispute, etc.) by finding in favour of one side; bring to a settlement, resolve" "[b]ring (a person) to a determination or resolution (against, in favour of, to do)", "[c]ome to a determination or resolution". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, pp. 618-619). We also note that there is no notable difference between the English, the French, and the Spanish texts of Articles 3.8 and 15.8.

<sup>601</sup> Vienna Convention, Article 31(1).

United States that the negotiating history of Articles 3.8 and 15.8 suggests that the "special care" requirement was originally linked to the nature of the information – predictions about the future – that authorities must rely on in making threat of injury determinations.<sup>602</sup> The apparent reason for the inclusion of what became the "special care" requirement supports our understanding that the obligation applies to an investigating authority's consideration of the substantive requirements for a determination of threat of injury. In addition, Articles 3.8 and 15.8 form part of, respectively, Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. The focus of these two Articles, both of which are entitled "Determination of Injury", is "on the *substantive* obligations that a Member must fulfil in making an injury determination".<sup>603</sup> The placement of the "special care" language in Articles 3 and 15 thus suggests that, in line with all the other provisions of those Articles, the "special care" provision concerns the substantive requirements for an investigating authority's determination of whether the domestic industry is threatened with material injury by subject imports.<sup>604</sup> By contrast, disciplines on the procedural and evidentiary aspects of anti-dumping and countervailing duty investigations are found primarily in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement, and the imposition and collection of duties is addressed in Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement.

7.344. We find further support in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement for our view that Articles 3.8 and 15.8 concern an investigating authority's consideration of the substantive requirements for a determination of threat of injury. Articles 6.9 and 12.8 impose a procedural obligation to disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measures".<sup>605</sup> This obligation applies to the facts underlying an authority's *substantive* consideration of the existence of dumping or subsidization, of injury, and of a causal link between the dumped or subsidized imports and the injury.<sup>606</sup> The fact that Articles 6.9 and 12.8 are, like Articles 3.8 and 15.8, formulated in terms of the *decision to apply anti-dumping or countervailing measures* even though they apply to substantive requirements lends support to our view that Articles 3.8 and 15.8 concern the substantive requirements applicable in determining whether a threat of injury exists.

7.345. In any event, even if the special care requirement could apply to something else than an investigating authority's consideration of the substantive requirements under Articles 3 and 15, we agree with the United States and the European Union<sup>607</sup> that the Anti-Dumping and SCM Agreements generally do not discipline Members' voting procedures or the manner in which decisions to apply duties are made. There is nothing in either the Anti-Dumping or SCM Agreements concerning the structure or responsibilities of the decision-making for investigations beyond the statement in footnote 3 of the Anti-Dumping Agreement that the term "authorities"

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<sup>602</sup> Group on Anti-Dumping Policies, Anti-Dumping Code draft (August 1966), (Exhibit US-26); Anti-Dumping Code (July 1967), (Exhibit US-27); and Group on Anti-Dumping Policies, Anti-Dumping Code draft (December 1966), (Exhibit US-30).

<sup>603</sup> Appellate Body Report, *Thailand – H-Beams*, para. 106. (emphasis original)

<sup>604</sup> Our understanding of Articles 3.8 and 15.8 is consistent with that of the panel in *US – Softwood Lumber VI*, which took the view that Articles 3.8 and 15.8 reinforce the fundamental obligation under Articles 3.7 and 15.7 that an investigating authority base a threat of injury determination on facts and not allegation, conjecture, or remote possibility. The panel also was of the view that Articles 3.8 and 15.8 "apply during the process of investigation and determination of threat of material injury", that is, "in the establishment of whether the prerequisites for application of a measure exist", and not merely afterward when final decisions whether to apply a measure are taken. (Panel Report, *US – Softwood Lumber VI*, para. 7.33). We note that in its report in the compliance proceedings in the same dispute, the Appellate Body included Articles 3.8 and 15.8 in a list of the *substantive* provisions of Articles 3 and 15 informing the standard of review to be applied by a panel considering claims concerning these provisions and, in this context, referred to the above discussion of Articles 3.8 and 15.8 by the *US – Softwood Lumber VI* panel. (Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 95-96). See also Appellate Body Report, *China – GOES*, fn 213: "Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement* set out the requirements regarding the determination of a threat of material injury".

