

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

**(DS491)**

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

**March 28, 2017**

1. Good morning, Mr. Chairman and distinguished members of the Panel. It's a pleasure to see you again.

2. Our statement today will be divided into four parts. Part I responds to specific arguments of Indonesia with respect to USDOC's countervailing duty determination. Part II addresses three systemic problems found throughout Indonesia's argumentation in this dispute. Part III responds to specific arguments of Indonesia with respect to the ITC's threat of injury determination.

Finally, Part IV addresses Indonesia's challenge to the tie vote rule under U.S. law.

## **I. INDONESIA'S CLAIMS REGARDING THE COUNTERVAILING DUTY DETERMINATION ARE WITHOUT MERIT.**

### **A. Preliminary Ruling Request**

3. We begin with a comment on the issues raised in the United States' preliminary ruling request. In a footnote to its second written submission, Indonesia suggests that the United States agrees with Indonesia that there is "no support for a Panel to find arguments are outside a Panel's terms of reference." This is not the case. As we have explained, Indonesia's arguments on financial contribution are not germane to the claims within the Panel's terms of reference. Accordingly, there is no basis for the panel report to address the substance of these arguments. Rather, the panel report should address these arguments by noting that they are not relevant to any matter within the Panel's terms of reference.

### **B. Indonesia's Article 14(d) Claims**

4. We next want to respond to Indonesia's attempt to recast its stumping program. Indonesia's new explanation(s) are plainly incorrect. As demonstrated in our second written submission, Indonesia's new argument is contradicted both by record evidence and prior

representations by Indonesia.<sup>1</sup> Furthermore, whatever name Indonesia wishes to use for its stumpage program, USDOC’s well-reasoned determination properly found that this program confers a subsidy.

5. USDOC learned in the underlying investigation that logging companies can obtain timber from the Government of Indonesia (“GOI”) land in three ways: harvesting pre-existing timber from the natural forest, clear-cutting pre-existing timber to establish an area as a future plantation, or harvesting cultivated timber on a plantation. 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.<sup>2</sup> It is this stumpage rate that USDOC examined for consistency with market principles.<sup>3</sup>

6. The GOI regulated timber plantations in a manner consistent with providing standing timber, and not – as Indonesia argues – in a manner consistent with providing access to land. To obtain an “HTI license” to operate a timber plantation on GOI land, a logging company must meet a number of regulatory requirements and pay a concession fee.<sup>4</sup> However, rather than payment of a lease based on a given *acreage*, the concessionaire pays stumpage fees on the *volume of wood* harvested from the land.<sup>5</sup> GOI officials accompany logging-company officials into the fields at the time of the harvest to check the accuracy of the company’s volume

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<sup>1</sup> United States Second Written Submission, paras. 21-27.

<sup>2</sup> IDM (Exhibit US-31) at 6.

<sup>3</sup> IDM (Exhibit US-31) at 6 (demonstrating USDOC’s analysis also accounted for additional fees that may be incurred, including per-unit rehabilitation fees (“DR” fees) for timber from the natural forest and province-specific “PSDA” fees).

<sup>4</sup> GOI Initial Questionnaire Resp. (Dec. 29, 2009) (Exhibit US-32) at 9-12; GOI Verification Rept. (Aug. 3, 2010) (Exhibit US-38), at 3.

<sup>5</sup> GOI Initial Questionnaire Resp. (Dec. 29, 2009) (Exhibit US-32), at 12.

reporting.<sup>6</sup> The GOI retains title to the standing timber cultivated by private companies until the applicable stumpage fees are paid. Only then are the logs officially the property of the logging company and permitted to exit the collecting area.<sup>7</sup>

7. Thus, contrary to what Indonesia claims in its opening statement,<sup>8</sup> the royalties are tied to stumpage, not land use. This conclusion is consistent with the GOI's licensing regime. It is also supported by the fact that the timber remains the property of the GOI while it is attached to the land and, even after the timber is cut down, until the appropriate royalty is established and paid.<sup>9</sup> We also note that this stumpage program is very similar to the description of how Canadian provinces administered their stumpage programs in *US – Softwood Lumber IV*. The panel and Appellate Body in that case found that Canada's stumpage regime constituted a subsidy.<sup>10</sup> The fact that Indonesia now relies upon – namely, that plantation owners may undertake tasks associated with growing and harvesting cultivated timber (versus “pre-standing” timber)<sup>11</sup> – changes nothing.

8. Moreover, it is irrelevant whether the land for which concessions were granted is degraded. Rather, the salient point is that without the government's provision of timber for less than adequate remuneration, the logging companies would have had to procure it at market price.

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<sup>6</sup> GOI Verification Rept. (Aug. 3, 2010) (Exhibit US-38), at 4.

<sup>7</sup> GOI Verification Rept. (Aug. 3, 2010) (Exhibit US-38), at 7; GOI Initial Questionnaire Resp. (Dec. 29, 2009) (Exhibit US-32), at 12.

<sup>8</sup> Indonesia Opening Statement (1st Panel Meeting), para. 22.

<sup>9</sup> See GOI Verification Rept. (Aug. 3, 2010) (Exhibit US-38), at 7; GOI Initial Questionnaire Resp. (Dec. 29, 2009) (Exhibit US-32), at 12.

<sup>10</sup> *US – Softwood Lumber IV (AB)*, para. 75 (concurring with the panel's finding).

