**SKRIPSI**

# STUDI KASUS PUTUSAN PANEL *WORLD TRADE ORGANIZATION* ANTARA INDONESIA DENGAN AMERIKA SERIKAT DALAM PERKARA ANTI DUMPING DAN TINDAKAN *COUNTERVAILING* SEBAGIAN PRODUK *COATED PAPER*

*Case Study on World Trade Organization Panel Verdict between Indonesia and United State on Anti Dumping and Countervailing Measures Case for Certain Coated Paper Product*

**Jeremias Andrew Desembrico**

**NIM 150710101287**

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**2019**

**MOTTO**

**In the end, we will remember not the words of our enemies, but the silence of our friends**

*" Pada akhirnya, kita akan mengingat bukan kata-kata musuh kita, melainkan keheningan teman-teman kita "*[1]

**(Martin Luther King, Jr.)**

[1] https://www.brainyquote.com/quotes/martin_luther_king_jr_103571, diakses pada 7 Februari 2019, pukul 11.58 WIB

## PERSEMBAHAN

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Diajukan sebagai salah satu syarat untuk memperoleh gelar Sarjana

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# PERNYATAAN

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Menyatakan dengan sesungguhnya bahwa karya tulis ilmiah yang berbentuk skripsi dengan judul : **STUDI KASUS PUTUSAN PANEL *WORLD TRADE ORGANIZATION* ANTARA INDONESIA DENGAN AMERIKA SERIKAT DALAM PERKARA ANTI DUMPING DAN TINDAKAN *COUNTERVAILING* SEBAGIAN PRODUK *COTED PAPER*** adalah benar-benar hasil karya sendiri dan didalam skripsi ini tidak terdapat karya orang lain yang pernah diajukan untuk memperoleh gelar di perguruan tinggi atau lembaga Pendidikan manapun, kecuali jika ada pengambilan karya orang lain dalam skripsi ini disebutkan sumbernya sebagaimana tercantum dalam Daftar Pustaka.

Demikian pernyataan ini saya buat dengan sebenarnya, tanpa adanya tekanan dan paksaan dari pihak lain serta bersedia mendapat sanksi akademik jika ternyata ditemukan dkemudian hari pernyataan ini tidak benar.

Jember,

Yang Menyatakan,


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NIM: 150710101287

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Jember,

Penulis

# RINGKASAN

Perdagangan internasional sebagai satu akibat dari adanya perdagangan bebas telah banyak melakukan usaha dalam kurun waktu yang panjang untuk menjaga eksistensi prinsip kebebasan dalam perdagangan ini yang kemudian menghasilkan suatu organisasi internaisonal yaitu *World Trade Organization* (WTO) yang bertugas untuk mengatur jalannya perdagangan internasional. Lalu WTO membentkuk *Dispute Settlement Body* (DSB) yang berwenang memeriksa dan memutus sengketa antar anggota WTO. Kasus penerapan kewajiban anti-dumping dan tindakan *countervailing* yang dilakukan oleh Amerika Serikat terhadap sebagian produk *coated paper* yang berasal dari Indonesia telah selesai disidangkan oleh DSB. Panel memutuskan bahwa Indonesia tidak dapat membuktikan penerapan kewajiban yang dilakukan oleh Ameriksa Serikat salah. Berdasarkan uraian tersebut penulis tertarik untuk menulis skripsi dengan judul **"Studi Kasus Putusan Panel *World Trade Organization* antara Indonesia dengan Amerika Serikat Dalam Perkara Anti Dumping dan Tindakan *Countervailing* Sebagian *Produk Coted Paper*"**.

Rumusan masalah yang dikemukakan dalam skripsi ini antara lain: *Pertama***,** Apakah Indonesia melanggar ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization* terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat**;** *Kedua*, Apa pertimbangan hukum (*ratio decidendi*) Panel dalam mengambil putusan *World Trade Organization* sudah sesuai dengan hukum internasional yang mengatur; dan *Ketiga*, Apa akibat hukum putusan Panel *World Trade Organization* terkait sengketa sebagian produk *coated paper* terhadap perdagangan internasional.

Tujuan dalam pembuatan skripsi antara lain Untuk mengetahui dan memahami ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization* terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat, Untuk mengetahui dan memahami pertimbangan hukum (*ratio decidendi*) Panel dalam mengambil putusan *World Trade Organization* berdasarkan hukum internasional yang mengatur, dan Untuk mengetahui akibat hukum putusan Panel *World Trade Organization* terkait sengketa produk sebagian *coated paper* terhadap perdagangan internasional.

Metode penelitian yang digunakan dalam penulisan skripsi ini adalah yuridis normatif dengan menggunakan pendekatan perundang-undngan dimana penulis menelaah semua undang-undang dan regulasi yang berkaitan dengan penelitian ini dan pendekatan konseptual dimana penulis dalam menyusun karya ilmiah merujuk pada prinsip-prinsip hukum.

Tinjauan Pustaka skripsi ini menguraikan tentang pengertian-pengertian serta istilah-istilah yang digunakan sebagai bahan penelitian dan pembahasan awal dalam skripsi ini. Diantaranya meliputi perdagangan internasional, General Agreement on Tariffs and Trade World Trade Organization – World Trade Organization (GATT – WTO), Pengertian Dumping, Pengertian Coated Paper, dan Penyelesaian Sengketa Perdagangan Internasional dalam Kerangka WTO.

Hasil pembahasan pada kasus ini adalah bahwa jawaban pada rumusan masalah pertama mengacu berkaitan dengan Perjanjian Anti-Dumping khususnya pada Pasal 3.5, Pasal 3.7, Pasal 3.8 dan Perjanjian SCM khususnya pada Pasal 2.1 (c), kepala/judul Pasal 2.1, Pasal 12.7, Pasal 14 (d), Pasal 15.5, Pasal 15.7, Pasal

15.8. Indonesia secara sah terbukti melakukan perbuatan dumping dan memberikan subsidi atas sebagian produk *coated paper* yang diproduksi oleh salah satu perusahaan terbesar di Indonesia yaitu APP / SMG yang diekspor ke Amerika Serikat. Berdasarkan pasal-pasal yang digugatkan, Indonesia telah gagal sama sekali dalam membuktikan gugatannya. Jawaban rumusan masalah kedua adalah didasarkan pada fakta-fakta dan bukti-bukti yang berkaitan dengan kasus ini ditarik ke dalam standar hukum setiap pasal yang digugatkan. Pertimbangan hukum Panel telah tepat dan sesuai dengan setiap aturan hukum internasional yang berkaitan dengan gugatan yang diajukan Indonesia dengan mendasarkan pemeriksaan fakta-fakta yang diajukan oleh kedua pihak yang bersengketa dengan peraturan-peraturan hukum yang terkait. Jawaban rumusan masalah ketiga adalah fungsi atas putusan Panel pada sengketa Indonesia dengan Amerika Serikat dalam perkara penerapan kewajiban anti-dumping dan tindakan *countervailing* pada sebagian produk *coated paper* terhadap keberlangsungan perdagangan internasional. Putusan Panel Indonesia dengan Amerika Serikat dalam perkara penerapan kewajiban anti-dumping dan tindakan *countervailing* sebagian produk *coated paper* memberikan dampak bagi perdagangan internasional. Putusan Panel ini dapat menjadi sumber hukum tambahan (yurisprudensi) yang digunakan dalam argumen para pihak dan/atau pertimbangan Panel dan *Appellate Body* (Badan Peninjau) dalam mengambil putusan.

Kesimpulan atas kasus ini adalah Indonesia telah melanggar ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization* terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat, pertimbangan hukum (*ratio decidendi*) Panel dalam mengambil putusan *World Trade Organization* sudah sesuai dengan hukum internasional yang mengatur; dan putusan Panel *World Trade Organization* terkait sengketa sebagian produk *coated paper* terhadap perdagangan internasional memiliki akibat hukum Indonesia tetap diberlakukan tindakan anti-dumping dan dikenakan tindakan *countervailing* serta putusan ini dapat dijadikan sebagai salah satu sumber hukum perdagangan intenasional.

Saran yang dapat diberikan dari skripsi ini adalah, *Pertama* pembelajaran bagi seluruh pelaku usaha di Indonesia, khusunya bagi mereka yang mengekspor barang usahanya untuk lebih memperhatikan dan menaati peraturan yang telah berlaku, khususnya peraturan-peraturan yang dikeluarkan oleh WTO selaku organisasi dagang dunia. *Kedua,* Indonesia sebelum mengajukan gugatan agar lebih memperhatikan kesiapan akan fakta-fakta dan bukti-bukti yang nantinya memiliki kekuatan untuk mendukung gugatannya. *Ketiga,* WTO setiap tahun akan menerbitkan buku yang berisi putusan-putusan Panel dan/atau Badan Peninjau sebagai laporan kasus-kasus yang berhasil dan selesai mereka tangani di tahun tersebut. Harapannya buku tersebut dapat diterjemahkan ke dalam berbagai bahasa negara anggota khususnya ke dalam bahasa Indonesia.

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# BAB 1. PENDAHULUAN

## 1.1 Latar Belakang

Bidang perdagangan bebas (*free trade*) adalah salah satu bidang yang telah ada sejak lama dan saat ini sedang berkembang, termasuk pula perdagangan bebas antara negara-negara di dunia ini.[2] Perdagangan bebas membawa perkembangan ekonomi suatu negara berjalan dengan semakin pesat sehingga semakin banyak pula kebutuhan-kebutuhan yang diperlukan negara tersebut untuk memenuhi kepuasan hidup masyarakatnya. Setiap kebutuhan tiap-tiap negara tersebut tentu tidak semuanya mampu dihasilkan oleh negara itu sendiri.[3] Hal ini dikarenakan adanya perbedaan sumber daya alam setiap negara yang dipengaruhi oleh letak geografis masing-masing negara. Dengan adanya perbedaan sumber daya alam tersebut menyebabkan suatu negara dalam memenuhi kebutuhannya melakukan suatu transaksi jual beli dengan negara lain guna memenuhi kebutuhan negaranya. Sama halnya dengan perdagangan dalam negeri terdapat transaksi jual beli demikian pula perdagangan luar negeri juga terdapat transaksi jual beli atau yang lebih dikenal dengan istilah ekspor dan impor.[4]

Perdagangan internasional merupakan suatu aktivitas perdagangan yang dilakukan oleh penduduk suatu negara dengan penduduk negara lain atas dasar kesepakatan bersama.[5] Dari pengertian diatas, perdagangan luar negeri juga dapat diartikan sebagai perdagangan internasional karena transaksi jual beli yang dilakukan dalam perdagangan luar negeri pastilah atas dasar kesepakatan bersama masing-masing pihak.

Transaksi jual beli yang dilakukan antarnegara tersebut membuktikan bahwa negara yang satu penting untuk menjalin hubungan dengan negara yang lain. Hal tersebut dikarenakan setiap negara tidak mampu untuk memenuhi kebutuhannya sekalipun negara tersebut adalah negara yang paling berkuasa

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[2] Munir Fuady, 2004, *Hukum Dagang Internasional (Aspek Hukum dari WTO)*, Bandung: Citra Aditya Bakti, hlm. 1

[3] Moerdjono dan Jamal Wiwoho, 1989, *Transaksi Perdagangan Luar Negeri Documentary Credit & Devisa*, Yogyakarta: Liberty, hlm.1

[4] *Ibid., hlm. 5*

[5] Mahyus Ekananda, 2015, *Ekonomi Internasional,* , Jakarta: Erlangga, hlm. 3

ataupun negara yang paling maju di dunia. Dengan begitu jelas bahwa perdagangan internasional merupakan faktor yang sangat penting bagi setiap negara. Sehingga, sangat diperlukannya hubungan perdagangan antarnegara yang tertib dan adil.[6]

Perdagangan internasional sebagai satu hal akibat dari adanya perdagangan bebas telah banyak melakukan usaha dalam kurun waktu yang panjang untuk menjaga eksistensi prinsip kebebasan dalam perdagangan ini, yang kemudian menghasilkan suatu organisasi internaisonal yaitu *World Trade Organization* (yang selanjutnya disebut WTO).[7] Dengan adanya WTO maka terdapat pula peraturan internasional mengenai perdagangan internasional. Baik negara maju maupun negara berkembang memerlukan peraturan internasional dalam bidang perdagangan internasional, salah satunya adalah untuk memberikan keamanan dan kepastian kepada pedagang-pedagang.[8]

Dengan terbentuknya WTO, bukan berarti perdagangan internasional terlepas dari sengketa antarnegara. Dalam kurun waktu 23 (dua puluh tiga) tahun ini, telah terjadi beberapa sengketa antarnegara akibat perbedaan kepentigan ataupun karena pencarian keuntungan sebesar-besarnya yang sudah menjadi tujuan dari setiap pedagang dalam menjual produknya. Sengketa-sengketa yang terjadi diselesaikan oleh WTO melalui jalur arbitrase. Indonesia sebagai negara yang telah menjadi salah satu anggota WTO sejak 1 Januari 1995 juga tidak terlepas dari tuduhan-tuduhan negara lain yang kasusnya dilaporkan ke WTO.[9] Tercatat, Indonesia telah 10 (sepuluh) kali menjadi *complainant* atau penuntut dan 13 (tiga belas) kali menjadi responden dengan total 23 (dua puluh tiga) kasus yang dibawa ke WTO sejak tahun 1995 hingga tahun 2015.[10]

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[6] Syahmin AK., 2006, *Hukum Dagang Internasional (dalam Kerangka Studi Analitis)*, Jakarta: Raja Grafindo, hlm. 12

[7] Munir Fuady, 2004, *Op. Cit.*, hlm. 2

[8] Peter Van Den Bossche, Daniar Natakusumah, dan Joseph Wira Koesnaidi, 2010, *Pengantar Hukum WTO (World Trade Organization)*, Jakarta: yayasan Pustaka Obor Indonesia, hlm. 1

[9] *Ibid., hlm. 27*

[10] Rachmi Hertanti dan Megawati. 2017. *Jurnal Catatan dari Sengketa Investasi dan Perdagangan Internasional*. Jakarta: Indonesia for Global Justice. hlm.4

Indonesia pada tahun 2015 melayangkan gugatannya kepada Amerika Serikat atas kasus penerapan kewajiban anti-dumping dan tindakan imbalan terhadap beberapa produk *coated paper* asal Indonesia. Kasus ini bermula pada tanggal 23 September 2009, tiga perusahaan dan serikat buruh mengajukan petisi atas nama industri domestik di Amerika Serikat untuk penerapan anti dumping dan tindakan imbalan terhadap impor sebagian *coated paper* dari Indonesia dan Cina. Dari hal tersebut kemudian, Departemen Perdagangan Amerika Serikat (yang selanjutnya disebut USDOC) pada tanggal 20 Oktober 2009 memprakarsai investigasi anti dumping dan tindakan imbalan terhadap impor sebagian *coated paper* dari Indonesia. Dalam investigasi USDOC memilih Bubur Kertas dan Kertas Asia / Grup Sinar Mas (yang selanjutnya disebut APP / SMG) sebagai responden wajib dalam investigasi. Kemudian pada tanggal 9 Maret 2010, USDOC mengeluarkan penetapan sementara bahwa tingkat subsidi APP / SMG sebesar 17,48% dan menetapkan tingkat yang sama terhadap semua produsen dan eksportir lainnya. Pada tanggal 27 September 2010 bahwa, USDOC mengeluarkan penetapan akhir bahwa tingkat subsidi bersih keseluruhan APP / SMG sebesar 17,49% dan menetapkan tingkat yang sama untuk semua produsen dan eksportir lainnya. Selain USDOC, Komisi Perdagangan Internasional Amerika Serikat (yang selanjutnya disebut USITC) juga melakukan investigasi sejak 30 September 2009 dan kemudian mengeluarkan penetapan akhir yaitu bahwa industri domestik Amerika Serikat terancam cedera material oleh alasan impor *coated paper* dari Indonesia dan Cina.[11]

Indonesia menganggap bahwa Amerika Serikat melanggar ketentuan-ketentuan Pasal 2 ayat (1), Pasal 2 ayat (1) huruf c, Pasal 10, Pasal 12 ayat (7), Pasal 14 huruf d, Pasal 15 ayat (5), Pasal 15 ayat (7) *Agreement on Subsidies and*

[11] World Trade Organization, Wto.org, 2018, *https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241711,240708,240707,230027,226743,133937,133258,130993&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True* - *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, diakses pada Sabtu, 29 September 2018, pukul 10.50 WIB.