<sup>605</sup> Article 6.9 of Anti-Dumping Agreement and Article 12.8 of the SCM Agreement read, in relevant part:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form *the basis for the decision whether to apply definitive measures*.

(emphasis added)

<sup>606</sup> See, e.g. Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.130.

<sup>607</sup> United States first written submission, paras. 320-325; second written submission, para 153; and European Union's third-party response to Panel question No. 14.

used in the Agreement "shall be interpreted as meaning authorities at an appropriate senior level". Had the drafters intended for the Anti-Dumping and the SCM Agreements to subject to review the manner in which Members structure their investigating authorities and the manner in which decisions to apply duties are made, they would, we believe, have done so explicitly, particularly in view of the wide variety of ways in which Members have organized and structured their investigating authorities.<sup>608</sup> We see no basis in the texts of the Anti-Dumping or SCM Agreements that would support Indonesia's argument that those Agreements impose procedural disciplines on how determinations are made.<sup>609</sup>

7.346. In light of our conclusion concerning the scope of application of Articles 3.8 and 15.8, we do not consider it necessary to go on to consider further the meaning of the term "special care". Nonetheless, we make the following observations in this regard. First, the ordinary meaning of the "special care" language implies an obligation on Members to apply a high degree of attention in threat of injury determinations.<sup>610</sup> Second, we note that Indonesia refers to the following as relevant context for the interpretation of the term "special care": (a) Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement requiring that an injury determination be based on an "objective examination" of "positive evidence"; (b) Article X:3(a) of the GATT 1994 requiring that measures be administered in a "uniform, *impartial* and *reasonable* manner"; (c) the principle of good faith as a "relevant rule of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the Vienna Convention; (d) a general standard of even-handedness, which, Indonesia argues, underlies the WTO covered agreements; and (e) Article 15 of the Anti-Dumping Agreement and Article 27 of the SCM Agreement, which set out special rules concerning developing country Members.<sup>611</sup> With the exception of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, we do not see, and Indonesia has not persuaded us of, the relevance for the interpretation of the special care requirement of the provisions and concepts that it refers to. As indicated above, in our view, Articles 3.7 and 15.7, which immediately precede Articles 3.8 and 15.8, provide the most relevant context for the interpretation of Articles 3.8 and 15.8, and this context suggests that the "special care" requirement relates to the obligations set out in those preceding provisions.

7.347. Finally, we note Indonesia's argument that the fact that the laws of certain other Members and the Statutes of the International Court of Justice provide for either an odd number of

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<sup>608</sup> Members have adopted a variety of different structures for the administration of their trade remedy systems. In some systems, the decision-maker is formally part of the government, while in others it is a separate, often quasi-judicial, body outside the formal government hierarchy. In some systems, there is a dual system in which one authority determines whether imports are dumped or subsidized, and another determines whether the domestic industry is injured by such imports. The ultimate decision whether to impose measures may rest with one or the other of these authorities, or with a separate authority. We recall that in the US system, while the USITC makes determinations regarding injury, the USDOC makes determinations regarding dumping and subsidization and the imposition of measures; the latter is required under US law if the USDOC and the USITC both make affirmative determinations of, respectively, dumping or subsidization, and injury. In some systems, the investigation and evaluation of the substantive requirements for the imposition of measures (i.e. dumping, subsidy, injury, and causation) is undertaken by one authority, which recommends a determination to another authority, which makes the ultimate determination whether to apply measures, and may accept, reject, or modify the recommendation.

<sup>609</sup> We also note the Appellate Body's statement in *US – Line Pipe* that the Agreement on Safeguards is not:

[C]oncerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The *Agreement on Safeguards* does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or—as here—six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the *Agreement on Safeguards*.

(Appellate Body Report, *US – Line Pipe*, para. 158)

<sup>610</sup> The Shorter Oxford Dictionary defines "care" as "[s]erious attention, heed; caution, pains; regard, inclination (to, for)" (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 348), and "special", (as an adjective), as "[e]xceptional in quality or degree; unusual; out of the ordinary". (Ibid. Vol. 2, p. 2942).