<sup>11</sup> Indonesia Second Written Submission, paras. 20, 23.

This conclusion was drawn from the record evidence and was reasoned and adequate as explained in the Issues and Decision Memorandum.<sup>12</sup>

9. We will now turn to Indonesia’s assertion that all the factors USDOC considered in its distortion analysis are not separate factors at all because they “rely on” government predominance in the market. Indonesia has no basis for reducing all of the other factors – government administered prices, negligible imports, the log export ban, government ownership of land, and low prices compared to the surrounding region – into one. It is expected that many of these factors would have overlapping effects, as indeed USDOC acknowledged in its determination.

10. Indonesia also fixates on tangential points that are unsupported and have little connection logically to its legal argument. For example, Indonesia raises issues with respect to whether wood chips or pulp are part of the log export ban, or why a handful of exporters might choose to sell to Indonesian customers despite low prices. The United States has responded to these arguments. Nonetheless, these subsidiary issues do not support Indonesia’s arguments with respect to USDOC’s distortion analysis. Indonesia’s approach involves an improper, *de novo* review of the USDOC determination.

11. The next issue we will address today is Indonesia’s argument regarding the investigation of private sales. Indonesia argues that the SCM Agreement required the investigating authority to seek and gather evidence which in hindsight would have been to Indonesia’s advantage, beyond what is feasible for investigating authorities. USDOC, in accordance with Article 12.1

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<sup>12</sup> IDM at 8-9, 28-37 (Exhibit US-31).

of the SCM Agreement, asked the interested parties to provide evidence of private sales that could be used to establish in-country benchmarks. Indonesia responded that it did not collect or maintain information that could be used for that purpose – i.e., the only data available was aggregate data, not species-specific data.<sup>13</sup> APP/SMG provided partial information about a single, private arrangement, but its payment records do not support the existence of this arrangement. Furthermore, APP/SMG never provided any underlying documentation that USDOC requested or argued that this arrangement was relevant to USDOC's benchmark analysis.<sup>14</sup> Clearly, Indonesia and APP/SMG are the parties in the best position to provide data that pertains to activity in their jurisdiction and sourced from primary sources in the Indonesian language. The GOI and APP also had direct access to other parties with whom they have commercial relationships or ties; and in APP/SMG's case, its own company records. Indonesia has not explained why USDOC is likely to succeed where the interested parties failed through requests for information from non-interested parties who have no obligation or incentive to cooperate.

12. Accordingly, Indonesia provides no basis for a finding of an alleged breach when it posits other possible modes of investigation. This conclusion comports with the SCM Agreement as a whole, which contemplates an investigating authority's need to establish deadlines to ensure

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<sup>13</sup> See United States Resp. to Panel Questions (1st Panel Meeting), paras. 37-42 (citing APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009), at 27-30 (Exhibit US-91); GOI Initial Questionnaire Resp. (Dec. 29, 2009), at 17 (Exhibit US-32)).

<sup>14</sup> United States Second Written Submission, paras. 31-33 (citing APP/SMG First Supplemental Questionnaire Response (Feb. 22, 2010) (Exhibit US-100 (BCI)) at 18, Ex. 44; APP/SMG Initial Questionnaire Resp. (Dec. 29, 2009) (Exhibit US-91 (BCI)), at 27-32).

timely and efficient conduct of its proceedings.<sup>15</sup> This conclusion is supported by the Appellate Body’s analogous finding in *US – Wheat Gluten* that investigating authorities do not have “an open-ended and unlimited duty to investigate all available facts that might *possibly* be relevant.”<sup>16</sup>

13. Finally, the United States recalls that this proceeding is not a *de novo* review of Indonesia’s subsidies. The question is not whether Indonesia might have conducted the investigation differently, or weighed the facts differently, but whether the USDOC provided a reasoned and adequate explanation for its determinations.

### **C. Indonesia’s Article 12.7 Claim**

14. With regard to Indonesia’s Article 12.7 claim, we first wish to dispel Indonesia’s arguments regarding the relevance and veracity of the newspaper articles, World Bank report, and independent expert summary relied on as facts available. First, it must be recalled that the bidding documents pertaining to the other PPAS sales were necessary for USDOC to have a baseline for understanding whether the IBRA’s due diligence procedures – of which there were no formal written procedures – were applied more deferentially for the APP/SMG debt sale than other sales. And, of course, USDOC was only requesting those documents because Orleans’ ownership information was already missing from the record. Thus, USDOC relied on the news articles, report, and expert summary evidence in finding the companies affiliated.

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<sup>15</sup> *E.g.*, SCM art. 12.1.1, 12.7.

<sup>16</sup> *Cf. US – Wheat Gluten (AB)*, para. 56 (emphasis added).

15. With regard to those articles, report, and independent expert summary, they must be viewed *collectively* and not piecemeal for what they represent.<sup>17</sup> Read together, this evidence suggests several overarching considerations; for example, that the IBRA was allegedly allowing debtors to buy back their debt through third parties, and with specific regard to the Orleans transaction, that there were “long-running creditor suspicions that APP/SMG has been surreptitiously been buying back its debt.”<sup>18</sup> USDOC’s reliance on the independent expert summary from the CFS investigation was not *post hoc*.<sup>19</sup> It was cited in the CCP Preliminary Determination.<sup>20</sup>

16. In addition, Indonesia claims that the independent expert summary is, on its face, speculative. This argument has no merit. Indonesia bases this claim on the diction in the report that the expert “believed the speculation” that affiliated parties are buying back debt.<sup>21</sup> The word “speculation” in this excerpt refers to others’ opinions, which was one element of the evidence examined by the expert. Nothing in the report, which examined diverse sources of information, supports the view that the expert’s own opinion was speculation.