*Countervailing Measures* (yang selanjutnya disebut Perjanjian SCM) dan Pasal 1, Pasal 3 ayat (5), Pasal 3 ayat (7), Pasal 3 ayat (8), Pasal 15 ayat (5), Pasal 15 ayat (8) Perjanjian Anti Dumping.[12] Putusan panel WTO atas gugatan-guatan yang diajukan oleh Indonesia kepada Amerika Serikat adalah:

a. Indonesia tidak dapat membuktikan bahwa USDOC melanggar ketentuan Pasal 14 (d), Pasal 12.7, Pasal 2.1 (c), dan Pasal 2.1 Perjanjain SCM
b. Indonesia tidak dapat membuktikan bahwa USITC melanggar ketentuan Pasal 3.5 Perjanjian Anti-Dumping dan Pasal 15.5 Perjanjian SCM, Pasal 3.7 Perjanjian Anti Dumping dan Pasal 15.7 Perjanjian SCM, Pasal 3.8 Perjanjain Anti Dumping dan Pasal 15.8 Perjanjian SCM.
c. Indonesia tidak dapat membuktikan bahwa ayat 771 (11) (B) dari *US Tarrif Act* tahun 1930, sebagaimana telah diubah (dikodifikasikan pada Kode Amerika Serikat Titel 19, ayat 1677 (11) (B)), yang berlaku untuk ancaman penentuan cedera, tidak konsisten dengan Pasal 3 ayat (8) Perjanjian Anti Dumping dan Pasal 15 ayat (8) Perjanjian SCM .[13]

Berdasarkan uraian diatas, penulis tertarik dan merasa perlu untuk membahas dan mengkaji kasus penerapan anti dumping dan tindakan imbalan yang dilakukan Amerika Serikat terhadap beberapa produk *coated paper* dari Indonesia dengan judul **"Studi Kasus Putusan Panel *World Trade Organization* antara Indonesia dengan Amerika Serikat dalam Perkara Anti-Dumping dan Tindakan *Countervailing* Sebagian Produk *Coted Paper*".**

## 1.2 Rumusan Masalah

1. Apakah Indonesia melanggar ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization*

[12] World Trade Organization, Wto.org, 2018, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds491_e.htm - *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, diakses pada Sabtu, 29 September 2018, pukul 10.48 WIB

[13] World Trade Organization, Wto.org, 2018, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241711,240708,240707,230027,226743,133937,133258,130993&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True - *United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, diakses pada Sabtu, 29 September 2018, pukul 10.50 WIB.

terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat?

2. Apa pertimbangan hukum (*ratio decidendi*) panel dalam mengambil putusan *World Trade Organization* sudah sesuai dengan hukum internasional yang mengatur?
3. Apa akibat hukum putusan panel *World Trade Organization* terkait sengketa sebagian produk *coated paper* terhadap perdagangan internasional?

## 1.3 Tujuan

### 1.3.1 Tujuan Umum

1. Untuk memenuhi tugas akhir sebagai salah satu persyaratan yang telah ditentukan Fakultas Hukum Universitas Jember untuk memperoleh gelar Sarjana Hukum.
2. Sebagai sarana untuk mengembangkan ilmu pengetahuan hukum yang telah diperoleh dari perkuliahan yang bersifat teoritis dan berasal dari masyarakat yang bersifat praktis.
3. Untuk memberikan wawasan dan informasi, serta sumbangan pemikiran yang bermanfaat bagi semua pihak yang tertarik dan berminat terhadap permasalahan yang dihadapi.

### 1.3.2 Tujuan Khusus

1. Untuk mengetahui dan memahami ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization* terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat.
2. Untuk mengetahui dan memahami pertimbangan hukum (*ratio decidendi*) panel dalam mengambil putusan *World Trade Organization* berdasarkan hukum internasional yang mengatur.

1. Untuk mengetahui akibat hukum putusan panel *World Trade Organization* terkait sengketa produk sebagian *coated paper* terhadap perdagangan internasional.Untuk mengetahui akibat hukum putusan panel *World Trade Organization* terkait sengketa produk sebagian *coated paper* terhadap perdagangan internasional.

## 1.4 Metode Penelitian

Metode dalam penelitian memiliki suatu peran penting yaitu untuk menambah kemampuan para ilmuan untuk mengadakan suatu penelitian secara lengkap, menambah peluang untuk meneliti hal-hal yang belum diketahui, membuka peluang yang lebih besar untuk melakukan penelitian interdisipliner, dan memberikan pedoman dalam mengorganisasikan serta mengintegrasikan pengetahuan, mengenai masyarakat. Melalui penjabaran tersebut, metodologi sangat dibutuhkan dan merupakan unsur yang harus ada dalam penelitian dan pengembangan ilmu pengetahuan. [14]

Penelitian memiliki fungsi untuk mendapatkan kebenaran.[15] Oleh karena itu, dalam menulis karya ilmiah ini penulis menggunakan metode penelitian untuk mendapatkan kebenaran tersebut dan agar penulisan karya ilmiah sesuai dengan kaidah hukum yang ada.

### 1.4.1 Tipe Penelitian

Dalam membuat karya ilmiah ini penulis menggunakan penelitian hukum normatif. Sunaryati Hartono menerangkan bahwa penelitian hukum normatif adalah suatu penelitian yang merupakan kegiatan sehari-hari seorang sarjana hukum dan penelitian hukum normatif hanya dapat dilakukan oleh sarjana hukum. Meskipun tidak menggunakan data primer bukan berarti dianggap bahwa

[14] Soerjono Soekanto, 2014, *Pengantar Penelitian Hukum*, Jakarta: Penerbit Universitas Indonesia, hlm. 7.

[15] Peter Mahmud Marzuki, 2016, *Penelitian Hukum (Edisi Revisi)*, Jakarta: Prenada media Group. hlm. 20

penelitian hukum normatif bukan suatu penelitian.[16] Penelitian hukum normatif juga sering disebut sebagai pendekatan kepustakaan (doktrin), dimana penulis menganalisis konsep-konsep, teori-teori, dan juga peraturan perundang-undangan yang berkaitan dengan tulisan ini. Pendekatan kepustakaan berarti juga mempelajari buku-buku, jurnal-jurnal, dan dokumen-dokumen lain yang dibutuhkan dalam penelitian ini.

### 1.4.2 Pendekatan Penelititan

Ada beberapa pendekatan di dalam penelitian hukum, yaitu pendekatan undang-undang, pendekatan kasus, pendekatan historis, pendekatan komparatif, dan pendekartan konseptual.[17] Pendekatan penelitan yang digunakan dalam penelitian ini adalah pendekatan perundang-undangan dan pendekatan konseptual.

Dalam pendekatan perundang-undangan penulis menelaah semua undang-undang dan regulasi yang berkaitan dengan penelitian ini.[18] Dalam metode pendekatan perundang-undangan peneliti perlu memahami hierarki, dan asas-asas dalam peraturan perundang-undangan. Pasal 1 angka 2 Undang-Undang No. 12 Tahun 2011 menjelaskan bahwa peraturan perundang-undangan adalah peraturan tertulis yang di dalamnya terdapat norma hukum secara umum yang dibentuk atau ditetapkan oleh suatu lembaga negara atau pejabat yang memiliki wewenang melalui prosedur sebagaimana diatur dalam peraturan perundang-undangan. Sebagai kesimpulan, pendekatan perundang-undangan merupakan pendekatan dengan menggunakan legislasi dan regulasi.[19]

Sedangkan dalam pendekatan konseptual penulis dalam menyusun karya ilmiah merujuk pada prinsip-prinsip hukum. Untuk menemukan prinsip-prinsip tersebut, penulis harus beranjak dari pandangan-pandangan dan doktrin-doktrin

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[16] Dyah Ochtorina Susanti dan A'an Efendi, 2013, *Penelitian Hukum (Legal Research)*, .Jakarta: Sinar Grafika. hlm.20

[17] Peter Mahmud Marzuki, *Op. Cit.*, hlm. 133

[18] *Loc. Cit.*

[19] *Ibid*., hlm. 137

yang berkembang di dalam ilmu hukum yang terkait dengan permasalahan yang sedang diteliti.[20]

### 1.4.3 Bahan Hukum

Dalam memecahkan suatu isu hukum dan sekaligus memberikan preskripsi mengenai apa yang sepatutnya, diperlukan sumber-sumber penelitian. Sumber penelitian hukum sendiri dibedakan menjadi sumber penelitian yang berupa bahan-bahn hukum primer dan bahan-bahan hukum sekunder.[21]

#### 1.4.3.1 Bahan Hukum Primer

Bahan hukum primer merupakan bahan hukum yang bersifat autoratif, artinya mempunyai otoritas. Bahan hukum primer dapat berupa perundang-undangan, catatan-catatan resmi atau risalah dalam peraturan perundang-undangan dan putusan-putusan hakim.[22] Hukum primer yang digunakan penulis dalam penelitian ini, antara lain:

a. *General Agreement on Tariff and Trade* (GATT) 1994;
b. Undang-Undang Nomor 7 Tahun 1994 tentang Pengesahan *Agreement Establishing the World Trade Organization* (Pesetujuan Pembentukan Organisasi Perdagangan Dunia);
c. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*Anti-Dumping Agreement*) - Perjanjian Anti-Dumping;
*d.* *Agreement on Subsidies and Countervailing Measures* – Perjanjian Subsidi dan Tindakan Imbalan;
e. *Understanding on Rules and Procedures Governing the Settlement of Dispute* (*Dispute Settlement Understanding* - DSU);
f. Putusan *Panel World Trade Organization, Panel Report – United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper From Indonesia*.

#### 1.4.3.2 Bahan Hukum Sekunder

Bahan hukum sekunder berupa publikasi tentang hukum yang merupakan bukan merupakan dokumen-dokumen resmi, meliputi buku-buku teks, kamus-

[20] *Ibid*., hlm. 178
[21] *Ibid*., hlm. 181
[22] *Loc. Cit.*

kamus hukum, jurnal-jurnal hukum yang berkaitan dengan masalah yang menjadi pokok bahasan dalam penulisan skripsi ini.[23]

#### 1.4.3.3 Bahan Non-Hukum

Untuk keperluan akademis, bahan-bahan non hukum dapat membantu akademisi dalam melakukan penelitian hukum. Misalnya, seorang calon doktor hukum menulis suatu karya ilmiah tentang eutanasia, maka ia tidak perlu mempelajari teori-teori tentang kedokteran terutamanya yang berkaitan dengan eutanasia dengan rinci. Melainkan ia membutuhkan ahli-ali di bidang kedokteran dan membaca literatur terkait eutanasia.[24] Hal ini dibutuhkan mengingat permasalahan hukum bersifat kompleks, sehingga memerlukan pemahaman tertentu untuk menyelesaikan permasalahan tersebut.

Dalam penelitian ini, isu hukum dan fakta kasus yang ada berkaitan pula dengan *coated paper*, sehingga penulis perlu menggunakan bahan non hukum untuk menjelaskan lebih lanjut mengenai *coated paper*. Hal ini bertujuan untuk memberikan wawasan dan pengetahuan lebih terkait dengan fakta kasus yang ada.

Adapun bahan-bahan non hukum yang digunakan yaitu artikel-artikel yang berkaitan dengan *coated paper*.

### 1.4.4 Analisis Bahan Hukum

Dalam melakukan penelitian hukum, baik normatif, sosiologis, maupun empiris, sepatutnya diikuti pula langkah-langkah yang harus dilakukan.[25] Peter Mahmud Marzuki menguraikan langkah-langkah tersebut, antara lain:

1. Mengidentifikasi fakta hukum dan mengeliminasi hal-hal yang tidak relevan untuk menetapkan isu hukum yang hendak dipecahkan;
2. Pengumpulan bahan-bahan hukum dan sekiranya dipandang mempunyai relevansi juga baha-bahan non hukum;
3. Melakukan telaah atas isu hukum yang diajukan berdasarkan bahan-bahan yang telah dikumpulkan;
4. Menarik kesimpulan dalam bentuk argumentasi yang menjwab isu hukum;

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[23] *Loc. Cit.*
[24] *Ibid*., hlm 204
[25] Soerjono Soekanto, *Op. Cit*., hlm. 53

5. Memberikan preskripsi berdasarkan argumentasi yang telah dibangun di dalam kesimpulan.

Langkah-langkah tersebut cocok dengan karakter ilmu hukum sebagai ilmu yang bersifat presikriptif dan terapan.[26]

[26] Peter Mahmud Marzuki, *Op. Cit*., hlm. 213

# BAB 2. TINJAUAN PUSTAKA

## 2.1 Perdagangan Internasional

Perdagangan internasional adalah suatu transaksi dagang yang dilakukan oleh penduduk suatu negara dengan penduduk negara lain atas dasar kesepekatan bersama. Penduduk yang dimaksud berupa antar perseorangan maupun antara pemerintah dengan perseorangan, atau sebaliknya.[27] Dapat diartikan pula bahwa perdagangan internasional merupakan perdagangan yang dilakukan oleh suatu negara dengan negara lain berlandaskan suatu kesepakatan antar para pihak yang melakukan perdagangan internasional tersebut.

Praktik transaksi perdagangan internasional melahirkan Hukum Dagang Internasional yang menganut kontrak standar atau kontrak baku yang harus dianut oleh seluruh pelaku dagang di seluruh dunia. Dengan adanya dominasi kontrak baku dalam Hukum Dagang Internasional, WTO selaku organisasi yang bergerak di bidang perdagangan internasional mempengaruhi dunia perdagangan bebas yaitu dengan menghadirkan aturan-aturan yang semakin melengkapi Hukum Dagang Internasional yang juga berlaku di Indonesia.[28]

Aturan-aturan hukum yang berlaku terhadap perdagangan barang, jasa, dan perlindungan hak atas kekayaan intelektual (HAKI) disebut sebagai Hukum Perdagangan Internasional. Contohnya yaitu aturan-aturan WTO, perjanjian multilateral mengenai perdagangan barang seperti GATT, perjanjian mengenai perdagangan di bidang jasa (GATS/WTO), dan perjanjian mengenai aspek-aspek yang terkait dengan HAKI (TRIPS).[29]

Selain aturan-aturan yang diberlakukam, subjek hukum berperan sangat penting dalam aktivitas perdagangan internasional terutamanya dalam perkembangan hukum perdagangan internasional. Subjek hukum yang dapat tergolong ke dalam lingkup hukum perdagangan internasional adalah:

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[27] Heri Setiawan dan Sari Lestari Zainal Ridho, 2011, *Perdagangan Internasional,* Yogaykarta: Pustaka Nusantara, hlm. 1

[28] Nuzulia Kumala Sari dan Ikarini Dani Widiyanti. 2012. *Buku Ajar Hukum Dagang Internasional,* Jember: Universitas Jember. hlm.3.