<sup>611</sup> Indonesia's first written submission, paras. 140-153; response to Panel question No. 63(b); opening statement at the first meeting of the Panel, paras. 79, 82; and second written submission, para. 85. (emphasis original)

decision-makers or for the presiding member to have a deciding vote are "circumstances surrounding the conclusion of a treaty" within the meaning of Article 32 of the Vienna Convention, which indicate that the special care requirement is generally perceived to entail a greater degree of diligence than that afforded by the US tie vote provision, thus showing that the provision is inconsistent with Articles 3.8 and 15.8.<sup>612</sup> Indonesia fails to explain how other Members' procedures could properly be regarded as circumstances surrounding the conclusion of the Anti-Dumping and SCM Agreements in this regard, given that the conclusion of these Agreements preceded the adoption of at least some of those procedures; legislation enacted subsequent to the conclusion of a treaty cannot be considered "circumstances of its conclusion".<sup>613</sup> Nor has Indonesia explained how tie-breaking provisions in other Members' trade remedy legislation could have been of relevance to, informed, or impacted, the negotiation of Articles 3.8 and 15.8, particularly as these Articles apply only in threat of injury determinations, and on their face have nothing to do with voting procedures.<sup>614</sup>

7.348. In its first written submission, Indonesia also argued that these same laws constituted "subsequent practice" within the meaning of "Article 31(1)(b) (sic)" of the Vienna Convention.<sup>615</sup> Indonesia later asserted, in its opening statement at the second meeting with the Panel, that it had not invoked Article 31(3)(b) or sought to rely on the subsequent practice of Members. In light of Indonesia's repudiation of its own argument, it is unnecessary to address this question. Nonetheless, we again note that there is no obvious connection between the tie-breaking provisions in other Members' legislation and the special care provision, and that Indonesia refers to the practice of only a handful of WTO Members. Thus, Indonesia in any event failed to demonstrate "a common, consistent, discernible pattern of acts or pronouncements" that "imply agreement on the interpretation of the relevant provision".<sup>616</sup> Indonesia also refers to the fact that in safeguards cases, under US law, the US president (who determines whether a measure will be applied and if so what measure) may deem a tied vote by the USITC to be affirmative.<sup>617</sup> However, Indonesia again fails explain the relevance of this decision-making procedure to the interpretation of Articles 3.8 and 15.8.

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<sup>612</sup> Indonesia's first written submission, paras. 160-165 (referring to Other Members' Laws on Tie Voting, (Exhibit IDN-20); and ICJ Statute, (Exhibit IDN-47)); opening statement at the second meeting of the Panel, para. 62.

<sup>613</sup> In *EC – Chicken Cuts*, the Appellate Body upheld the panel's view that the "circumstances of the conclusion should be ascertained over a period of time ending on the date of the conclusion of the WTO Agreement". (Appellate Body Report, *EC – Chicken Cuts*, para. 293 (emphasis added)). Canada's legislation appears to pre-date the entry into force of the Uruguay Round Agreements, whereas Argentina, South Africa, and Turkey's legislation appear to post-date it. Of course, it may well be that these Members had similar legislation in place prior to the conclusion of the Uruguay Round, but we cannot assume this to be the case in the absence of evidence to this effect and Indonesia has not submitted evidence that would demonstrate that the laws were enacted prior to the conclusion of the Uruguay Round. Moreover, in the present case, the language of Articles 3.8 and 15.8 originates in the Kennedy Round Anti-Dumping Code, and in our view, the laws would have to pre-date the conclusion of that agreement to qualify under Article 32 of the Vienna Convention in the manner argued by Indonesia.

<sup>614</sup> In addition, Indonesia invokes the practice of only four Members, and fails to mention that at least one other Member, Korea, has a provision similar to the US tie vote provision. (South Korea, Act on the Investigation of Unfair International Trade Practices, (Exhibit US-29), Article 32 (referred to in United States' first written submission, para. 343)).