17. Furthermore, we address Indonesia’s arguments regarding the due diligence statements in the World Bank report and the independent expert summary. In particular, Indonesia contends that because the reports contained references to IBRA, USDOC already possessed the necessary

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<sup>17</sup> See, e.g., Indonesia Second Written Submission, paras. 32, 44.

<sup>18</sup> See Petitioners’ General Factual Information Submission (Exhibit US-40).

<sup>19</sup> Indonesia Second Written Submission, para. 35.

<sup>20</sup> CCP Preliminary Determination, 75 Fed. Reg. 10,772 n.10 (Exhibit US-48). *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 164 (stating Article 22.5 [of the SCM Agreement] does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination”) (emphasis in original).

<sup>21</sup> Indonesia Second Written Submission, para. 37.



information that USDOC’s request for the additional PPAS documents was designed to elicit.<sup>22</sup> This is incorrect. The necessary information that was missing from the record was the relationship between APP/SMG and Orleans. USDOC needed to know whether they were affiliated to determine whether the debt sale was, in fact, a debt buyback and, in turn, a subsidy. Upon receiving the Orleans’ bid package – which did not list ownership details that were therefore “missing” from the record – USDOC resorted to facts available. In that context, USDOC provided a further opportunity to develop facts for the record on the affiliation issue that could be consulted or weighed in selecting among the available facts. Thus, even though there were two gaps in the record, the gaps did not relate to separate factual issues, but rather, the same primary one: the issue of affiliation. USDOC was reasonable when it considered this other record evidence that simultaneously suggested Orleans and APP/SMG were affiliated companies.

#### **D. Indonesia’s Article 2.1(c) Claim (Debt Buyback)**

18. Indonesia draws another faulty conclusion from the evidence USDOC relied upon as facts available for affiliation, which Indonesia carries over to USDOC’s finding that the debt buyback was *de facto* company-specific. Indonesia contends that the evidence USDOC relied on as *facts available* suggests that the debt buyback is not *de facto* company specific. But Indonesia has *not* challenged the evidence upon which USDOC relied in finding the debt buyback *de facto* company-specific.<sup>23</sup> Indonesia’s Article 2.1(c) challenge in this dispute is whether a subsidy

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<sup>22</sup> Indonesia Second Written Submission, at para. 44.

<sup>23</sup> See Indonesia’s First Written Submission, paras. 3, 81-83; Indonesia’s Second Written Submission, para. 4, 48.

program exists as a precursor to USDOC’s *de facto* specificity analysis. With regard to the issue Indonesia has challenged here, the subsidy program’s existence in the form of a plan or scheme is comprised of the terms of reference, the bid protocol, and other documents stipulating the conditions of sale.

## **II. SYSTEMIC CONCERNS WITH INDONESIA’S ARGUMENTS.**

### **A. Indonesia Seeks *De Novo* Review**

19. Throughout its submissions, Indonesia raises arguments that are tantamount to requests for a *de novo* review of the factual record. We have highlighted two of the many instances in our discussion earlier this morning – regarding the characterization of the timber concession, and the evaluation of pricing data for private transactions.

20. These arguments must be rejected because they do not comport with the appropriate standard of review in disputes under the SCM Agreement or AD Agreement. Instead of *de novo* review, a panel should “review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.”<sup>24</sup>

### **B. Indonesia Has Repeatedly Offered Arguments Predicated on Inapposite Legal Principles**

21. Throughout its submissions, Indonesia relies on supposed legal principles that are not applicable to the facts in this dispute, and/or that lack any basis in the covered agreements. We will discuss three clear examples from its second written submission.

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<sup>24</sup> *China – Broiler Products*, para. 7.4 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

22. First, Indonesia now asserts that USDOC’s distortion finding rested on a presumption that Indonesia could not overcome, and that presumptions are *per se* inconsistent with WTO rules.<sup>25</sup> This argument is divorced from USDOC’s record. Rather, as the United States has explained at length, USDOC’s findings that the timber market in Indonesia is distorted and that in-country benchmarks are not appropriate were based on an extensive review of the factual record. USDOC’s determination engages with these facts, and provides a reasoned explanation of its conclusions.

23. Accordingly, when Indonesia argues that market predominance was the only relevant factor examined by Commerce, Indonesia is simply wrong.<sup>26</sup> Naturally, where the government provided 94% of the total supply of timber, USDOC weighted that factor heavily, as was appropriate. This assignment of evidentiary weight is in line with the Appellate Body’s finding in *US – Antidumping and Countervailing Duties* that “[t]here may be cases ... where the government’s role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight.”<sup>27</sup>

24. Second, Indonesia argues as if the findings in Appellate Body reports must be applied as if they were treaty text. For example, in its second written submission, Indonesia refers to USDOC’s finding on distortion as being “in contravention of” *US – Countervailing Measures (China)*. As the United States has explained, USDOC’s findings in this dispute in fact fit within the approach used by the Appellate Body in that report. Nonetheless, as a systemic matter, the

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<sup>25</sup> Indonesia Second Written Submission, para. 13.