[29] *Ibid*., hlm. 8

1. Negara

   Negara merupakan subjek hukum terpenting di dalam perdagangan internasional. Negara berposisi sebagai pedagang itu sendiri merupakan satu-satunya subjek hukum yang memiliki kedaulatan dan juga berperan penting baik secara langsung maupun tidak langsung dalam pembentukan organisasi-organisasi internasional. Selain itu, negara juga dapat mengadakan perjanjian internasional terkait dengan aktivitas perdagangan di antara mereka.[30]

2. Organisasi Internasional

   Organisasi internasional yang dimaksud disini adalah organisasi internasional yang bergerak di bidang perdagangan internasional. Organisasi internasional dibentuk oleh dua atau lebih negara guna mencapai tujuan bersama dengan cara membentuk suatu dasar hukum yang biasanya berupa perjanjian internasional. Peran organisasi internasional sebagai subjek hukum perdagangan internasional adalah sebagai pihak yang lebih banyak mengeluarkan peraturan-peraturan yang bersifat rekomendasi dan *guidelines*.[31]

3. Individu

   Individu atau perusahaan menjadi pelaku utama dalam perdagangan internasional. Individu dipandang sebagai subjek hukum dengan sifat hukum perdata dan hanya terikat dan tunduk pada ketentuan-ketentuan hukum nasional yang dibuat oleh negaranya. Oleh karenanya, apabila individu merasa hak-hak perdagangannya terganggu atau dirugikan, yang dapat dilakukan hanyalah sebatas meminta bantuan negaranya untuk mengajukan klaim terhadap negara yang merugikannya kepada badan peradilan internasional.[32]

4. Bank

   Dalam perdagangan internasional, bank berperan sebagai pemain kunci dan menjembatani antara penjual dengan pembeli dengan memfasilitasi pembayaran antara penjual dan pembeli. Selain itu, bank berperan penting dalam menciptakan aturan-aturan hukum dalam perdagangan internasional khususnya dalam mengembangkan hukum perbankan internasional. Salah satu instrumen hukum yang telah berhasil dikembangkan oleh bank adalah sistem pembayaran dalam transaksi perdagngan internasional, seperti terbentuknya "kredit dokumen" atau yang disebut "*documentary credit*".[33]

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[30] Huala Adolf, 2016, *Hukum Perdagangan Internasional*, Jakarta: RajaGrafindo Persada, hlm. 57-72

[31] *Ibid.*, hlm. 64-67

[32] *Ibid.*, hlm. 68-70

[33] *Ibid.*, hlm. 71-72

## 2.2 General Agreement on Tariffs and Trade – World Trade Organization (GATT – WTO)

### 2.2.1 Sejarah GATT – WTO

Berakhirnya Perang Dunia II menimbulkan terjadinya perkembangan yang sangat pesat di bidang perdagangan terutamanya dalam perdagangan antarnegara. Perang Dunia II memunculkan usaha-usaha untuk mensejahterakan masyarakat dunia secara adil tanpa membedakan antara negara yang bekuasa dengan negara yang tidak berkuasa di dunia.

Pasca Perang Dunia II, diadakan konferensi internasional terkait dengan perdagangan internasional yang semula akan diatur berdasar perjanjian internasional multilateral di bawah *the Internasional Trade Organization* (yang selanjutnya disebut ITO) sebagai salah satu organ khusus Perserikatan Bangsa Bangsa (yang selanjutnya disebut PBB). Konferensi yang diadakan dari tahun 1946 hingga 1948 menghasilkan Piagam Havana (*the Havana Charter*) yang merupakan peraturan dasar ITO. Mayoritas negara-negara peserta perundingan tidak meratifikasi Piagam Havana, termasuk Amerika Serikat sehingga Piagam Havana tersebut gagal diberlakukan. Hal itu berdampak pula gagal terbentuknya ITO sebagai organisasi perdagangan internasional di bawah PBB. Bersamaan dengan perundingan pembentukan Piagam Havana, sejumlah negara melakukan perundingan-perundingan perdagangan internasional berkaitan dengan konsesi *tariff* (bea masuk) timbal balik yang kemudian dituangkan dalam *the General Agreement on Tariff and Trade* (yang selanjutnya disebut GATT) pada tanggal 30 Oktober 1947. Pada mulanya GATT merupakan kodifikasi sementara mengenai peraturan hubungan perdagangan antarnegara penanda tangan (ditanda tangani 23 negara) sembari menunggu diberlakukannya Piagam Havana dimana ketentuan-ketentuan GATT tersebut akan dimasukkan ke dalam Piagam Havana sebagai bagian dari peraturan perdagangan berdasar Piagam Havana. GATT pada akhirnya menjadi instrumen hukum yang berdiri sendiri dikarenakan gagalnya pemberlakuan Piagam Havana dan diberlakukan mulai tanggal 1 januari 1948.

GATT berlaku sebagai peraturan perdagangan internasional yang terpenting dan juga berperan sebagai organisasi perdagangan internasional hingga terbentuknya Persetujuan WTO. Oleh karena itu, di bawah GATT perdagangan internasional diupayakan berjalan seliberal mungkin.[34]

GATT dibentuk tentu memiliki tujuan, antara lain:[35]

1. Terjadinya perdagangan dunia yang bebas, tanpa diskriminasi.
2. Menempuh disiplin di antara anggotanya supaya tidak mengambil langkah yang merugikan anggota yang lain.
3. Mencegah terjadinya perang dagang yang akan merugikan semua pihak.

GATT telah menjadi peraturan multilateral utama perdagangan internasional sejak tahun 1948 hingga tahun 1994, salah satunya yaitu sebagai forum perundingan masalah perdagangan internasional. Terhitung sebanyak 8 (delapan) kali putaran perundingan telah dilakukan. Putaran-putaran perundingan tersebut yakni:

1. Putaran Geneva 1947
2. Putaran Annecy 1949
3. Putaran Torquay 1950
4. Putaran Geneva 1956
5. Putaran Dillon 1960 – 1961
6. Putaran Kennedy 1962 – 1967
7. Putaran Tokyo 1973 – 1979
8. Putaran Uruguay 1986 – 1994

Fokus perundingan Putaran ke-1 sampai ke-6 adalah masalah penururnan tarif dan dihasilkan keputusan-keputusan tentang penurunan *tariff*.[36] Putaran Uruguay merupakan putaran yang paling ambisius dan kompleks membahas masalah perdagangan internasional dan diikuti oleh banyak negara. Selain itu, untuk pertama kalinya dalam perundingan GATT, negara-negara berkembang menjadi partisipan aktif, mulai dari permulaan sampai usaha untuk merampungkannya.[37]

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[34] Triyana Yohanes, 2015, *Hukum Ekonomi Internasional Perspektif Kepentingan Negara Sedang Berkembang dan LDCs*, Yogyakarta: Cahaya Atma Pustaka, hlm. 44-46

[35] R. Hendra Halwani, 2005, *Ekonomi Internasional & Globalisasi Ekonomi (Edisi Kedua)*, Bogor: Ghalia Indonesia, hlm. 301

[36] Triyana Yohanes, *Op. Cit.*, hlm. 66

[37] R. Hendra Halwani, *Op. Cit.*, hlm 311

WTO dibentuk menggantikan GATT dengan persetujuan 125 (seratus dua puluh lima) negara pada pertemuan menteri di Marrakesh (Maroko) pada 15 April 1994, sebagai bagian dari kesepakatan Putaran Uruguay.[38] Dengan latar belakang banyaknya kegagalan usaha-usaha negara-negara yang memenangkan Perang Dunia dalam membentuk suatu organisasi perdagangan internasional, baik itu ITO maupun Piagam Havana, telah menjadikan WTO sebagai oragnisasi internasional yang didambakan sejak semula.[39]

### 2.2.2 Prinsip GATT – WTO

WTO maupun GATT memiliki prinsip untuk mencapai suatu perdagangan dunia yang lebih tertib, lancar, bebas, liberal, transparan, dan prediktif dengan sengketa yang dapat diselesaikan dengan adil. Prinsip-prinsip tersebut antara lain:

1. Prinsip *Most-Favoured Nation*

   Maksud dari prinsip ini adalah dalam menjalankan suatu perdagangan berdasarkan asas nondiskriminasi, yakni tidak membeda-bedakan antara satu anggota WTO dengan anggota lainnya. Para anggota tidak boleh memberikan kemudahan terhadap negara tertentu saja atas tindakan yang berkenaan dengan *tariff* dan perdagangan. Prinsip ini diatur dalam Article I ayat (1) Perjanjian GATT.[40]

2. Prinsip *Tariff Binding*

   Negara anggota WTO terikat dengan *tariff* yang telah disepakati berapapun besarnya. *Tariff* sendiri merupakan suatu pajak yang ditarik oleh pemerintah atas barang-barang impor, yang menyebabkan menjadi makin tingginya harga barang tersebut di pasar domestik. *Tariff* impor memiliki beberapa fungsi antara lain:

   1. Sebagai pungutan oleh suatu negara atas barang impor dimana dari pungutan tersebut masuk menjadi kas negara. Sehingga dapat disimpulkan bahwa *tariff* merupakan pajak yang disebut dengan "pajak barang impor".
   2. Penerapan *tariff* bagi barang impor menyebabkan harga barang impor menjadi tinggi sehingga produk dalam negeri mampu bersaing dengan barang-barang impor. Oleh karena itu, *tariff* mempunyai efek terhdap perlindungan produk-produk dalam negeri.
   3. Penerapan *tariff* yang tinggi terhadap barang impor berfungsi agar harga barang tersebut di pasar menjadi tinggi. Hal tersebut

[38] *Ibid.*, hlm. 308
[39] Sudargo Gautama, 1997, *Hukum Dagang Internasional*, Bandung: Alumni, hlm. 210
[40] Munir Fuady, *Op. Cit*., hlm. 69-71

merupakan pembalasan terhadap proteksi pemerintah negara asal atas proses pengadaan dan produksi barang impor tersebut. Tujuan dari penerapan *tariff* yang tinggi untuk menghilangkan pengaruh dari subsidi yang diberikan oleh negara asal atas barang yang diekspor.

4. Pengenaan *tariff* terhadap barang yang diimpor dapat menambah restribusi pemerintah

Prinsip *Tariff Binding* diatur dalam Article II ayat (1) Perjanjian GATT.[41]

3. Prinsip *National Treatmen*

Negara anggota WTO harus memberikan perlakuan yang berbeda-beda terhadap pelaku bisnis domestik dengan pelaku bisnis nondomestik, terutama apabila berasal dari negara anggota WTO. Prinsip ini dilakukan dengan mengenakan pajak barang impor lebih besar daripada barang domestik yang sejenis. Hal tersebut sebagai prinsip perlindungan seimbang (*equal protection*) antara produsen dari dalam negeri dan produsen yang berasal dari luar negeri. Prinsip *National Treatmen* diatur dalam Article III ayat (1) dan ayat (2) GATT.[42]

4. Prinsip *Nontariff Barriers*

Prinsip ini merupakan suatu tindakan yang dilakukan oleh beberapa negara anggota WTO untuk melindungi industri domestik dengan cara yang bersifat *Tariff Measures*. Hal ini dilakukan dengan perlindungan *tariff*, dalam arti sedapat mungkin menghindari atau merendahkan *tariff*-nya sehingga masih akan terjadi kompetisi. Namun demikian, proteksi perdagangan masa kini menggunakan cara *nontariff*, yang menggantikan sistem perlindungan *tariff* yang berdasarkan semangat *free trade* (yang terorganisir). Terdapat beberapa model perlindungan *nontariff*, beberapa contohnya antara lain:

a. Ekspor yang disubsidi;
b. Impor yang disubsidi;
c. *Dumping*;
d. Sistem kuota;
e. Transpari yang kurang;
f. Regulasi tentang kesehatan, hewan, tanaman, hak buruh, hak asasi manusia, kemananan nasional;
g. Pajak yang intensif
h. Kewajiban *fees* dan *formalities* yang berkenaan dengan pajak.

Terdapat beberapa dampak negatif dari penerapan prinsip ini yaitu rusaknya tatanan perekonomian dunia karena perlindungan *nontariff* sulit dideteksi dan diukur. Oleh karena itu perlu adanya kesadaran dari setiap negara anggota untuk bersikap *fair* dalam menunjang pemberlakuan prinsip perdagangan dunia yang bebas.[43]

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[41] *Ibid.*, hlm. 71-75
[42] *Ibid.*, hlm. 75-77
[43] *Ibid.*, hlm. 78-81

## 2.3 Dumping

Dumping menurut GATT merupakan keadaan suatu produk dimasukkan ke dalam pasar negara lain dengan harga yang lebih rendah dari harga normal. Berdasarkan ketentuan GATT, bahwa dalam keadaan adanya dumping, dengan persyaratan tertentu, negara pengimpor dapat mengesampingkan untuk memberikan kompensasi besarnya dumping, contohnya dengan memberikan bea masuk tambahan terhadap pengekspor.[44]

Ada 3 (tiga) kriteria suatu keadaan dikatakan dumping, antara lain:

1. Produk ekspor negara telah diekspor dengan melakukan dumping.
2. Akibat dumping tersebut telah mengakibatkan kerugian secara material.
3. Adanya hubungan klausal antara dumping yang dilakukan dengan akibat kerugian yang terjadi.[45]

## 2.4 Subsidi

Subsidi scara internasional diatur didalam *Agreement on Subsidies and Countervailing Measures.* Subsidi menurut Pasal 1 ayat (1) Perjanjian SCM merupakan: *pertama*, kontribusi keuangan oleh pemerintah atau badan publik di dalam wilayah Anggota WTO dimana praktik pemerintah yang melibatkan penyerahan dana secara langsung (misalnya hibah, pinjaman, dan penyertaan), kemungkinan pemindahan dan atau kewajiban secara langsung (misalnya jaminan utang); *kedua*, pendapatan pemerintah yang seharusnya jatuh tempo menjadi tidak dapat ditagih (misalnya intensif fiskal seperti keringanan pajak); *ketiga*, penyediaan barang oleh pemerintah atau jasa selain infrastruktur umum atau pembelian barang; *keempat*, pembayaran pemerintah pada mekanisme pendanaan, atau mempercayakan atau mengarahkan badan swasta untuk melaksanakan satu atau lebih dari jenis fungsi pertama dan ketiga, berbeda dari praktik yang biasanya diikuti pemerintah.

Subsidi dibagi menjadi 3 (tiga) berdasarkan perjanjian SCM, yaitu:[46]

a. Subsidi yang dilarang (*prohibited subsidies*)

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[44] R. Hendra Halwani, *Op. Cit.*, hlm. 327

[45] Nuzulia Kumala Sari dan Ikarini Dani Widiyanti, *Op. Cit.*, hlm. 51

[46] Ratya Anindita, 2008, *Bisnis dan Perdagangan Internasional*, Yogyakarta: Andi Offset, hlm. 44.