<sup>615</sup> Indonesia's first written submission, para. 161. Indonesia explained that:  
The Appellate Body has defined 'subsequent practice as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation', see *Appellate Body Report, Japan – Alcoholic Beverages II*, p.13. Indonesia can rely on laws enacted after the entry into force of the WTO agreements as an indication of how states perceive 'special care' to be correctly interpreted.

(Ibid. fn 216)

The language of the Appellate Body Report in *Japan – Alcoholic Beverages II* cited by Indonesia concerns the use of subsequent practice under Article 31.3(b) of the Vienna Convention, which provides that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

<sup>616</sup> Appellate Body Reports, *US – Gambling*, para. 192; *EC – Chicken Cuts*, paras. 258-259. (emphasis original)

<sup>617</sup> Indonesia's first written submission, para. 164; response to Panel question No. 60 (referring to Safeguard Tie Vote, (Exhibit IDN-37)).

### **7.7.3 Whether the US "tie vote" provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement**

7.349. Indonesia's argument that the US tie vote provision is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement is premised on its interpretation of the "special care" obligation. We have rejected Indonesia's interpretation of Articles 3.8 and 15.8, concluding that these provisions establish no disciplines on Members' decision-making procedures in determining whether a domestic industry is threatened with injury and whether to apply measures. The US tie vote provision is a procedural mechanism to establish an outcome based on the votes of individual Commissioners in the event of a tied vote on whether there is injury caused by subject imports. Consequently, we conclude that Indonesia has failed to establish the inconsistency of the US tie vote provision with the special care requirement under Articles 3.8 and 15.8.

7.350. Finally, we note that the parties also disagree as to the significance, for Indonesia's claims, of the fact that under US law<sup>618</sup> the USDOC has no discretion not to issue an anti-dumping or countervailing duty order following affirmative determinations by the USDOC and the USITC. In particular, the parties disagree whether this means that under US law, an affirmative USITC decision constitutes a decision to apply duties.<sup>619</sup> In light of our conclusions regarding the scope of application of Articles 3.8 and 15.8, we see no need to address the parties' arguments in this respect.

7.351. In light of the foregoing, we find that Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement and reject Indonesia's "as such" claims under these provisions.

## **8 CONCLUSIONS**

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. With respect to Indonesia's claims concerning the USDOC's subsidy determination:
  - i. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for standing timber in Indonesia as the basis for establishing the benchmark for the provision of standing timber;
  - ii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using private prices for logs in Indonesia as the basis for establishing the benchmark for the log export ban;
  - iii. Indonesia has failed to establish that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in its determination that Orleans was affiliated with APP/SMG;
  - iv. Indonesia has failed to establish that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to determine or identify the relevant subsidy programmes in connection with the provision of standing timber, the log export ban, or the debt forgiveness;
  - v. Indonesia has failed to establish that the USDOC acted inconsistently with the chapeau of Article 2.1 of the SCM Agreement by failing to identify the granting authority that forgave debt in favour of APP/SMG or the jurisdiction of that granting authority.

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<sup>618</sup> See above, para. 7.336.

<sup>619</sup> United States' first written submission, paras. 319 and 333-336; second written submission, para. 153; response to Panel question No. 102(a); Indonesia's response to Panel question Nos. 59 (a), (b), and (c); and comments on the United States' response to Panel question No. 102(a).



- b. With respect to Indonesia's claims concerning the USITC's threat of injury determination:
  - i. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement because the USITC attributed to the subject imports adverse effects caused by other factors;
  - ii. Indonesia has failed to establish that the USITC's findings that in the imminent future subject imports would gain market share at the expense of the domestic industry and would have adverse effects on US prices are based on conjecture and remote possibility, and therefore that the USITC's threat of injury determination is inconsistent with Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement;
  - iii. Indonesia has failed to establish that the USITC's threat of injury determination is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.
- c. With respect to Indonesia's "as such" claims concerning Section 771(11)(B) of the US Tariff Act of 1930 (the "tie vote" provision):
  - i. Indonesia has failed to establish that Section 771(11)(B) of the US Tariff Act of 1930, as amended (codified at Title 19 of the United States Code, Section 1677(11)(B)), as it applies to threat of injury determinations, is inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

8.2. In light of these conclusions, the Panel makes no recommendation under Article 19.1 of the DSU.

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