<sup>26</sup> *E.g.*, United States First Written Submission, paras. 64-69 (citing IDM at 8, 28-37; GOI Questionnaire Resp. of 12/29/2009 at 17-18 & Ex. 27 (Ex. US-32)).

<sup>27</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

United States would highlight that Appellate Body findings are not binding interpretations with respect to all Members and all future disputes. And, to the extent the Panel finds Appellate Body findings pertaining to out-of-country benchmarks helpful in its analysis, there is no reason to refer only to *US – Countervailing Measures (China)*. As the United States has noted, the reports in *US – Antidumping and Countervailing Duties (China)* and *US – Softwood Lumber IV* are also relevant.

25. Indeed, as we explained previously,<sup>28</sup> the Appellate Body’s collective findings in the relevant disputes support the conclusion that different cases should be treated differently: there is no rote, one-size-fits-all rule – as Indonesia apparently advocates – governing the relationship between government involvement in the market and an investigating authority’s market distortion analysis. The facts of the present dispute closely resemble those of *US – Softwood Lumber IV* in terms of the government’s role as a direct supplier of the input and as the entity that administratively controls stumpage prices. The present facts also are much more aligned with *US – Anti-Dumping and Countervailing Measures (China)* in terms of government market share. The Appellate Body in *US – Countervailing Measures (China)* acknowledged that “depending on the particular circumstances at hand, an investigating authority may not be required to conduct a market analysis addressing all the elements mentioned above as examples of relevant inquiries.”<sup>29</sup>

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<sup>28</sup> United States Resp. to Panel’s Questions (1st Panel Meeting), para. 31.

<sup>29</sup> *US – Countervailing Measures (China) (AB)*, n.552.

26. Third, Indonesia has no legal basis for its supposed presumption that a government would not violate its own law.<sup>30</sup> There is no such rule in the SCM Agreement. Indeed, the SCM Agreement specifically provides that debt forgiveness can be a subsidy. Apparently, according to Indonesia, a Member can immunize itself from an affirmative subsidy determination by passing a law.

**C. Indonesia’s Narration of the Facts is Constantly Shifting and the Panel Should Give No Credence to Indonesia’s Recently-Raised Assertions.**

27. Our third systemic concern is that Indonesia’s arguments and theories have continued to change during the course of these Panel proceedings. Two examples are a) Indonesia’s contention in its second written submission that the independent expert summary is suspect because the report supposedly is speculative;<sup>31</sup> and b) Indonesia’s contention that the World Bank report and expert summary suggested that other affiliated sales may have taken place under similar due diligence standards.<sup>32</sup>

28. Indonesia should not be raising these new arguments at such a late point in the proceedings. Indonesia’s factual arguments address record evidence dating back several years. Further, these new arguments are not made in rebuttal, but instead are new attempts to find flaws in the determination at issue.

29. In these circumstances, the untimeliness of Indonesia’s arguments would be an independent basis to reject them. Indeed, the Panel’s Working Procedures in this dispute state,

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<sup>30</sup> Indonesia Second Written Submission, para. 38.

<sup>31</sup> Indonesia Second Written Submission, para. 37.

<sup>32</sup> Indonesia Second Written Submission, paras. 44, 51.

“[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.” Similarly, the Appellate Body has found that “complaining parties should put forward their cases – with ‘a full presentation of the facts on the basis of submission of supporting evidence’ – during the first stage of panel proceedings.”<sup>33</sup>

### **III. INDONESIA’S CLAIMS REGARDING THREAT OF MATERIAL INJURY ARE WITHOUT MERIT.**

30. The United States will next address Indonesia’s claims concerning the U.S. International Trade Commission’s (“ITC” or “Commission”) determination of threat of material injury. The United States explained in its submissions, its answers to the Panel’s first set of questions, and at the First Meeting of the Panel with the parties why these claims are without merit. Indonesia’s second written submission added nothing new to the discussion.

31. Indeed, that submission reinforced that Indonesia’s claims concerning the threat of injury determination rest on misreading of the ITC’s well-reasoned determination and on misunderstanding of the WTO disciplines concerning threat of injury. Trying to show some contradiction that simply does not exist, Indonesia overstates what the ITC actually said about present material injury and juxtaposes its own over-statements with incomplete depictions of the ITC’s threat of injury analysis. Moreover, Indonesia’s submission makes clear that its arguments rest on a fundamentally illogical premise: that an examination of whether material injury is

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<sup>33</sup> *US – Gambling (AB)*, para. 271 (quoting standard working procedures).

threatened cannot involve consideration of the baseline condition of the industry at issue. As a matter of basic logic, that position makes no sense.

32. Indonesia also repeatedly asks the Panel to consider the import of particular facts in isolation. But the ITC properly considered the record as a whole to reach the conclusion that subject imports threatened material injury. The United States has discussed this record in extensive detail in prior submissions. When the Commission’s views are read in their totality, there is no question that the record supports the Commission’s determination that the domestic industry was indeed threatened with material injury, and that the ITC determination was fully consistent with all relevant WTO obligations.