Subsidi-subsidi yang terdapat dalam peraturan perundang-undangan ataupun dalam kenyataan yang dikaitkan dengan kinerja ekspor, atau subsidi yang dikaitkan sebagai persyaratan tunggal atau sebagai beberapa persyaratan lain, dengan maksud mendahulukan barang-barang domestik di atas barang-barang impor. Hal ini dilarang karena akan mengakibatkan distorsi perdagangan internasional dan menggangu perdagangan lain. Tindakan pemberian subsidi ini dapat diajukan ke DSB. Jika DSB memutuskan bahwa subsidi yang diberikan termasuk ke dalam subsidi yang dilarang maka negara tersebut diharuskan untuk segera mencabut aturannya mengenai subsidi. Jika tidak dipatuhi maka negara penggugat boleh melakukan tindakan imbalan (*countervailing measures*) karena akan merugikan industri domestik.

b. Subsidi yang dapat ditindak (*actionable subsidies*)

Negara pengimpor harus dapat membuktikan bahwa subsidi terhadap produk ekspor yang dilakukan negara pengekspor telah merugikan kepentingan negara pengimpor. Kalau tidak dapat dibuktikan maka subsidi tersebut dapat diteruskan. Kerugian tersebut dibagi dalam tiga jenis: *pertama*, kerugian yang dialami oleh industri domestik; *kedua*, kerugian yang dialami oleh negara lainnya yang menjadi korban dalam kompetisi antara negara lainnya yang bersaing di pasar negara; dan *ketiga*, kerugian yang dialami oleh pengekspor karena negara pengimpor menerapkan subsidi domestik. Jika DSB memutuskan bahwa subsidi yang diberikan memberikan efek negatif maka subsidi tersebut harus dihapuskan.

c. Subsidi yang diperbolehkan (*non actionable subsidies*).

Subsidi yang termasuk dalam subsidi ini adalah subsidi non spesifik, subsidi yang khusus diberikan untuk riset dan kegiatan pengembangan, subsidi unutk daerah miskin yang terbelakang dan bantuan yang ditujukan untuk proses adaptasi terhadap peraturan mengenai lingkungan atau hukum baru. Subsidi jenis ini tidak dapat diajukan ke DSB dan tidak dapat dikenakan imbalan.

## 2.5 *Countervailing Measures*

*Countervailing measures* atau yang disebut dengan tindakan imbalan merupakan istilah yang terdapat dalam *Agreement on Subsidies and Countervailing Measures* (Perjanjian Subsidi dan Tindakan-tindakan Imbalan; yang selanjutnya). Perjanjian tersebut memuat aturan-aturan tentang subsidi dan tindakan-tindakan yang dapat dilakukan guna memberikan perlawanan atas tindakan subsidi yang dilakukan oleh negara anggota WTO lain dengan mengenakan bea masuk tambahan. Perjanjian ini juga mengatur tata cara

menyelesaikan sengketa untuk mengupayakan penghapusan subsidi yang merugikan dan juga upaya melawan subsidi yang merugikan industri domestik.[47]

## 2.6 *Coated Paper*

Kamus bahasa inggris mendefinisikan *coated paper* adalah kertas yang permukaannya telah diperlakukan untuk mendapatkan kesan setengah warna atau pencetakan warna.[48] *Coated paper* juga dapat didefinisakan sebagai kertas yang permukaannya ditambahkan dengan suatu lapisan senyawa tertentu dengan tujuan untuk meningkatkan penampilan dan permukaan cetak dari suatu kertas. Lapisan tersebut ada bermacam-macam, seperti lapisan kusam, *gloss*, *matte*, atau lainnya. Kelebihan dari c*oated paper* yaitu mampu menghasilkan gambar yang lebih tajam, lebih terang dan memiliki reflektifitas yang lebih baik daripada kertas biasa.[49] *Coated paper* memiliki daya serap tinta yang tidak terlalu tinggi (tertahan oleh lapisan di permukaan kertas), maka tinta yang diprint di atas kertas ini, tidak terserap penuh hingga ke dalam serat kertas sehingga proses pengeringan lebih cepat dan warna yang dihasilkan lebih tajam. Kelebihan-kelebihan inilah yang memnyebabkan *coated paper* bagus untuk mencetak gambar-gambar tajam dan kompleks karena tintanya tetap berada di atas kertas.[50]

*Coated gloss paper* biasanya digunakan untuk surat edaran, pamflet dan poster untuk acara, biasanya digunakan sebagai iklan pertunjukan dan klub, menu *takeaway* dan untuk hasil fotografi. *Coated silk paper* biasanya juga digunakan untuk surat edaran dan pamflet, tetapi kertas ini sering digunakan untuk keperluan bisnis dan memberikan nuansa lebih halus dan canggih dibanding dengan *coated*

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[47] Badan Pembinaan Hukum Nasional, bphn.go.id, 2012, https://www.bphn.go.id/data/documents/pkj_2012_-_8.pdf - *Peran Hukum Nasional Dalam Mendorong Peningkatan Produk Nasional Di Dalam Negara Pada Era Perdagangan Bebas*, diakses pada Senin, 1 Oktober 2018, pukul 17.59 WIB

[48] Collins Dictionary, collinsdictionary.com, 2010, https://www.collinsdictionary.com/dictionary/english/coated-paper - *English Dictionary*, diakses pada Rabu, 10 Oktober 2018, pukul 13.26 WIB

[49] Numera Analytics, numeraanalytics.com, 2017, https://numeraanalytics.com/printing-writing-papers/ - *Printing and Writing Paper*, diakses pada Senin, 1 Oktober 2018, pukul 21.54 WIB

[50] Uprint.id Percetakan Online Indonesia, uprint.id, https://uprint.id/blog/jenis-jenis-kertas-dalam-industri-percetakan/ - *Apa Saja Jenis-Jenis Kertas yang Umum Digunakan dalam Industri Percetakan?*, diakses pada Rabu, 10 Oktober 2018, pukul 13.40 WIB

*gloss paper*. Selain itu, *coated silk paper* juga sangat cocok untuk menunjukkan hasil fotografi dan memberikan nuansa halus dengan kualitas yang tinggi.[51]

## 2.7 Penyelesaian Sengketa Perdagangan Internasional dalam Kerangka WTO

Tidak dapat dihindari bahwa suatu saat negara anggota WTO akan saling bertikai dalam suatu sengketa perdagangan internasional. Sengketa yang timbul bisa saja karena salah satu negara anggota WTO melanggar prinsip WTO yang melanggar hak pihak lain atau negara lain.[52] Negara-negara yang bersengketa dapat memilih cara penyelesaian sengketanya, misalnya melalui proses politis-diplomatik, yakni secara nonyudisial atau melalui proses yudisial yakni diselenggarakan dalam forum tribunal.[53] Dalam perundingan Putaran Uruguay dibahas pula sistem peneyelesaian sengketa yang terdapat dalam GATT. Hasil dari perundingan tersebut adalah ditetapkannya *Understanding on Rules Procedures Governing the Settlement of Dispute* (yang selanjutnya disebut DSU) yang dijadikan sebagai prosedur yang digunakan oleh lembaga *Dispute Settlement Body* (yang selanjutnya disebut DSB; Badan yang menangani sengketa perdagangan internasional). Diterapkannya DSU, hasil perundingan Putaran Uruguay, memiliki fungsi untuk menjaga agar setiap anggota tetap menghormati hak dan kewajiban masing-masing sesuai dengan perjanjian yang telah disepakati.[54]

Tahapan-tahapan penyelesaian sengketa sebagaimana diatur dalam DSU yaitu:

1. Konsultasi

   Para pihak yang bersengketa pertama-pertama harus berupaya menyelesaikan sengketa melalui konsultasi bilateral. Jangka watku yang diberikan adalah selama 60 (enam puluh) hari.[55]
2. Permintaan suatu Panel

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[51] Solopress, solopress.com, 2015, *https://www.solopress.com/blog/print-inspiration/coated-paper-vs-uncoated-paper/* - *Coated Paper vs. Uncoated Paper*, diakses pada Senin, 8 Oktober 2018, pukul 18.27 WIB

[52] Munir Fuady, *Op. Cit.*, hlm. 111

[53] N. Rosyidah Rakhmawati, 2006, *Hukum Ekonomi Internasiona dalam Era Global*, Malang: Bayumedia Publishing, hlm. 150

[54] *Ibid.*, hlm. 151-152

[55] Syahmin AK, *Op. Cit.*, hlm. 259

Konsultasi gagal dilakukan, maka pemohon dapat meminta pembentukan panel kepada DSB untuk mengadakan pengkajian.[56]

3. Pekerjaan Panel

Panel bertugas untuk mempresentasikan setiap temuan-temuan beserta alasannya, mengadakan pertemuan dengan pihak-pihak yang bersengketa bersama dengan pihak ketiga, mengumpulkan bantahan, menyiapkan fakta dan argumen dari pihak-pihak yang bersengketa, mengkonsep kesimpulan rekomendasi-rekomendasi, dan menyampaikan laporan akhir kepada pihak yang bersengketa dan kepada DSB.[57]

4. Pengesahan Keputusan

Laporan panel harus disahkan dalam kurun watku enam puluh hari, apabila terdapat pihak yang tidak setuju tentang ketentuan selama proses berlangsung, maka pihak tersebut dapat mengajukan keberatan. DSB akan membentuk *Appellate Body* untuk menangani pengajuan keberatan tersebut. Badan ini dapat membenarkan, melakukan modifikasi, mengubah temuan-temuan berikut kesimpulan-kesimpulan panel. Batas pengajuan permohonan ini tidak boleh melewati enam puluh hari dan harus diselesaikan dalam waktu 90 (sembilan puluh) hari.[58]

5. Pelaksanaannya

Setelah rekomendasi dan pengaturan disahkan, maka harus segera dilaksanakan karena hal tersebut sangatlah penting bagi berlangsungnya efektivitas pemecahan sengketa. Apabila rekomendasi tersebut tidak dapat dilaksankaan segera oleh negara yang dinyatakan bersalah, maka dilakukan perundingan kembali untuk menetapkan secara bersama suatu konsesus. Jika tidak dicapai persetujuan kompensasi, pemohon dapat mengajukan penangguhan kewajiban-kewajiban negara yang dinyatakan bersalah kepada DSB, dan meminta hak untuk melakukan tindakan balasan (*retaliasi*).[59]

Keanggotaan Panel dalam proses penyelesaian sengketa melalui DSU adalah bersifat netral, dalam arti bahwa anggota Panel diisi oleh negara-negara yang tidak sedang bersengketa. Mekanisme DSB dalam menyelesaikan suatu persengketaan berpegang teguh pada DSU karena DSU sendiri merupakan hukum acara yang berlaku dalam DSB. Oleh karenanya, semua persengketaan yang diselesaikan oleh DSB maka harus sesuai dengan prosedur yang telah diatur dalam DSU.

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[56] *Loc. Cit.*
[57] *Ibid.*, hlm. 260-261
[58] *Loc. Cit.*
[59] *Ibid.*, hlm. 262-263

# BAB 4. PENUTUP

## 4.1 Kesimpulan

Berdasarkan pembahasan di atas, dapat ditarik kesimpulan sebagai berikut:

1. Indonesia telah terbukti melanggar ketentuan Perjanjian Anti Dumping dan Perjanjian Subsidi dan Tindakan Imbalan *World Trade Organization* terkait sebagian produk *coated paper* yang diekspor ke Amerika Serikat karena Amerika Serikat dapat memberikan bukti-bukti yang kuat atas alasannya menerapkan kewajiban anti-dumping dan tindakan *countervailing* terhadap sebagian produk *coated paper* yang diimpor dari salah satu produsen asal Indonesia yaitu APP / SMG. Baik Pemerintah Indonesia maupun APP / SMG dalam usahanya telah gagal membuktikan bahwa Amerika Serikat dalam menerapkan kewajiban anti-dumping dan tindakan *countervailing* tidak sesuai atau tidak konsisten dengan Pasal 3.5, Pasal 3.7, dan Pasal 3.8 Perjanjian Anti-Dumping dan Pasal 2.1(c), kepala/judul Pasal 2.1, Pasal 12.7, Pasal 14 (d), Pasal 15.5, Pasal 15.7, Pasal 15.8 Perjanjian SCM yang berarti telah terbutki bahwa Indonesia melakukan perbuatan *dumping* dan memberikan subsidi pada sebagian produk *coated paper* yang diekspor ke Amerika Serikat. Selain itu Indonesia juga tidak dapat menetapkan bahwa Pasal 771 (11) (B) Undang-Undang Tarif AS tahun 1930, sebagaimana telah diubah dan dikodifikasi dalam Judul 19 dari Kode Amerika Serikat, Pasal 1677 (11) (B) tidak konsisten dengan Pasal 3.8 Perjanjian Anti-Dumping dan Pasal 15.8 Perjanjian SCM. Amerika Serikat membuktikan dengan benar dan menetapkan bahwa Indonesia telah memberikan subsidi berupa penghapusan hutang dan sebagai penyedia barang serta Amerika Serikat menetapkan bahwa industri domestik mengalami ancaman cedera.
2. Pertimbangan hukum (*ratio decidendi*) Panel dalam mengambil putusan *World Trade Organization* sudah sesuai dengan hukum internasional yang mengatur karena setiap pemeriksaan yang dilakukan Panel sesuai dengan peraturan-peraturan hukum internasional yang berkaitan. Panel telah teliti dalam mengemukakan pertimbangannya dengan menggunakan fakta-fakta

yang dikemukakan oleh para pihak bahkan juga menggunakan putusan Badan Peninjau terdahulu yang berkaitan dengan sengketa yang diperiksa dalam melakukan pertimbangannya dalam pemeriksaan sengketa ini. Sehingga, putusan Panel telah sesuai dengan peraturan-peraturan hukum internasional yang berlaku dan berkaitan dengan sengketa antara Indonesia dan Amerika Serikat yang diperiksanya.

3. Akibat hukum putusan panel *World Trade Organization* terkait sengketa sebagian produk *coated paper* terhadap perdagangan internasional akan berdampak bagi perdagangan internasional kedepannya. Hal tersebut karena negara-negara anggota WTO dapat menjadikan putusan ini sebagai dasar argumen mereka dalam proses pemeriksaan penyelesaian sengketa perdagangan internasional. Tidak hanya para negara anggota, tetapi Panel juga dapat menggunakannya sebagai penguatan ataupun perbandingan pada kasus yang akan datang yang sengketa kasus tersebut sejenis atau terkait dengan permasalahan yang terjadi pada sengketa di putusan ini. Kedepannya, putusan ini juga akan menjadi pembatas tindakan para pelaku usaha dalam melakukan kegiatan perdangan internasional. Dampak yang dirasakan Indonesia akibat dari putusan ini adalah pelaku usaha sejenis, khususnya APP / SMG yang terbukti telah melakukan dumping dan mendapatkan subsidi dari Pemerintah Indonesia akan mengalami krisis kepercayaan dalam proses perdagangan internasional yang mereka lakukan. Selain itu, keuangan dan devisa negara juga akan terkena dampaknya. Hal ini sangat disayangkan mengingat Indonesia memiliki sumber daya hutan yang sangat melimpah yang merupakan bahan baku dalam pembuatan *coated paper* dimana minat *coated paper* dunia terus meningkat hingga hari ini.

