

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

(DS491)

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES**

March 29, 2017

Mr. Chairman, members of the Panel:

1. The United States explained in its opening statement that Indonesia has raised assertions not supported by record evidence and has asked the Panel to weigh the evidence de novo.

Specifically, with respect to both its subsidy and threat arguments, Indonesia has attempted to recast record evidence and introduce non-record facts. The United States' concerns were realized in Indonesia's opening statement. For example, Indonesia argues for the first time, "USDOC should have solicited information to examine benchmarks relating to the per hectare cost of a lease for degraded forest land." The appropriate inquiry, however, is whether the investigating authority during the investigation made determinations on the basis of record evidence and adequately explained those determinations.

2. This problematic approach is also evidenced in Indonesia's responses to the Panel's questions. Contrary to Indonesia's assertions, there can be no question that both investigating authorities based their determinations on positive evidence. The record developed before the United States Department of Commerce ("USDOC") is that the Government of Indonesia ("GOI") provided standing timber for less than adequate remuneration. APP/SMG paid PSDH royalties whether the timber it harvested was "pre-standing" or cultivated and the royalties were determined based solely upon the volume of timber and its species. Acreage or land has no consideration in Indonesia's stumpage royalty program.

3. The GOI's cavalier posture as to whom Orleans' owners were – despite the erasure of over \$600 million in debt – resulted in USDOC engaging in a supplemental line of questioning to develop the record on the affiliation issue. The GOI repeatedly failed to avail itself of numerous opportunities to provide an answer to a very straightforward inquiry on whether APP/SMG and Orleans are affiliated. The record contained positive evidence calling into question the GOI's

thinly supported assertions. On the other hand, there were multiple sources probative of whether affiliation was likely. That the selection of those facts, in the absence of knowledge of Orleans' owners, led to an unfavorable result for Indonesia is not a breach of the SCM Agreement.

Indeed, Article 12.7 contemplates this result. Moreover, Indonesia cannot immunize itself from an affirmative subsidy finding simply because it passed a municipal law. The SCM Agreement recognizes no such exception.

4. With respect to specificity, we remind the Panel that there is no dispute that a limited number of enterprises or industries used the subsidies, which is the central question under Article 2.1 in a de facto specificity scenario. With respect to the de facto specificity finding on the debt buyback, Indonesia's panel request and first written submission do not challenge the supporting evidence pertaining to that central inquiry. Indonesia's late challenges to that finding – such as those raised during this Panel meeting – should be rejected.

5. Indonesia's threat claims are divorced from the facts and what the legal standards actually are. Threat determinations have to be based on facts, and the U.S. International Trade Commission ("ITC") based its determination on ample facts. An investigating authority needs to establish the existence of a threat that actually is from subject imports, and the ITC certainly did that. Indonesia's arguments neglect the fact that the ITC did indeed conduct a non-attribution analysis as part of its threat determination. In fact, Indonesia's arguments this morning made clear that it isn't even clear what its legal claims are with regard to threat.

6. In truth, the ITC's threat finding was one that was unquestionably reasonable. The ITC had direct evidence of APP's intent to massively increase its exports to the United States, and near the end of the POI APP set up its own distributor, so it had a vehicle to do so. The ITC also

reasonably found that Chinese capacity was going to increase massively, and that the United States was an attractive target market.

7. Indonesia asks the Panel to look at particular sentences or facts in isolation. But the ITC properly considered the record as a whole. As we have explained, the Panel’s job is not to review *de novo* or to re-adjudicate decisions about which evidence to credit.

8. On the question of special care, the United States has explained why “special care” simply is not a discipline applicable to decision-making procedure. This is clear from the structure of the AD Agreement and the SCM Agreement and the texts of the agreements when they are read as a whole. It is also clear from the drafting history. The Appellate Body’s decision in *US – Line Pipe* further confirms that AD Agreement Article 3.8 and SCM Agreement Article 15.8 do not discipline decision-making procedures.

9. As the United States has explained, moreover, Indonesia’s legal arguments on special care lead to far-reaching and intrusive results that would affect investigating authority operation and structure. This serves to underscore that the special care requirement was not intended to discipline decision-making procedures.

10. In closing, the United States requests that the Panel reject each of Indonesia’s claims. The United States thanks the Panel for its time and detailed attention to this dispute.