**A. Indonesia’s Arguments Concerning the Commission’s Examination of the Domestic Industry’s Baseline Condition Would Have the Panel Preclude An Investigating Authority From Ever Finding Threat of Material Injury.**

33. Indonesia’s second written submission further crystalizes the fact that its claims concerning threat of injury rest on a fundamentally illogical complaint that, if accepted, would serve to nullify the concept of threat of injury. Indonesia contends that any consideration of the baseline condition of the domestic industry automatically breaches the AD Agreement and SCM Agreement if (as will inevitably be the case) that condition is affected by anything other than subject imports. Here, Indonesia claims that the ITC’s consideration of the domestic industry’s vulnerability “demonstrates violation of the non-attribution principle because subject imports were not what caused the domestic industry to be vulnerable.”<sup>34</sup> Indonesia also asserts that “Rather than finding the domestic industry’s vulnerability made it more likely that subject

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<sup>34</sup> Indonesia’s Second Written Submission, para. 54.

imports threatened injury, the USITC should have analyzed the impact of just the subject imports on the domestic industry during the period of investigation, after isolating out the other factors and, based on that analysis determined whether a threat of injury was likely.”<sup>35</sup>

34. Indonesia mistakenly conflates the Commission’s consideration of the domestic industry’s vulnerability with a non-attribution analysis. The Commission based its finding that the industry was vulnerable on the industry’s weak condition at the end of the period of investigation, according to most measures of industry performance.<sup>36</sup> Having established the baseline condition of the industry, the Commission proceeded to consider the questions of threat and non-attribution.<sup>37</sup>

35. By contrast, Indonesia’s alternative approach to analyzing vulnerability simply makes no sense, and would result in an inability ever to find threat of material injury. It is obvious that the impact of subject imports going forward will depend on the baseline condition of the domestic industry. Accordingly, examination of that baseline condition is unquestionably proper. As the panel explained in *Egypt – Steel Rebar*, “[s]olely 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.”<sup>38</sup> Indeed, it is unclear as a matter of logic how one could construct a hypothetical, imaginary domestic industry where the only factor bearing on its performance was subject imports. Indonesia’s alternative approach is also inconsistent with the requirement that

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<sup>35</sup> Indonesia’s Second Written Submission, para. 62.

<sup>36</sup> USITC Pub. 4192 (Exhibit US-1) at 38; *see also* U.S. First Written Submission, para. 115.

<sup>37</sup> USITC Pub. 4192 (Exhibit US-1) at 38-39; *see also* U.S. First Written Submission, para. 118.

<sup>38</sup> *Egypt – Steel Rebar*, para. 7.91.



investigating authorities address threat in the context of the economic factors set out in Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement “to establish a background against which to evaluate the effects of future dumped and subsidized imports.”<sup>39</sup>

36. Acceptance of Indonesia’s position would as a practical matter eliminate the possibility that an investigating authority could ever find threat of material injury. Under Indonesia’s logic, factors other than subject imports that leave a domestic industry vulnerable to injury from subject imports would preclude attribution of any subsequent threat of material injury to the industry to subject imports. But where a domestic industry was not shown to be vulnerable, Indonesia would presumably take the position that subject imports could not threaten the industry. And if subject imports were themselves responsible for an industry’s vulnerability, there would be no need for a finding of threat of injury, as present material injury would exist.

37. In sum, the AD Agreement and SCM Agreement obviously contemplate the imposition of trade remedies where a domestic industry is threatened with material injury. But acceptance of Indonesia’s arguments would empty threat of material injury of any utility at all and render Articles 3.7 and 3.8 of the AD Agreement and Articles 15.7 and 15.8 of the SCM Agreement meaningless.

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<sup>39</sup> *US – Softwood Lumber VI (Panel)*, para. 7.107-7.108.

**B. Suggestions of Flaws in the Commission’s Analysis are Based on Mischaracterizations.**

38. Indonesia’s second written submission contains numerous mischaracterizations of what the Commission actually found. These mischaracterizations form the foundation for Indonesia’s claims that the Commission’s analysis was flawed, or failed to account for relevant factors.

39. First, Indonesia misstates what the Commission actually concluded about present material injury. Contrary to what Indonesia alleges,<sup>40</sup> the Commission did *not* conclude that subject imports caused no injury to the domestic industry during the POI. To the contrary, the Commission found that the significant increase in subject import volume and market share was accompanied by declining domestic industry shipments.<sup>41</sup> The Commission also found that subject imports depressed domestic like product prices to some extent between 2008 and 2009.<sup>42</sup> Because other factors also weighed on the industry’s performance, however, the Commission was unable to “find a sufficient causal nexus necessary to make a determination that the subject imports are currently having a significant adverse impact.”<sup>43</sup>

40. Second, in a variant of its misstatement of the Commission’s overall conclusion on present injury, Indonesia incorrectly asserts that the Commission found declining demand and the expiration of the black liquor tax credit (BLTC) to be the cause of the domestic industry’s

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<sup>40</sup> See Indonesia’s Second Written Submission, para. 72.

<sup>41</sup> USITC Pub. 4192 (Exhibit US-1) at 26-27.

<sup>42</sup> USITC Pub. 4192 (Exhibit US-1) at 32-33.

<sup>43</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

vulnerability.<sup>44</sup> As explicitly set forth in the determination,<sup>45</sup> the Commission based its vulnerability finding on the domestic industry’s declining performance during the POI, and not on declining demand or expiration of the BLTC.<sup>46</sup> The Commission, moreover, never concluded that subject imports played no role in the domestic industry’s declining performance, but to the contrary noted connections between subject imports and the domestic industry’s declining shipments and prices. Indonesia’s arguments, which are based on overstatements of what the Commission said when declining to find that subject imports were currently having a significant adverse impact on the domestic industry, only underscore the consistency between what the Commission actually said on injury and on threat.