## 4.2 Saran

Berdasarkan penulisan skripsi ini, maka terdapat saran atas beberapa hal yang seharusnya menjadi perhatian, antara lain:

1. Pemerintah Indonesia maupun produsen asal Indonesia untuk kedepannya lebih lagi memperhatikan dan menaati ketentuan yang terdapat dalam Perjanjian Anti-Dumping dan Perjanjian SCM. Terutamanya dalam melakukan "kerja sama" dalam pemeriksaan dengan pihak yang bersengketa dilakukan sebaik mungkin dan semaksimal mungkin dengan selalu menyimpan data-data yang berkaitan dengan transaksi internasional. Agar Indonesia juga lebih memperhatikan Pasal 1.1 Perjanjian SCM sehingga dapat membuat regulasi untuk menghindari ikut serta Pemerintah Indonesia berupa pemberian subsidi dalam perdagangan internasional.
2. Pertimbangan Panel dalam proses pemeriksaan melihat dari fakta-fakta dan bukti-bukti yang terkait dengan sengketa yang kemudian ditarik ke dalam aturan-aturan hukum internasional yang berlaku dan bersangkutan dengan sengketa yang diperiksa. Oleh karena itu, khususnya untuk Indonesia sebelum mengajukan gugatan kepada negara lain agar terlebih dahulu menyiapkan fakta-fakta dan bukti-bukti yang sekiranya akan mendukung gugatan tersebut untuk diterima oleh Panel disesuaikan dengan pasal-pasal yang diklaim Indonesia kepada negara lain.
3. Setiap tahun WTO akan terus menerbitkan buku mengenai kasus-kasus sengketa yang berhasil dan telah selesai ditangani oleh DSB selaku badan yang memiliki kewenangan untuk menangani penyelesaian sengketa. Buku yang telah diterbitkan masih berbahasa Inggris dan belum ada yang diterjemahkan ke dalam bahasa Indonesia. Untuk kedepannya, alangkah baiknya apabila WTO menerbitkan pula buku terjemahan ke dalam berbagai bahasa, khususnya Indonesia, dalam hal ini WTO dapat bekerja sama dengan setiap negara anggota untuk membantu dalam pelaksanaan penerjemahan buku tersebut. Hal ini bertujuan untuk mempermudah masyarakat, khususnya praktisi hukum dan praktisi bisnis dalam menjalankan tugas dan pekerjaannya.

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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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| *US – Large Civil Aircraft (2nd complaint)* | Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7 |

| Short title | Full case title and citation |
|---|---|
| *US – Line Pipe* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403 |
| *US – Oil Country Tubular Goods Sunset Reviews* | Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257 |
| *US – Shrimp II (Viet Nam)* | Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R |
| *US – Softwood Lumber IV* | Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571 |
| *US – Softwood Lumber IV* | Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641 |
| *US – Softwood Lumber VI* | Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485 |
| *US – Softwood Lumber VI (Article 21.5 – Canada)* | Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865 |
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323 |
| *US – Zeroing (Japan) (Article 21.5 – Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441 |

## 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, *United States Federal Register*, 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, *United States Federal Register*, Vol. 75, No. 221 (17 November 2010) |
| IDN-3/US-66 | Initiation of Anti-Dumping Investigations | Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Initiation of Antidumping Duty Investigations, *United States Federal Register*, Vol. 74 No. 201 (20 October 2009) |
| 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, *United States Federal Register*, Vol. 74 No. 201 (20 October 2009) |
| IDN-5/US-48 | Preliminary Countervailing Duty Determination | Certain Coated Paper from Indonesia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, *United States Federal Register*, Vol. 75, No. 45 (9 March 2010) |
| IDN-6/US-47 | Final Countervailing Duty Determination | Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010) |
| 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, *United States Federal Register*, 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, *United States Federal Register*, 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, *United States Federal Register*, 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, *United States Federal Register*, 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 | *United States Code*, 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 | *United States Code*, 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 | *United States Code*, Title 19, Section 1671d |
| US-60 | 19 U.S.C., Section 1673d | *United States Code*, 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, *United States Federal Register*, 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, *United States Federal Register*, Vol. 75, No. 186 (27 September 2010) |
| US-74 | CFS Final Countervailing Duty Determination | Certain Coated Paper from Indonesia: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, 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, *United States Code*, 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 Industria |
| 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[1] |
| 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 |

[1] 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).[2]

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.[3] On 20 August 2015, Indonesia submitted a new request for the establishment of a panel.[4] 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.[5]

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.[6]

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<br>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.

[2] Request for consultations by Indonesia, WT/DS491/1.
[3] Request for the establishment of a panel by Indonesia, WT/DS491/2.
[4] Request for the establishment of a panel by Indonesia WT/DS491/3 (hereinafter Indonesia's panel request).
[5] DSB, Minutes of the meeting held on 28 September 2015, WT/DSB/M/368.
[6] 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[7] 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.[8] 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.[9]

### 1.3.3 Request for a preliminary ruling

1.10. In its first written submission dated 12 September 2016[10], 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.[11] Indonesia responded to the United States' request on 26 September 2016.[12] The parties further addressed each other's arguments concerning the United States' request in their subsequent submissions and statements to the Panel.[13] Third parties were also invited to comment on the United States' request in their third-party submissions but did not do so.[14] 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,

[7] Panel's Working Procedures, Annex A-1.
[8] Communication from the Panel, WT/DS491/5.
[9] Additional Working Procedures of the Panel concerning Business Confidential Information, Annex A-2.
[10] 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.
[11] United States' first written submission, paras. 33-40.
[12] Indonesia's response to the United States' preliminary ruling request.
[13] 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.
[14] 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.[15] 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).[16] 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.[17] 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.[18]

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.[19] 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.[20] The USDOC issued its final determination on 27 September 2010.[21] 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.[22]

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.[23] 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

[15] 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)).
[16] Indonesia's first written submission, para. 5.
[17] Petition, (Exhibit US-80).
[18] 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.
[19] 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).
[20] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)).
[21] 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.
[22] 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)).
[23] USITC Notice of Preliminary Determination, (Exhibit IDN-8).

Indonesia.[24] 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.[25]

## 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[26]:

   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"[27];

b. With respect to the USITC's threat of injury determination, that[28]:

   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.

[24] 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.

[25] 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).

[26] Indonesia's first written submission, paras. 3 and 166; second written submission, paras. 2-5.

[27] 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).

[28] 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.[29]

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.[30]

3.4. The United States requests that the Panel reject Indonesia's claims in this dispute in their entirety.[31] 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).

[29] Indonesia's first written submission, paras. 5 and 166; second written submission, para. 10.
[30] 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.
[31] 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.[32]

### 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.[33] 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

[32] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.
[33] 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".[34]

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.[35] 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".[36]

#### 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.[37] 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.[38] It is generally for each party asserting a fact to provide proof thereof.[39]

### 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.[40]

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

7.11. As indicated above[41], 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.[42] 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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[34] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106). (emphasis original)
[35] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[36] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[37] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[38] Appellate Body Report, *EC – Hormones*, para. 104.
[39] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[40] See below, paras. 7.120 and 7.346.
[41] See above, para. 1.10.
[42] 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.[43] 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.[44] 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.[45]

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.[46]

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.[47] 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.[48]

[43] 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.

[44] 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)).

[45] United States' first written submission, para. 40; response to Panel question No. 7(c).

[46] United States' first written submission, paras. 35-36; response to Panel question No. 5(a).

[47] 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.

[48] 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.[49]

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.[50]

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[51], 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.[52] 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.[53] 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.[54] 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

[49] United States' first written submission, para. 40.
[50] Indonesia's response to the United States' preliminary ruling request, paras. 4-7.
[51] 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.
[52] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120.
[53] See above, para. 7.6.
[54] 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.[55] 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.[56] 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).[57] 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.[58] 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.[59] 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

[55] 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).

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

[57] 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.

[58] 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).

[59] 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.[60] 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.[61]

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 Industria (HTI) licences to establish, and harvest timber from, plantations, and HPH licences to harvest timber from the natural forest.[62] The USDOC observed that, as it had found in the CFS investigation, HTI licence holders paid "cash stumpage fees"[63] 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.[64] 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.[65]

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.[66] 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[67] "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.[68] The log export ban was administered and operated in

[60] USITC Final Determination, (Exhibit US-1), p. I-5.
[61] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 7 and 11-14.
[62] 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).
[63] The USDOC used the term "stumpage fees" to refer to fees paid for harvesting standing timber.
[64] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6 (referring to CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 69).
[65] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7.
[66] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[67] 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)).
[68] 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.[69] 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.[70]

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.[71]

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.[72] 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.[73] According to Indonesia, instead of using Indonesian prices, the USDOC resorted to "aberrationally high" out-of-country benchmarks.[74]

7.29. The United States requests that the Panel reject Indonesia's claims.[75]

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:
>
> …

[69] Part Two of GOI First Supplemental Questionnaire Response, (Exhibit US-34 (BCI)), appendix 1, pp. 1-2.
[70] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[71] 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).
[72] Indonesia's first written submission, paras. 41-42 and 45.
[73] Indonesia's first written submission, paras. 3 and 29.
[74] Indonesia's first written submission, para. 29.
[75] 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".[76] Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration.[77]

7.33. The Appellate Body has found[78], and the parties agree[79], 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.[80]

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.[81]

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.[82] 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.[83] 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.[84]

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[76] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.45.
[77] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.149.
[78] Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.154; *US – Softwood Lumber IV*, para. 90.
[79] Indonesia's first written submission, para. 31; United States' first written submission, para. 48.
[80] 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)).
[81] 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.
[82] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 439 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).
[83] 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.
[84] 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.[85]

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.[86] However, there is no threshold above which the government's significance as a supplier in the market alone becomes sufficient to establish price distortion.[87] 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.[88] 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.[89] 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*".[90]

7.38. Finally, the investigating authority must explain the basis for its conclusions in arriving at a proper benchmark.[91] 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.[92]

#### 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.[93] In Indonesia's view, the USDOC failed to analyse whether such prices were actually distorted and applied a "*per*

[85] 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.
[86] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.52 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444).
[87] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156.
[88] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446.
[89] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453.
[90] 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).
[91] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.153 and 4.157.
[92] Appellate Body Report, *US – Softwood Lumber IV*, para. 106.
[93] 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.[94] 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.[95]

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.[96] 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.[97] 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.[98]

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.[99] 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.

[94] Indonesia's first written submission, para. 42 (referring to Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.101).
[95] Indonesia's response to Panel question Nos. 11, 15, and 17.
[96] United States' first written submission, paras. 43, 59, 61, and 67; response to Panel question No. 23.
[97] United States' first written submission, paras. 52 and 65.
[98] United States' second written submission, paras. 30-34.
[99] 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.[100]

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.[101] 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.[102] 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.[103]

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".[104]

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

[101] Appellate Body Report, *Brazil – Aircraft*, para. 157.

[102] Indonesia's panel request, para. 1; response to Panel question No. 2. See also para. 3.1 of this Panel Report.

[103] 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.

[104] 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.[105]

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.[106] 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.[107] 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.[108] In the CFS investigation, the USDOC had used these same prices as the basis for the stumpage benchmark.[109]

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.[110] 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.[111] 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.[112]

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.[113] 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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[105] 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.

[106] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 8.

[107] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.

[108] 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).

[109] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 8-10.

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

[111] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 455.

[112] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453.

[113] 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.[114]

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.[115]

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.[116]

7.55. Regarding evidence of private prices, unlike in the CFS investigation[117], 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.[118] 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.[119]

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

[114] Indonesia's opening statement at the first meeting of the Panel, paras. 30-33.
[115] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 9.
[116] 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.
[117] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 19.
[118] 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)).
[119] 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).[120] 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.[121]

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.[122] 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]".[123] 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.[124] 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".[125] 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.[126]

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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[120] United States' response to Panel question Nos. 10-11.

[121] 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).

[122] GOI Initial Questionnaire Response, (Exhibit US-32), pp. 17-18.

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

[124] 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).

[125] 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))

[126] 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.[127] 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.[128] 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[129], 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.[130]

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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[127] Indonesia's response to Panel question Nos. 10-11.
[128] United States' response to Panel question No. 11.
[129] Para. 7.55.
[130] 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.[131] 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.[132]

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 supressed prices.[133] Indonesia submits that the ban does not create oversupply or result in low prices for inputs used by Indonesian paper producers.[134] Indonesia submits that the ban was created to confront the growing problem of deforestation and illegal logging in Indonesia.[135] Indonesia adds that the export of the downstream products used to make paper – pulp, chipwood, and wood chips – was not prohibited.[136] Therefore, if the purpose of the ban was to benefit paper producers, it made no sense to allow these downstream products to be exported.[137] 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.[138] 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.[139] 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

[131] 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.

[132] 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.

[133] 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.

[134] Indonesia's opening statement at the first meeting of the Panel, para. 25.

[135] 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).

[136] 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).

[137] 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).

[138] 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.

[139] 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.[140]

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).[141] 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.[142]

7.66. As indicated above[143], 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.[144] 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.[145] 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 m3 out of a total of 31,984,443 $m^3$ (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.[146]

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[140] 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).

[141] See also para. 7.12 above, concerning the United States' request for a preliminary ruling in this respect.

[142] United States' first written submission, paras. 84-91.

[143] Para. 7.26.

[144] USDOC, Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[145] 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).

[146] 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.[147] 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.[148] 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.[149] Contrary to Indonesia's suggestion[150], 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.[151] 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[152], 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

[147] 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).

[148] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[149] 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.

[150] Indonesia's response to Panel question No. 6; opening statement at the second meeting of the Panel, para. 23.

[151] Panel Report, *US – Softwood Lumber IV*, para. 7.57 (quoted in Appellate Body Report, *US – Softwood Lumber IV*, para. 98).

[152] 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.[153] 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.[154]

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.[155] 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

[153] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.
[154] CFS USDOC Issues and Decision Memorandum, (Exhibit US-43), p. 32. (emphasis original)
[155] 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.[156]

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.[157] 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.[158] According to the United States, where government intervention has distorted the prices in a

[156] See para. 7.64 and fn 136.
[157] Panel Reports, *US – Export Restraints*, para. 8.21; *China – GOES*, para. 7.90; and *US – Countervailing Measures (China)*, para. 7.401.
[158] 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.[159]

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.[160] 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.[161] It therefore excluded such shipments from the Malaysian export data that it used as benchmark.[162] 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".[163] 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.[164] 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."[165]

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.[166] 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

[159] United States' response to Panel question No. 70(a).
[160] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), p. 10769 (emphasis added). See para. 7.66 above.
[161] 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).
[162] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 28, 32, 34, 36, and 40.
[163] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 31-32.
[164] 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).
[165] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 27.
[166] 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).[167] 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.[168] 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.[169]

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).[170] 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.[171] 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

[167] 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.
[168] United States' opening statement at the first meeting of the Panel, paras. 17-20.
[169] Indonesia's first written submission, paras. 3 and 28.
[170] 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.
[171] 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.[172] 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.[173] 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.[174] 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 [[***]].[175]

7.90. According to the information before the USDOC, IBRA Regulation SK-7/BPPN/0101[176] 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[177] and (at least for some of the sales) [[***[178] ***[179]]] 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.[180]

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.[181] 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)

[172] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), responses to question No. 4, pp. 5-6, and No. 22(c), p. 16.
[173] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 9, p. 9.
[174] 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.
[175] 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)).
[176] Exhibit 1 to GOI Third Supplemental Questionnaire Response, (Exhibit US-84).
[177] 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 [[***]]
[178] [[***]]
[179] [[***]]
[180] 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.
[181] 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.[182]

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.[183] 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.[184]

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.[185] 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.[186] 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

[182] 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.

[183] GOI Initial Questionnaire Response, (Exhibit US-32), response to question No. E, pp. 29-30.

[184] 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).

[185] 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.

[186] 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.[187]

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.[188] 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.[189] 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".[190] 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."[191]

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.[192] 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.[193] 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.[194]

[187] Preliminary Countervailing Duty Determination, (Exhibits IDN-5/US-48 (exhibited twice)), pp. 10071-10773.
[188] GOI Third Supplemental Questionnaire, (Exhibit US-41), question Nos. 5, 6, 7, 12, 17, 18, and 22(c).
[189] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), response to question No. 5, pp. 6-7).
[190] 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).
[191] GOI Third Supplemental Questionnaire Response, (Exhibit IDN-15), responses to question Nos. 6, p. 7, and 7, pp. 7-8.
[192] GOI Fifth Supplemental Questionnaire, (Exhibit US-42), question Nos. 3, 4, 5, and 8.
[193] GOI Verification Outline, (Exhibit US-77).
[194] 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."[195] 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.[196]

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.[197] 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.[198]

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

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).

[195] Letter to GOI regarding Verification, (Exhibit US-76).

[196] 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.

[197] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 52-55.

[198] 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".[199] 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.[200] 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.[201] 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.[202]

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[203], 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.[204] 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.[205] 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.[206] 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

[199] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[200] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[201] 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)*)
[202] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.
[203] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 295; *US – Carbon Steel (India)*, paras. 4.423 and 4.425.
[204] 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.
[205] Indonesia's first written submission, para. 65.
[206] 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.[207]

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.[208]

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.[209] 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.[210]

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.[211]

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.[212]

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

[207] Indonesia's first written submission, paras. 57-59 and 63.
[208] Indonesia's response to Panel question No. 87.
[209] United States' first written submission, para. 150.
[210] United States' comments on Indonesia's response to Panel question No. 87.
[211] United States' first written submission, paras. 136-140 and 150-156.
[212] United States' first written submission, paras. 136-140 and 150-156.
[213] 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".[214] 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.[215]

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".[216] 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.[217] 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".[218] 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[219] – 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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[214] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 48-55.
[215] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 20.
[216] See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[217] Panel Report, *Egypt – Steel Rebar*, para. 7.155.
[218] 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))
[219] 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".[220] 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.*"[221] 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*.[222]

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".[223] The Appellate Body also considered, however, that paragraph 2 of Annex II[224] 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.[225] 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.[226]

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[220] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 517.
[221] Emphasis added.
[222] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99. (emphasis original)
[223] Appellate Body Report, *US – Hot-Rolled Steel*, para. 100.
[224] 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)
[225] Appellate Body Report, *US – Hot-Rolled Steel*, para. 101.
[226] 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 [227] (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". [228] 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.[229]

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.[230]

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.[231]

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.[232] 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

[227] 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."
[228] Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.
[229] Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.
[230] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.
[231] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 54-55.
[232] 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.[233]

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.[234] 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.[235]

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."[236] 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".[237]

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[238] does not affect our conclusion in this respect. Verification visits are only one of several

[233] 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.

[234] 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).

[235] Article 12.1.1 and fn 40 of the SCM Agreement.

[236] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 31. (underline original)

[237] GOI Third Supplemental Questionnaire, (Exhibit US-41), cover letter; GOI Fifth Supplemental Questionnaire, (Exhibit US-42), cover letter.

[238] 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[239], and the SCM Agreement does not require an investigating authority to conduct such visits.[240]

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[241] 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"[242], and that an investigating authority is not required "to accept *all* information presented to it during a verification visit."[243] 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

[239] 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".

[240] 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).

[241] 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[.]

[242] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.74.

[243] 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.[244]

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.[245] 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.[246]

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"[247], with a view to arriving at an accurate determination[248], i.e. with a view to selecting the best information.[249] 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.[250] Where there are multiple "available facts" from which to choose, the process of reasoning and evaluation should involve a degree of comparison[251]; 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.[252] 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.[253] 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.[254]

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

[244] 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.
[245] United States' response to Panel question No. 87.
[246] United States' first written submission, paras. 119, 141, and 158-165.
[247] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. (emphasis added)
[248] 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).
[249] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[250] 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).
[251] See, in particular, Appellate Body Report, *US – Carbon Steel (India)* para. 4.426.
[252] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.417 and 4.428.
[253] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.426 and 4.468.
[254] 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.[255]

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.[256]

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."[257]

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.[258] 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.[259] 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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[255] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80; see also ibid. para. 7.61.
[256] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6; see also ibid. pp. 48-55.
[257] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 6. (fn omitted)
[258] See above, para. 7.112.
[259] 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.[260, 261]

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.[262]

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".[263] The USDOC determined, on this basis, that "the provision of stumpage [was] specific … because it [was] limited to a group of industries".[264] 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".[265] 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."[266]

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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[260] 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).

[261] 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).

[262] Indonesia's first written submission, para. 3.

[263] 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).

[264] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

[265] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[266] 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".[267]

7.138. The United States requests that the Panel reject Indonesia's claims.[268]

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.[269]

#### 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.[270]

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

[267] 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).

[268] United States' opening statement at the first meeting of the Panel, para. 43.

[269] 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.

[270] 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.[271]

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.[272] 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".[273] 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[274] 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.[275]

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".[276] 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.[277]

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.[278] 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.[279] The focus of this provision is, therefore, on factual circumstances surrounding the granting of a subsidy.[280] 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".[281]

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".[282] 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".[283] 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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[271] Emphasis added; fns omitted.
[272] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21.
[273] Emphasis added.
[274] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.
[275] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140 (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 750).
[276] By contrast, Article 2.2 establishes principles relevant to determine whether a subsidy is regionally-specific.
[277] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367.
[278] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.
[279] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 877.
[280] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.369.
[281] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.374.
[282] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.
[283] 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.[284]

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.[285] 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".[286]

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."[287]

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.[288] 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.[289] 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.[290]

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.[291]

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

[284] Panel Report, *US – Countervailing Measures (China)*, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32).
[285] 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).
[286] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.988.
[287] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.
[288] 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.
[289] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.167.
[290] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.169.
[291] 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).[292]

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.[293] 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.[294]

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.[295] 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.[296] Indonesia links this contention to what it considers are shortcomings in the USDOC's benefit findings for the three subsidies at issue.[297] 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

[292] 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.

[293] 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.

[294] 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).

[295] Indonesia's response to Panel question Nos. 27(b) and 27(c).

[296] Indonesia's second written submission, paras. 46-48.

[297] Indonesia's response to Panel question No. 27(b).

benefit the GOI.[298] 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 "supressed" prices[299], 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.[300] 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.[301] 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.[302]

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.[303]

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.[304] 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".[305]

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.[306] However, we reject the view that, in considering a subsidy programme that is manifested in the

[298] 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.
[299] 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.
[300] Indonesia's second written submission, para. 47.
[301] 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).
[302] 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.).
[303] 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.
[304] United States' second written submission, para. 90.
[305] United States' second written submission, paras. 89 and 96.
[306] 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.[307] 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.[308]

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.[309]

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.[310] 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.[311] 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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[307] 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).

[308] 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).

[309] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

[310] Panel Report, *US – Countervailing Measures (China)*, para. 7.242; Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.149.

[311] 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".[312] 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).[313]

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.[314] The USDOC

[312] 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).

[313] 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).

[314] 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.[315] 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.[316]

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.[317] 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.[318]

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.[319] 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.[320] 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.[321]

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.[322] 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.

[315] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 6-7 and 11.

[316] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 7.

[317] 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).

[318] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 13.

[319] USDOC Issues and Decision Memorandum, (Exhibit US-31), p. 5.

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

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

[322] 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.[323] 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[324]; 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".[325] 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.[326]

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.[327] Indonesia initially argued that the USDOC was required to identify the government entity that allegedly forgave debt.[328] 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.[329]

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."[330] The United States argues that, although not required to do so, the USDOC also identified the particular agency within Indonesia that provided

[323] Indonesia's first written submission, para. 83.
[324] 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).
[325] Indonesia's first written submission, para. 3.
[326] Indonesia's first written submission, paras. 94-95; response to Panel question No. 30; and second written submission, para. 49.
[327] Indonesia's second written submission, para. 49; opening statement at the second meeting of the Panel, para. 34.
[328] Indonesia's first written submission, paras. 93-95.
[329] Indonesia's response to Panel question No. 30; second written submission, para. 49.
[330] 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.[331]

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).[332] 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[333], 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.[334]

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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[331] United States' second written submission, para. 110.

[332] USDOC Issues and Decision Memorandum, (Exhibit US-31), pp. 5-6 and 17-20.

[333] We find support for this proposition in the Appellate Body's statement in *US – Large Civil Aircraft (2nd 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 (2nd complaint)*, para. 756 (emphasis original))

[334] 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.[335] 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.[336] 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.[337]

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.[338]

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".[339] In addition, the United States submits that APP/SMG constituted a single company, regardless of the fact that it comprised multiple entities.[340]

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.[341] 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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[335] 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.

[336] Indonesia's opening statement at the first meeting of the Panel, para. 57; second written submission, para. 49.

[337] Indonesia's second written submission, paras. 50-51.

[338] 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)).

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

[340] United States' second written submission, paras. 102 and 107-109.

[341] 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[342], that is "'on the face' of the panel request".[343]

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".[344]

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."[345]

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).[346]

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.[347]

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

[342] 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).
[343] Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).
[344] Indonesia's panel request, para. 1(c)(i).
[345] Indonesia's panel request, para. 1(c)(ii).
[346] Indonesia's response to Panel question No. 86; comments on the United States' response to Panel question No. 86.
[347] 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.[348]

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.[349] 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".[350]

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.[351] Moreover, we note that APP/SMG's debt was sold as a single asset.[352] 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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[348] 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.

[349] 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 (2nd complaint)*, paras. 748-753).

[350] Petitioners' General Factual Information Submission, (Exhibit US-40), exhibit 24, p. 13. (emphasis added)

[351] 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.

[352] 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.[353] 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).[354] The USITC defined the domestic industry as the US producers and converters of certain coated paper.[355]

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.[356, 357] 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

[353] USITC Final Determination, (Exhibit US-1), pp. 15-17.
[354] 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).
[355] USITC Final Determination, (Exhibit US-1), p. 13.
[356] 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.
[357] 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.[358]

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.[359]

### 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.[360]

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.[361] 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.[362] 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.[363]

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

[358] USITC Final Determination, (Exhibit US-1).
[359] United States' second written submission, para. 113.
[360] Indonesia's first written submission, para. 4.
[361] 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).
[362] Indonesia's second written submission, para. 63.
[363] 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.[364]

#### 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.[365]

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.[366]
>
> [*fn original][47] 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.[367] 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.[368] 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

[364] United States' first written submission, paras. 294-297; opening statement at the second meeting of the Panel, para. 54.
[365] Emphasis added.
[366] Emphasis added.
[367] 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).
[368] 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".[369] 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.[370]

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.[371] 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".[372] 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".[373]

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.[374] 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.[375]

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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[369] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[370] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.
[371] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.
[372] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189.
[373] See, e.g. Panel Report, *EU – Footwear (China)*, para. 7.483.
[374] Indonesia's first written submission, paras. 111-113 (quoting Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405).
[375] 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*.[*][376]

[*fn original][282] 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.[377] 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.[378] 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.

[376] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405. (emphasis added)

[377] 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".

[378] 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.[379]

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.[380] 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.[381]

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.[382] 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.[383] 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".[384] 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.[385]

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.[386] 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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[379] USITC Final Determination, (Exhibit US-1), pp. 26-27.
[380] USITC Final Determination, (Exhibit US-1), p. 27.
[381] USITC Final Determination, (Exhibit US-1), p. 29.
[382] 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)
[383] USITC Final Determination, (Exhibit US-1), p. 33.
[384] USITC Final Determination, (Exhibit US-1), p. 33.
[385] USITC Final Determination, (Exhibit US-1), p. 33.
[386] 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.[387] 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.[388]

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.[389] 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.[390] 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.[391]

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.[392]

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".[393] 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

[387] 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.

[388] USITC Final Determination, (Exhibit US-1), p. 35.
[389] USITC Final Determination, (Exhibit US-1), p. 35.
[390] USITC Final Determination, (Exhibit US-1), p. 36.
[391] 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.
[392] USITC Final Determination, (Exhibit US-1), p. 38
[393] 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".[394]

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.[395]

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.[396]

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.[397] 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.[398]

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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[394] 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)

[395] USITC Final Determination, (Exhibit US-1), pp. 38-39.

[396] USITC Final Determination, (Exhibit US-1), p. 39.

[397] 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).

[398] 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.[399]

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.[400]

#### 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[401], 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.[402] 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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[399] USITC Final Determination, (Exhibit US-1), pp. 18-19. (emphasis added; fns omitted)

[400] 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.

[401] 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.

[402] 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.[403]

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.[404] 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.[405] 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.[406]

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.[407] 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.[408]

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.[409]

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

[403] Indonesia's second written submission, para. 62; response to Panel question No. 41.
[404] United States' second written submission, para. 115.
[405] United States' first written submission, paras. 296-299.
[406] United States' first written submission, para. 293.
[407] 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).
[408] 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.
[409] 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.[410]

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.[411]

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.[412] 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.[413] 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".[414] 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.[415]

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[410] 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.

[411] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.469. (fn omitted; emphasis original)

[412] USITC Final Determination, (Exhibit US-1), p. 38.

[413] USITC Final Determination, (Exhibit US-1), p. 37.

[414] 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).

[415] 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.[416] 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.[417] 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.[418] 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.[419]

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.[420] The United States adds that the USITC explained in its findings that the

[416] 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.).

[417] 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).

[418] Indonesia's response to Panel question No. 92(c).

[419] Indonesia's first written submission, paras. 109 and 116.

[420] 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.[421]

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)[422] 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.[423]

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.[424]

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.[425] In its consideration of the impact of subject imports, the USITC noted that US demand had declined by 21.3% from 2007 to 2009.[426] 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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[421] United States' first written submission, paras. 300 and 305.

[422] 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.

[423] USITC Final Determination, (Exhibit US-1), pp. 38-39.

[424] 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)

[425] USITC Final Determination, (Exhibit US-1), p. 33.

[426] 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.[427]

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.[428] 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)[429], 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.[430] 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.[431] The tax credit went into effect in late 2007 and expired at the end of 2009.[432] Before the USITC, respondent parties contended that the tax credit allowed domestic producers to lower prices on certain coated paper in 2009[433], whereas petitioners argued that the tax credit was not a factor in domestic producers' pricing decisions in 2009.[434]

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[427] USITC Final Determination, (Exhibit US-1), p. 38.

[428] 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.

[429] USITC Final Determination, (Exhibit US-1), table C-3 on p. C-6.

[430] 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.

[431] 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)).

[432] 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).

[433] 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.

[434] 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[435], 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.[436] 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.[437] Indonesia also faults the USITC for examining the question of threat of injury in the context of a domestic industry that was vulnerable.[438]

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[439] – 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.[440] 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.[441]

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.[442] 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.[443] The USITC did not address the black liquor tax credit further and did not discuss it in considering non-attribution.

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[435] 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)).

[436] Indonesia's second written submission, para. 55.

[437] Indonesia's opening statement at the first meeting of the Panel, para. 61.

[438] Indonesia's response to Panel question No. 47.

[439] 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)).

[440] United States' second written submission, paras. 117 and 125.

[441] United States' first written submission, para. 309; second written submission, para. 125.

[442] USITC Final Determination, (Exhibit US-1), p. 33.

[443] 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.[444] 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.[445, 446]

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.[447]

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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).

[444] 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.

[445] 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.

[446] 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)).