41. Third, Indonesia’s assertions with respect to the BLTC and the imposition of preliminary duties are similarly unfounded. It is simply not the case that the credit was an aspect of “normal market conditions,”<sup>47</sup> the disappearance of which would constitute an alternate source of injury to the domestic industry. To the contrary, the credit paid benefits in only one year, 2009, and the Commission properly took that into account.<sup>48</sup> The Commission amply considered the temporary effect of the credit during that year, as well as the credit’s relationship to subject imports.<sup>49</sup> The Commission explained that to the extent the BLTC provided any benefit in 2009,

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<sup>44</sup> Indonesia’s Second Written Submission, para. 54; *see also* Indonesia’s Second Written Submission, paras. 61 (claiming that the Commission found subject imports were not the cause of downwards performance trends and had instead found them to be caused by the economic downturn and declining demand), 72 (claiming that the Commission found declining consumption and the economic downturn were responsible for the decline in domestic industry’s U.S. shipments).

<sup>45</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

<sup>46</sup> *See* U.S. Second Written Submission at para. 115.

<sup>47</sup> Indonesia’s Second Written Submission, paras. 55-56.

<sup>48</sup> USITC Pub. 4192 (Exhibit US-1) at 25.

<sup>49</sup> *See* USITC Pub. 4192 (Exhibit US-1) at 33-34, 37 n.249.

that would have temporarily masked the extent to which the domestic industry’s performance indicators showed vulnerability – a masking effect that would not repeat due to expiration of the credit.<sup>50</sup> And to be clear, contrary to what Indonesia asserts,<sup>51</sup> the Commission made no finding that the credit’s expiration was a source of vulnerability to the domestic industry. Indeed, the Commission made no finding that the domestic industry derived a net benefit from the credit. In fact, during the investigation, Indonesian respondents themselves argued that the credit harmed the domestic industry in 2009 by reducing prices, and the Commission agreed.<sup>52</sup>

42. Fourth, the Commission in no way “credited the lifting of the preliminary measures as a threat factor.”<sup>53</sup> Rather, the Commission simply and correctly noted that the pendency of the investigations accounted for the decline in subject import volume during the first half of 2010, while appropriately considering the likely price effects of subject imports in the imminent future in the absence of duties.<sup>54</sup> The Commission relied on ample facts to support its finding that subject imports would likely be priced aggressively, including pervasive subject import underselling during the period of investigation and APP’s stated determination to double its exports to the United States by cutting its already low prices.<sup>55</sup> Moreover, contrary to Indonesia’s suggestion that subject imports might behave differently without the BLTC, the Commission found that subject imports undersold the domestic like product to a similar degree

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<sup>50</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

<sup>51</sup> Indonesia’s Second Written Submission, para. 61.

<sup>52</sup> See U.S. Second Written Submission at para. 125

<sup>53</sup> Indonesia’s Second Written Submission, para. 55.

<sup>54</sup> USITC Pub. 4192 (Exhibit US-1) at 27, 34-35.

<sup>55</sup> See U.S. Second Written Submission at para. 127.

in each year of the period of investigation, including 2007 and 2008 when the BLTC was not used.<sup>56</sup>

43. In sum, consideration of what the Commission *actually* said and found shows that its analysis was well-reasoned and amply supported.

**C. Reading the ITC’s Determination in Its Totality Confirms That Indonesia’s Claims Lack Merit.**

44. In its second written submission, Indonesia also attacks the Commission’s determination by questioning the Commission’s analysis of particular record facts and evidence in isolation. Consistent with the United States’ AD Agreement and SCM Agreement obligations, however, the Commission considered the totality of the evidence and issued a well-reasoned determination that found a threat of material injury based on numerous considerations.

45. For instance, Indonesia claims that APP’s decision to set up Eagle Ridge “is evidence of an attempt to recoup” sales lost when APP lost Unisource as a supplier.<sup>57</sup> But APP itself stated – before losing the Unisource account – that its goal was to double shipments to the United States by reducing its already low prices.<sup>58</sup> APP lost Unisource as a distributor after Unisource refused to assist, and Eagle Ridge provided a vehicle to accomplish APP’s stated goal notwithstanding the loss of Unisource.<sup>59</sup> Indeed, the Commission found that APP’s loss of Unisource did not

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<sup>56</sup> U.S. Second Written Submission at para. 139.

<sup>57</sup> Indonesia’s Second Written Submission, para. 65.

<sup>58</sup> Unisource Affidavit (Exhibit US-2).

<sup>59</sup> USITC Pub. 4192 (Exhibit US-1) at 29; Unisource Affidavit (Exhibit US-2), para. 5.

result in a substantial decline in subject import volume in 2009 or the first two months of 2010, based on an analysis of monthly import data.<sup>60</sup>

46. Indonesia also argues that APP's loss of the Unisource account serves as evidence that lower prices do not necessarily increase market share.<sup>61</sup> But nothing about APP's loss of the Unisource account undermines the fact that domestic and subject CCP are of moderately high interchangeability, or the fact that price was an important consideration in purchasing decisions, as evidenced by behavior during the POI.<sup>62</sup> Nor does anything about APP's loss of that account undermine the basic rule of economics that price reductions by one producer will be expected to result in market share gains by that producer, reductions in the prices and profits of other producers, or both. Indeed, during the POI, pervasive subject import underselling was accompanied by a significant increase in subject import volume and market share.<sup>63</sup>

47. Indonesia also seeks support for its position from the fact that subject imports did not double between 2008 and 2009, after APP informed Unisource of its intention to double its exports by reducing its prices.<sup>64</sup> Indonesia's reliance is misplaced. That APP did not immediately realize its goal of doubling shipments in no way detracts from the Unisource affidavit. Rather, it reflects the fact that Unisource chose not to assist APP and then dropped it as a supplier, setting back APP's plans and leading it to establish Eagle Ridge as a means of

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<sup>60</sup> USITC Pub. 4192 (Exhibit US-1) at 29-30 & n.193.