[447] 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.[448] 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.[449] 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.[450]

7.254. Indonesia does not argue that non-subject imports would in the future cause injury to the domestic industry.[451] 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[452], 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.[453] 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

[448] Indonesia's first written submission, paras. 110 and 117; response to Panel question No. 48(b).
[449] United States' first written submission, paras. 301 and 306-308; second written submission, fn 218.
[450] United States' first written submission, paras. 301 and 306-308.
[451] 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.
[452] 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.
[453] Indonesia's first written submission, para. 4.

prices.[454] 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.[455]

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.[456]

#### 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.
>
> [fn original][10] 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)).[457]

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

[454] 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).
[455] Indonesia first written submission, para. 124; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.
[456] United States' first written submission, para. 259.
[457] 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.[458]

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".[459] 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[460], and show a high degree of likelihood that projected occurrences will occur.[461]

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.[462] 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.[463] 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.[464]

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.[465]

#### 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".[466] 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

[458] Indonesia's first written submission, para. 122; opening statement at the first meeting of the Panel, para. 65; and second written submission, para. 64.
[459] 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.
[460] 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.
[461] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 109.
[462] Panel Report, *Mexico – Corn Syrup*, paras. 7.125-7.126.
[463] See above, para. 7.231 and fn 410.
[464] 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).
[465] Panel Report, *US – Softwood Lumber VI*, para. 7.57.
[466] 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.[467]

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.[468] 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.[469] 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 shorts 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.[470] The USITC observed that subject imports increased despite a substantial decline in apparent US consumption.[471]

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.[472]

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.[473] The USITC also noted that, soon after APP lost its major US distributor – Unisource Worldwide, Inc.

[467] 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.

[468] USITC Final Determination, (Exhibit US-1), pp. 30-31.

[469] USITC Final Determination, (Exhibit US-1), p. 27.

[470] USITC Final Determination, (Exhibit US-1), p. 26.

[471] 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).

[472] USITC Final Determination, (Exhibit US-1), p. 28.

[473] 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.[474] 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.[475]

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.[476]

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.[477] 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.[478] 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[479]] 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.[480]

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[474] USITC Final Determination, (Exhibit US-1), p. 29.

[475] 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).

[476] USITC Final Determination, (Exhibit US-1), pp. 34-35.

[477] 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).

[478] USITC Final Determination, (Exhibit US-1), p. 38.

[479] 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).

[480] 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.[481]

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.[482] 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.[483]

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.[484] 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.[485]

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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[481] 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).

[482] 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)).

[483] Indonesia's opening statement at the first meeting of the Panel, para. 65 (referring to United States' first written submission, para. 263).

[484] 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).

[485] 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.[486] 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.[487] 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%.[488] While non-subject imports' market share decreased from 25.4% in 2007 to 16.1% in 2009 (-9.3 percentage points)[489], subject imports' market share increased from 13.9% in 2007 to 18.3% in 2009 (+4.4 percentage points)[490] and the domestic industry's market share increased from 60.7% in 2007 to 65.5% in 2009 (+4.8 percentage points).[491] 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.[492] The volume of subject imports decreased from 210,506 short tons in interim 2009 to 85,033 short tons in interim 2010[493], 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.[494]

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.[495] 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

[486] See para. 7.6 of this Report.
[487] 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).
[488] 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).
[489] USITC Final Determination,(Exhibit US-1), pp. 23, 36, and 39; table IV-7, p. IV-12; and table C-3, p. C-6.
[490] USITC Final Determination,(Exhibit US-1), pp. 22 and 36; table IV-7, p. IV-12; and table C-3, p. C-6.
[491] USITC Final Determination,(Exhibit US-1), pp. 22 and 36; table IV-7, p. IV-12; and table C-3, p. C-6.
[492] USITC Final Determination,(Exhibit US-1), p. 39.
[493] USITC Final Determination, (Exhibit US-1), p. 27 and table C-3.
[494] USITC Final Determination, (Exhibit US-1), pp. 22, 23, and 39, and table C-3.
[495] 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.[496] 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.[497] 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.[498] 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.[499] 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.[500] 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.[501]

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

[496] 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.
[497] USITC Final Determination, (Exhibit US-1), p. 27.
[498] USITC Final Determination, (Exhibit US-1), pp. 26-27. See also ibid. table C-3.
[499] Indonesia's opening statement at the first meeting of the Panel, para. 67.
[500] Indonesia's opening statement at the first meeting of the Panel, para. 67; second written submission, para. 68.
[501] Indonesia's opening statement at the second meeting of the Panel, para. 44.

suggests.[502] 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"[503], 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.[504]

7.286. Indonesia also argues that the subject imports were not responsible for the decline in domestic industry US sales volumes during the POI.[505] Indonesia submits that the USITC found that declining consumption and the economic downturn were responsible for that decline.[506] 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.[507]

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.[508] 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.[509] 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.[510] 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.[511]

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[502] Indonesia's first written submission, para. 128; response to Panel question No. 48(b).
[503] USITC Final Determination, (Exhibit US-1), pp. 38-39.
[504] Indonesia's response to Panel question No. 48(b).
[505] See for instance Indonesia's opening statement at the second meeting of the Panel, para. 48.
[506] 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.
[507] USITC Final Determination, (Exhibit US-1), p. 38, quoted above para. 7.270.
[508] 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).
[509] Indonesia's opening statement at the second meeting of the Panel, para. 52.
[510] See below, paras. 7.297 and 7.307.
[511] 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.[512]

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.[513] 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.[514]

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[512] 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.

[513] 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.

[514] 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.[515] 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.[516] Indonesia also argues that, despite the projected additional new capacity, Chinese producers projected very little excess capacity in 2011.[517] 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.[518]

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.[519] 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[520], and respondents characterized that source as "independent".[521] APP even characterized the RISI data as "the best available for assessing consumption growth in Asia".[522] 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)

[515] Indonesia's opening statement at the second meeting of the Panel, paras. 41 and 52.

[516] 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.

[517] 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).

[518] 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).

[519] 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).

[520] 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.

[521] APP Pre-hearing Brief to USITC, (Exhibit IDN-45), pp. 122, 134, and 136.

[522] 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.[523] 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".[524] 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.[525] 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.[526] 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[527] 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.[528] 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.[529] Moreover, the USITC's analysis reflects the existing sales patterns of the Chinese

[523] Indonesia's opening statement at the second meeting of the Panel, fn 63.
[524] USITC Final Determination, (Exhibit US-1), fn 181.
[525] 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).
[526] Indonesia's opening statement at the first meeting of the Panel, paras. 68 and 71; second written submission, paras. 70 and 73.
[527] USITC Final Determination, (Exhibit US-1), p. 28.
[528] USITC Final Determination, (Exhibit US-1), fn 188.
[529] 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.[530] Overall, we consider the USITC's analysis of other export markets was based on relevant facts, and not on speculation.[531]

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.[532]

7.299. The USITC found that subject producers had a strong interest in increasing shipments to the United States.[533] 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

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.

[530] 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.

[531] 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).

[532] Indonesia's opening statement at the second meeting of the Panel, paras. 37-39 (referring to United States' second written submission, paras. 112-113).

[533] 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.[534]

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.[535] 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.[536] However, in its last submission to the Panel, Indonesia indicated that it does not know "every statement ever made by an APP representative".[537] In the same submission, Indonesia argued that there were other testimonies on the record that conflict with the statements in the Unisource affidavit.[538] 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.[539] 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.[540]

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.[541]

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.[542] 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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[534] 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)
[535] United States' response to Panel question No. 95.
[536] Indonesia's opening statement at the second meeting of the Panel, para. 39.
[537] Indonesia's comments on the United States' response to Panel question No. 95.
[538] Indonesia's comments on the United States' response to Panel question No. 95.
[539] United States' response to Panel question No. 95.
[540] 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).
[541] 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.
[542] See above, para. 7.7.

principal distributor in the US market (Unisource)[543] in May 2009, APP established its own distribution network for the US market (Eagle Ridge) in October 2009.[544] This occurred at a time when subject imports were increasing their presence in the US market.[545] 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.[546] Even assuming new evidence could not be submitted after the filing of pre-hearing briefs, as Indonesia alleges[547], 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.[548]

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.[549] 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

[543] 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".

[544] 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).

[545] As indicated before, subject imports were at their peak in the period 2008-2009.

[546] 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))

[547] 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.

[548] 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 (Mr Hunley) 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.

[549] 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.[550]

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.[551] 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.[552]

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.[553] 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.[554] 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.[555] The USITC did not make a finding

[550] 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).

[551] Indonesia's first written submission, paras. 124-126.

[552] United States' first written submission, para. 273.

[553] USITC Final Determination, (Exhibit US-1), p. 34.

[554] 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%.

[555] 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).[556]

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.[557] 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.[558] 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.[559] 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.[560]

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).

[556] USITC Final Determination, (Exhibit US-1), p. 33.

[557] 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).

[558] USITC Final Determination, (Exhibit US-1), p. 34.

[559] USITC Final Determination, (Exhibit US-1), p. 31.

[560] 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.[561] 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.[562]

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.[563] Indonesia considers that it was speculative to conclude that "such a small portion of the market" would drive prices in the remaining market.[564] 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[565], 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.[566] 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.[567] Finally, we consider that the

[561] USITC Final Determination, (Exhibit US-1), pp. 32-33. See also fn 555.
[562] 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).
[563] USITC Final Determination, (Exhibit US-1), p. 34.
[564] Indonesia's first written submission, paras. 125-129.
[565] See above, para. 7.287.
[566] USITC Final Determination, (Exhibit US-1), pp. 27, 28, and 34.
[567] 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.[568]

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.[569] 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.[570] 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".[571]

7.321. The United States requests that we reject Indonesia's claims.[572]

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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.

[568] USITC Final Determination, (Exhibit US-1), pp. 34-35.

[569] Indonesia's first written submission, para. 127.

[570] United States' first written submission, para. 285 (referring to USITC Final Determination, (Exhibit US-1), pp. 35 and 39). (emphasis added)

[571] Indonesia's first written submission, para. 130; second written submission, para. 76.

[572] 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.[573]

#### 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.[574]

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.[575]

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.[576]

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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[573] See below, para. 7.346.

[574] Indonesia's first written submission, paras. 131-132; response to Panel question No. 56; and second written submission, para. 76.

[575] 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.

[576] 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.[577]

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.[578] 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.[579]

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.[580] 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.[581]

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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[577] 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.

[578] United States' second written submission, para. 148.

[579] 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.

[580] 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.

[581] 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.[582]

7.332. The United States requests that we reject Indonesia's claim.[583]

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.[584] 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
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> (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.[585]

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[586] 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).[587]

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

[582] Indonesia's first written submission, paras. 3 and 133-165.
[583] United States' first written submission, para. 353.
[584] See, e.g. Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.94.
[585] 19 U.S.C., Section 1677, (Exhibit US-12), Section 1677(11)(B).
[586] 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))).
[587] 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.[588]

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.[589] 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.[590] 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" of "measures".[591] 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.[592]

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.[593] The special care obligation does not, in the United States' view, discipline a Member's voting system or decision-making procedures.[594] 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

[588] 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).
[589] 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.
[590] Indonesia's response to Panel question Nos. 59 (a), (b), and (c).
[591] Indonesia's response to Panel question No. 59(c).
[592] 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.
[593] United States' second written submission, paras. 155-156.
[594] United States' first written submission, para. 319.

Articles 3.8 and 15.8.[595] 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.[596]

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.[597] 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.[598] 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.[599]

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"[600], 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.[601] 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

[595] 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).

[596] United States' response to Panel question No. 59(a).

[597] 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).

[598] United States' second written submission, paras. 164-165.

[599] 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)).

[600] 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.

[601] 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.[602] 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".[603] 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.[604] 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*".[605] 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.[606] 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[607] 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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[602] 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).

[603] Appellate Body Report, *Thailand – H-Beams*, para. 106. (emphasis original)

[604] 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".

[605] 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)

[606] See, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

[607] 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.[608] 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.[609]

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.[610] 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.[611] 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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[608] 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.

[609] 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)

[610] 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).

[611] 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. [612] 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".[613] 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.[614]

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.[615] 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".[616] 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.[617] 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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[612] 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.

[613] 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.

[614] 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)).

[615] 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".

[616] Appellate Body Reports, *US – Gambling*, para. 192; *EC – Chicken Cuts*, paras. 258-259. (emphasis original)

[617] 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[618] 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.[619] 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.

[618] See above, para. 7.336.
[619] 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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# AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

*Members* hereby *agree* as follows:

## PART I

### *Article 1*

### *Principles*

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

### *Article 2*

### *Determination of Dumping*

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value

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[1]The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2]Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

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[3]When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

[4]The extended period of time should normally be one year but shall in no case be less than six months.

[5]Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

[6]The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

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[7]It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8]Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

*Article 3*

*Determination of Injury*[9]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return

[9]Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 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.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 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.[10] 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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[10]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.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

*Article 4*

*Definition of Domestic Industry*

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied[12] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

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[11]For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

[12]As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

*Article 5*

*Initiation and Subsequent Investigation*

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on

[13]In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

*Article 6*

*Evidence*

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

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[14]Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[17]

6.5.1 The authorities shall require interested parties providing confidential information to

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[15]As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[16]It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

[17]Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

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

6.9 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. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any

[18]Members agree that requests for confidentiality should not be arbitrarily rejected.

exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 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.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

*Article 7*

*Provisional Measures*

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused

during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

*Article 8*

*Price Undertakings*

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases,

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[19]The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

*Article 9*

*Imposition and Collection of Anti-Dumping Duties*

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the

anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while

[20]It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

*Article 10*

*Retroactivity*

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding

of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

*Article 11*

*Duration and Review of Anti-Dumping Duties and Price Undertakings*

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period

[21]A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[22] The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

*Article 12*

*Public Notice and Explanation of Determinations*

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[23], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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[22]When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[23]Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

*Article 13*

*Judicial Review*

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

*Article 14*

*Anti-Dumping Action on Behalf of a Third Country*

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

*Article 15*

*Developing Country Members*

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

*Article 16*

*Committee on Anti-Dumping Practices*

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

*Article 17*

*Consultation and Dispute Settlement*

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

(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.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

## PART III

### *Article 18*

### *Final Provisions*

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

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[24]This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

# ANNEX I

## PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. 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; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

## ANNEX II

## BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

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

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such

as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, 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.

Pasal 3

Penentuan Cedera

3.5 Harus ditunjukkan bahwa impor dumping, melalui efek dumping, sebagaimana diatur dalam ayat (2) dan (4), menyebabkan kerugian sesuai dengan makna Perjanjian ini. Demonstrasi hubungan sebab akibat antara impor dumping dan cedera pada industri dalam negeri harus didasarkan pada pemeriksaan terhadap semua bukti yang relevan di hadapan pihak berwenang. Pihak berwenang juga harus memeriksa faktor-faktor yang diketahui selain impor dumping yang pada saat yang sama melukai industri dalam negeri, dan cedera yang disebabkan oleh faktor-faktor lain ini tidak boleh dikaitkan dengan impor dumping. Faktor-faktor yang mungkin relevan dalam hal ini termasuk, antara lain, volume dan harga impor tidak dijual dengan harga dumping, penyusutan dalam permintaan atau perubahan dalam pola konsumsi, praktik pembatasan perdagangan dan persaingan antara produsen asing dan domestik, perkembangan teknologi dan kinerja ekspor serta produktivitas industri dalam negeri.

3.7 Penentuan ancaman cedera material harus didasarkan pada fakta dan bukan hanya pada dugaan, dugaan, atau kemungkinan jarak jauh. Perubahan keadaan yang akan menciptakan situasi di mana pembuangan akan menyebabkan cedera harus secara jelas diramalkan dan segera terjadi.10 Dalam membuat keputusan mengenai adanya ancaman cedera material, pihak berwenang harus mempertimbangkan, antara lain, faktor-faktor seperti:

(i) tingkat peningkatan impor dumping yang signifikan ke pasar domestik yang mengindikasikan kemungkinan peningkatan impor secara substansial;

(ii) cukup sekali pakai, atau peningkatan substansial, dalam waktu dekat, kapasitas eksportir menunjukkan kemungkinan peningkatan ekspor dumping ke pasar Anggota pengimpor, dengan mempertimbangkan ketersediaan pasar ekspor lain untuk menyerap tambahan ekspor;

(iii) apakah impor masuk pada harga yang akan memiliki efek secara signifikan melemahkan atau menekan harga domestik, dan kemungkinan akan meningkatkan permintaan untuk impor lebih lanjut; dan

(iv) persediaan produk yang diselidiki.

Tidak satu pun dari faktor-faktor ini dengan sendirinya dapat memberikan panduan yang menentukan, tetapi totalitas dari faktor-faktor yang dipertimbangkan harus mengarah pada kesimpulan bahwa ekspor dumping lebih lanjut akan segera terjadi dan bahwa, jika tidak diambil tindakan perlindungan, cedera material akan terjadi.

# AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

*Members* hereby *agree* as follows:

## PART I: GENERAL PROVISIONS

### *Article 1*

### *Definition of a Subsidy*

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 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.

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[1]In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

*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[2] 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.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

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[2]Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[3]In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

## PART II: PROHIBITED SUBSIDIES

### *Article 3*

### *Prohibition*

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

### *Article 4*

### *Remedies*

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to

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[4]This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[5]Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

[6]Any time-periods mentioned in this Article may be extended by mutual agreement.

[7]As established in Article 24.

the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

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[8]If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[9]This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[10]This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

## PART III: ACTIONABLE SUBSIDIES

### *Article 5*

### *Adverse Effects*

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[11];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[12];

(c) serious prejudice to the interests of another Member.[13]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

### *Article 6*

### *Serious Prejudice*

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent[15];

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

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[11]The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

[12]The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[13]The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

[14]The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

[15]Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information

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[16]Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

[17]Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

*Article 7*

*Remedies*

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the

[18]The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[20], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

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[19]In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

[20]Any time-periods mentioned in this Article may be extended by mutual agreement.

[21]If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[22]If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

## PART IV: NON-ACTIONABLE SUBSIDIES

### *Article 8*

### *Identification of Non-Actionable Subsidies*

8.1 The following subsidies shall be considered as non-actionable[23]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24, 25, 26]

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity[29, 30];

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[23]It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

[24]Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

[25]Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

[26]The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

[27]The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

[28]The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

[29]The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects

and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development[31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[32], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

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cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

[30]In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

[31]A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

[32]"Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[34]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases,

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[33]The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

[34]It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

*Article 9*

*Consultations and Authorized Remedies*

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

## PART V: COUNTERVAILING MEASURES

### *Article 10*

### *Application of Article VI of GATT 1994*[35]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

### *Article 11*

### *Initiation and Subsequent Investigation*

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

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[35]The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[36]The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

[37]The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either

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[38]In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[39]Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

*Article 12*

*Evidence*

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[41] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is

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[40]As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[41]It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[43]

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

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

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

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[42]Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[43]Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 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.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

*Article 13*

*Consultations*

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[44]

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such

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[44]It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

*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:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(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).

*Article 15*

*Determination of Injury*[45]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and

[45]Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] 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.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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[46]Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

[47]As set forth in paragraphs 2 and 4.

15.7 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 subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) 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

(v) 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 subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

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

*Article 16*

*Definition of Domestic Industry*

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial

[48]For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

*Article 17*

*Provisional Measures*

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

*Article 18*

*Undertakings*

18.1 Proceedings may[49] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with

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[49]The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

*Article 19*

*Imposition and Collection of Countervailing Duties*

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

*Article 20*

*Retroactivity*

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury,

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[50]For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

[51]As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

*Article 21*

*Duration and Review of Countervailing Duties and Undertakings*

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation

or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

*Article 22*

*Public Notice and Explanation of Determinations*

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[53], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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[52]When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[53]Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

*Article 23*

*Judicial Review*

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

## PART VI: INSTITUTIONS

### *Article 24*

### *Committee on Subsidies and Countervailing Measures and Subsidiary Bodies*

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

## PART VII: NOTIFICATION AND SURVEILLANCE

### *Article 25*

### *Notifications*

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection,

and without prejudice to the contents and form of the questionnaire on subsidies[54], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

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[54]The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

*Article 26*

*Surveillance*

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

## PART VIII: DEVELOPING COUNTRY MEMBERS

*Article 27*

*Special and Differential Treatment of Developing Country Members*

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of

[55]For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

## PART IX: TRANSITIONAL ARRANGEMENTS

### *Article 28*

### *Existing Programmes*

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

### *Article 29*

### *Transformation into a Market Economy*

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

## PART X: DISPUTE SETTLEMENT

### *Article 30*

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

## PART XI: FINAL PROVISIONS

### *Article 31*

### *Provisional Application*

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

### *Article 32*

### *Other Final Provisions*

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

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[56]This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

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[57]The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[58]For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[59]The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes[58] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes[58] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[60] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges[58] in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

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[60]Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[61]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

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[61]Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION
(PARAGRAPH 1(A) OF ARTICLE 6)[62]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[63] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[64]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[65]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

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[62]An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[63]The recipient firm is a firm in the territory of the subsidizing Member.

[64]In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

[65]Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[66] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[67]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes

[66]In cases where the existence of serious prejudice has to be demonstrated.

[67]The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

# ANNEX VI

## PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. 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; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

# ANNEX VII

## DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[68]The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

Pasal 2

Kekhususan

2.1 Untuk menentukan apakah suatu subsidi, sebagaimana didefinisikan dalam Pasal 1 ayat (1), khusus untuk suatu perusahaan atau industri atau kelompok perusahaan atau kelompok industri (disebut dalam Perjanjian ini sebagai "perusahaan tertentu") dalam yurisdiksi pemberian kewenangan, prinsip-prinsip berikut ini akan berlaku:

(c) Jika, meskipun ada kesan tidak spesifik yang dihasilkan dari penerapan prinsip-prinsip yang tercantum dalam sub-ayat (a) dan (b), ada alasan untuk meyakini bahwa subsidi mungkin sebenarnya spesifik, faktor-faktor lain dapat dipertimbangkan. Faktor-faktor tersebut adalah: penggunaan program subsidi oleh sejumlah perusahaan tertentu, penggunaan utama oleh perusahaan-perusahaan tertentu, pemberian subsidi dalam jumlah besar secara tidak proporsional kepada perusahaan-perusahaan tertentu, dan cara di mana keleluasan telah dilakukan oleh pemberian kewenangan dalam keputusan untuk memberikan subsidi.

Pasal 12

Bukti

12.7 Dalam kasus-kasus di mana Anggota atau pihak yang berkepentingan menolak akses, atau sebaliknya tidak menyediakan, informasi yang diperlukan dalam jangka waktu yang pantas atau secara signifikan menghambat penyelidikan, putusan pendahuluan dan putusan akhir, diterima dan ditolak, dapat dilakukan berdasarkan fakta yang tersedia.

Pasal 14

Perhitungan Jumlah Subsidi dalam

Ketentuan dari Keuntungan untuk Penerima

Untuk tujuan Bagian V, metode apa pun yang digunakan oleh otoritas penyelidik untuk menghitung keuntungan bagi penerima yang diberikan sesuai dengan paragraf 1 Pasal 1 harus diatur dalam undang-undang nasional atau peraturan pelaksanaan Anggota yang bersangkutan dan penerapannya untuk masing-masing kasus harus transparan dan dijelaskan secara memadai. Lebih lanjut, metode semacam itu harus konsisten dengan pedoman berikut:

(d) ketentuan barang atau jasa atau pembelian barang oleh pemerintah tidak akan dianggap memberikan keuntungan kecuali ketentuan tersebut dibuat untuk remunerasi yang kurang memadai, atau pembelian dilakukan untuk lebih dari remunerasi yang memadai. Kecukupan remunerasi harus ditentukan sehubungan dengan kondisi pasar yang berlaku untuk barang atau jasa yang bersangkutan di negara penyedia atau pembeli (termasuk harga, kualitas, ketersediaan, kemampuan pemasaran, transportasi dan ketentuan pembelian atau penjualan lainnya).

Pasal 15

Penentuan Cidera

15.5 Harus ditunjukkan bahwa impor bersubsidi, melalui efek subsidi, menyebabkan kerugian sesuai dengan makna Perjanjian ini. Demonstrasi hubungan sebab akibat antara impor bersubsidi dan cedera pada industri dalam negeri harus didasarkan pada pemeriksaan terhadap semua bukti yang relevan di hadapan pihak berwenang. Pihak berwenang juga harus memeriksa faktor-faktor yang diketahui selain impor bersubsidi yang pada saat yang sama melukai industri dalam negeri, dan cedera yang disebabkan oleh faktor-faktor lain ini tidak boleh dikaitkan dengan impor bersubsidi. Faktor-faktor yang mungkin relevan dalam hal ini termasuk, antara lain, volume dan harga impor non-subsidi dari produk yang dipertanyakan, penyusutan dalam permintaan atau perubahan dalam pola

konsumsi, praktik pembatasan perdagangan dan persaingan antara produsen asing dan domestik, perkembangan teknologi dan kinerja ekspor dan produktivitas industri dalam negeri.

15.7 Penentuan ancaman cedera dasar material harus berdasarkan pada fakta dan tidak hanya pada pernyataan tanpa bukti, dugaan, atau kemungkinan jarak jauh. Perubahan keadaan yang akan menciptakan situasi di mana subsidi akan menyebabkan cedera harus secara jelas diprediksi dan akan segera terjadi. Dalam membuat keputusan mengenai adanya ancaman cedera material, otoritas investigasi harus mempertimbangkan, antara lain, faktor-faktor seperti:

(i) sifat subsidi atau subsidi yang dipermasalahkan dan dampak perdagangan yang mungkin timbul darinya;

(ii) peningkatan signifikan impor bersubsidi ke pasar domestik yang mengindikasikan kemungkinan peningkatan impor secara substansial;

(iii) cukup sekali pakai, atau segera terjadi, peningkatan substansial, dalam kapasitas eksportir yang mengindikasikan kemungkinan peningkatan ekspor dumping ke pasar Anggota pengimpor, dengan mempertimbangkan ketersediaan pasar ekspor lain untuk menyerap tambahan ekspor;

(iv) cukup sekali pakai, atau segera terjadi, peningkatan substansial, dalam kapasitas eksportir yang mengindikasikan kemungkinan peningkatan ekspor dumping ke pasar Anggota pengimpor, dengan mempertimbangkan ketersediaan pasar ekspor lain untuk menyerap tambahan ekspor; dan

(v) persediaan produk yang diselidiki.

Tidak satu pun dari faktor-faktor ini dengan sendirinya dapat memberikan panduan yang mutlak, tetapi totalitas dari faktor-faktor yang dipertimbangkan harus mengarah pada kesimpulan bahwa ekspor bersubsidi lebih dekat sudah dekat dan bahwa, kecuali jika tindakan perlindungan diambil, cedera material akan terjadi., tetapi keseluruhan faktor-faktor yang dipertimbangkan harus mengarah pada kesimpulan bahwa ekspor bersubsidi selanjutnya akan segera terjadi dan bahwa, kecuali jika tindakan perlindungan diambil, cedera material akan terjadi.

15.8 Sehubungan dengan kasus-kasus di mana cedera merupakan ancaman dari impor bersubsidi, penerapan tindakan penyeimbang harus dipertimbangkan dan diputuskan dengan hati-hati.

**ANNEX 2**

**UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES**

*Members* hereby *agree* as follows:

*Article 1*

*Coverage and Application*

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

*Article 2*

*Administration*

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[1]

*Article 3*

*General Provisions*

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure

[1]The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[2]

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

*Article 4*

*Consultations*

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

[2]This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4], such Member

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[3]Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

[4]The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14;

may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

*Article 5*

*Good Offices, Conciliation and Mediation*

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

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Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

*Article 6*

*Establishment of Panels*

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[5]

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

*Article 7*

*Terms of Reference of Panels*

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

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

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

*Article 8*

*Composition of Panels*

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

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[5]If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

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[6]In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

*Article 9*

*Procedures for Multiple Complainants*

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

*Article 10*

*Third Parties*

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

*Article 11*

*Function of Panels*

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

*Article 12*

*Panel Procedures*

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country

Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. 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.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

*Article 13*

*Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

*Article 14*

*Confidentiality*

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

*Article 15*

*Interim Review Stage*

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

*Article 16*

*Adoption of Panel Reports*

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

[7]If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

*Article 17*

*Appellate Review*

*Standing Appellate Body*

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

*Procedures for Appellate Review*

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

*Adoption of Appellate Body Reports*

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

*Article 18*

*Communications with the Panel or Appellate Body*

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

*Article 19*

*Panel and Appellate Body Recommendations*

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

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[8]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[9]The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[10]With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

*Article 20*

*Time-frame for DSB Decisions*

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

*Article 21*

*Surveillance of Implementation of Recommendations and Rulings*

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

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[11]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[12]If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[13]The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

*Article 22*

*Compensation and the Suspension of Concessions*

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

[14]The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to

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[15]The expression"arbitrator" shall be interpreted as referring either to an individual or a group.

[16]The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

*Article 23*

*Strengthening of the Multilateral System*

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

*Article 24*

*Special Procedures Involving Least-Developed Country Members*

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel

[17]Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

*Article 25*

*Arbitration*

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

*Article 26*

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

*Article 27*

*Responsibilities of the Secretariat*

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods
Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES
CONTAINED IN THE COVERED AGREEMENTS

| *Agreement* | *Rules and Procedures* |
|---|---|
| Agreement on the Application of Sanitary and Phytosanitary Measures | 11.2 |
| Agreement on Textiles and Clothing | 2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12 |
| Agreement on Technical Barriers to Trade | 14.2 through 14.4, Annex 2 |
| Agreement on Implementation of Article VI of GATT 1994 | 17.4 through 17.7 |
| Agreement on Implementation of Article VII of GATT 1994 | 19.3 through 19.5, Annex II.2(f), 3, 9, 21 |
| Agreement on Subsidies and Countervailing Measures | 4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V |
| General Agreement on Trade in Services | XXII:3, XXIII:3 |
| Annex on Financial Services | 4 |
| Annex on Air Transport Services | 4 |
| Decision on Certain Dispute Settlement Procedures for the GATS | 1 through 5 |

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

APPENDIX 3

WORKING PROCEDURES

l. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

| | | | |
|---|---|---|---|
| (a) | Receipt of first written submissions of the parties: | | |
| | (1) complaining Party: | _____ | 3-6 weeks |
| | (2) Party complained against: | _____ | 2-3 weeks |
| (b) | Date, time and place of first substantive meeting with the parties; third party session: | _____ | 1-2 weeks |
| (c) | Receipt of written rebuttals of the parties: | _____ | 2-3 weeks |
| (d) | Date, time and place of second substantive meeting with the parties: | _____ | 1-2 weeks |
| (e) | Issuance of descriptive part of the report to the parties: | _____ | 2-4 weeks |
| (f) | Receipt of comments by the parties on the descriptive part of the report: | _____ | 2 weeks |
| (g) | Issuance of the interim report, including the findings and conclusions, to the parties: | _____ | 2-4 weeks |
| (h) | Deadline for party to request review of part(s) of report: | _____ | 1 week |
| (i) | Period of review by panel, including possible additional meeting with parties: | _____ | 2 weeks |
| (j) | Issuance of final report to parties to dispute: | _____ | 2 weeks |
| (k) | Circulation of the final report to the Members: | _____ | 3 weeks |

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

# APPENDIX 4

## EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.