<sup>61</sup> Indonesia's Second Written Submission, para. 67.

<sup>62</sup> USITC Pub. 4192 (Exhibit US-1) at 24, 31; *see also* U.S. Responses to the Panel's First Set of Questions, para. 140.

<sup>63</sup> USITC Pub. 4192 (Exhibit US-1) at 26-27, 31.

<sup>64</sup> Indonesia's Second Written Submission, para. 67.

retaining and growing its U.S. market presence.<sup>65</sup> Belying Indonesia's questioning before this panel of the credibility of Unisource's statements, moreover, Respondents did not challenge the affidavit's veracity before the Commission, when they commented on the affidavit in their final comments.<sup>66</sup>

48. Likewise, that the domestic industry's market share gain in 2010 resulted from preliminary duties in no way undermines its significance, nor was that gain remotely the only basis for the Commission's view that subject import volumes would increase significantly in the absence of orders. Regardless of why subject imports left the market, the domestic industry's subsequent market share gain supported the Commission's finding that subject imports were likely to take market share from the domestic industry in the imminent future, and were not merely competing with non-subject imports.<sup>67</sup> Moreover, not only did APP have a goal to double its US shipments from 2008 levels,<sup>68</sup> but Chinese producers were projected to have massive excess capacity, and ample incentive to fill that excess capacity with increased exports to the U.S. market.<sup>69</sup> The threat found by the Commission was not – as Indonesia suggests<sup>70</sup> – that subject imports would merely recoup volume lost during the interim period, but rather that subject import volumes would significantly increase from the already significant level achieved during the period of investigation.<sup>71</sup>

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<sup>65</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>66</sup> See APP's Final Comments, 16-17 (Exhibit US-103).

<sup>67</sup> See USITC Pub. 4192 (Exhibit US-1) at 34, 38.

<sup>68</sup> Unisource Affidavit (Exhibit US-2).

<sup>69</sup> USITC Pub. 4192 (Exhibit US-1) at 28 & fn 181.

<sup>70</sup> Indonesia's Second Written Submission, para. 74.

<sup>71</sup> See USITC Pub. 4192 (Exhibit US-1) at 31, 38.

49. Indonesia's attacks on the Commission's reliance on excess Chinese capacity likewise ignore the Commission's actual findings. The Commission did not assume, as Indonesia states,<sup>72</sup> that the Chinese industry will export all of its excess capacity to the United States. Rather, the Commission found that excess Chinese capacity would likely be used to significantly increase exports to the United States based on APP's stated goal of doubling exports to the United States using low prices, its establishment of Eagle Ridge, the higher prices available in the U.S. market relative to markets in Asia, the prevalence of spot sales in the U.S. market, and the familiarity of Chinese and Indonesian producers with the market.<sup>73</sup> The record showed that APP could double its exports to the U.S. market using a fraction of its excess capacity in China.<sup>74</sup> Indeed, the Commission found that Chinese capacity growth would exceed Chinese consumption growth by 900,000 metric tons, and that consumption growth in the rest of Asia could absorb 160,000 tons of this capacity at most, leaving 740,000 metric tons of excess Chinese capacity available for export to the United States and third country markets outside of Asia.<sup>75</sup> Chinese producers themselves, moreover, projected that exports to third country markets outside of Asia would increase by only 43,578 short tons – even if there were a massive decline in Chinese exports to the United States.<sup>76</sup>

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<sup>72</sup> Indonesia's Second Written Submission, para. 69.

<sup>73</sup> USITC Pub. 4192 (Exhibit US-1) at 28-29; Unisource Affidavit (Exhibit US-2).

<sup>74</sup> See U.S. Responses to the Panel's First Set of Questions, paras. 152-154.

<sup>75</sup> USITC Pub. 4192 (Exhibit US-1) at 28 & fn 181.

<sup>76</sup> USITC Pub. 4192 (Exhibit US-1) at Table VII-2.



50. That “Indonesia does not concede that the Chinese producers possessed 740,000 metric tons of capacity”<sup>77</sup> in this dispute is irrelevant. As the United States has noted throughout this dispute, a WTO dispute does not involve a *de novo* review, but rather involves an examination of whether the authority had a reasoned and adequate explanation for its determination. Here, the Commission chose to rely on the capacity projections of RISI. As explained in the Commission’s determination, RISI is “an information provider for the global forest products industry, and a resource cited by both Petitioners and Respondents.”<sup>78</sup> And indeed, Indonesia has not made any assertion that this reliance was improper. Similarly misplaced is Indonesia’s argument that, if the Commission was correct that “Chinese industry would get rid of excess capacity by exporting to the United States, then the Chinese industry would not have had excess capacity in any year of the POI.”<sup>79</sup> In fact, APP tried to massively increase exports to the United States during the POI but did not succeed due to the unwillingness of Unisource to cooperate.<sup>80</sup> APP subsequently established its own distributor, Eagle Ridge, as a means of retaining and growing its U.S. market presence.<sup>81</sup> Furthermore, in finding that subject import volume was likely to increase significantly in the imminent future, the Commission relied on the massive increase in Chinese excess capacity that was projected to occur through 2011, to a level far greater than that possessed by Chinese producers during the period of investigation.<sup>82</sup>

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<sup>77</sup> Indonesia’s Second Written Submission, para. 70.

<sup>78</sup> USITC Pub. 4192 (Exhibit US-1) at 28 & n.181.

<sup>79</sup> Indonesia’s Second Written Submission, para. 70.

<sup>80</sup> Unisource Affidavit (Exhibit US-2).

<sup>81</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>82</sup> USITC Pub. 4192 (Exhibit US-1) at 28 & n.181, Table VII-2

51. Indonesia likewise overlooks facts in suggesting that the Commission lacked a basis to predict pricing behavior in the absence of the black liquor tax credit and sharply declining demand.<sup>83</sup> The Commission found that subject imports undersold the domestic like product to a similar degree in each year of the period of investigation, even though most of the demand decline and the entire effect of the BLTC took place in 2009.<sup>84</sup> APP also had indicated a desire to massively increase its shipments, and a willingness to lower its prices in order to do so.<sup>85</sup>

52. Indeed, with respect to both volume and price, Indonesia ignores much of the positive evidence that the Commission used to support its affirmative threat determination. Contrary to Indonesia's arguments, facts supported the Commission's conclusion that subject imports were likely to increase significantly in the imminent future, in significant part at the expense of domestic producers. In particular, the Commission found that subject imports adversely affected the domestic industry during the period of investigation, as the significant increase in subject import volume coincided with a decline in domestic industry shipments and pervasive subject import underselling depressed domestic like product prices to some extent between 2008 and 2009.<sup>86</sup> In considering threat, the Commission explained that subject producers would be in a better position to take sales from domestic producers in the imminent future than they were during the 2007-2009 period due to clearly foreseen and imminent changes in circumstances; namely, the 740,000 metric tons of excess capacity that Chinese producers were likely to possess in 2011, net of demand growth in China and Asia, and APP's establishment of Eagle Ridge, a

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<sup>83</sup> Indonesia's Second Written Submission, para. 71.

<sup>84</sup> See U.S. Second Written Submission at para. 139.

<sup>85</sup> Unisource Affidavit (Exhibit US-2).

<sup>86</sup> See U.S. Second Written Submission at para. 144.

distributor of subject imports, in the second half of 2009.<sup>87</sup> The Commission found it likely that subject producers would use their massive excess capacity to increase exports to the United States significantly based on their familiarity with the large U.S. market; the higher prices available there, relative to China and other markets in Asia; the prevalence of spot sales and private label products in the U.S. market, which would enable subject producers to quickly gain market share;<sup>88</sup> and crucially, APP's stated intent to double its exports to the U.S. market by reducing its already low prices – which alone would result in an increase in subject import volume equivalent to 109 percent of nonsubject import volume in 2009.<sup>89</sup> Because demand was projected to decline, the significant increase in subject import volume that was likely would necessarily take sales from existing suppliers, including the domestic industry.<sup>90</sup> Thus, contrary to Indonesia's argument, the Commission fully supported its affirmative threat determination with a range of positive evidence and record facts.

53. When the Commission's findings are viewed as a whole, it is thus clear that the Commission had ample support for its conclusion that subject imports threatened the domestic industry with material injury. Its determination was objective, based on facts and positive evidence, and consistent with the United States' obligations under the AD and SCM Agreements.

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<sup>87</sup> See U.S. Responses to Panel Questions at para. 143.

<sup>88</sup> USITC Pub. 4192 (Exhibit US-1) at 29.

<sup>89</sup> See U.S. Second Written Submission at para. 142.

<sup>90</sup> USITC Pub. 4192 (Exhibit US-1) at 38.

**IV. THE ITC’S TIE VOTE PROVISION IS FULLY CONSISTENT WITH AD AGREEMENT ARTICLE 3.8 AND SCM AGREEMENT ARTICLE 15.8.**

54. The United States turns lastly to Indonesia’s “as such” challenge to the use in threat of injury cases of the statutory “tie vote” provision governing ITC determinations.

55. As the United States has explained, the special care obligation applies to the substantive requirements for a determination of threat of injury; it does not relate to an investigating authority’s decision-making procedure. The specific placement of the special care provisions within the AD and SCM Agreements, as well as the text of other portions of those agreements, make this clear.<sup>91</sup> Consistent with the fact that the AD and SCM Agreements do not impose obligations with respect to decision-making procedure, nothing in the text of the AD Agreement or SCM Agreement requires investigating authorities to make affirmative threat determinations by majority vote, or to treat tie votes in any particular way. The United States has explained that this is confirmed by the fact that, where the AD and SCM Agreements do discuss procedural matters – in connection with things other than decision-making – they are explicit.<sup>92</sup> It is further confirmed by the drafting history.<sup>93</sup>

56. Because the agreements do not prescribe the internal decision-making process for making threat determinations, the process of determining the outcome where members of a multi-member body disagree is, as the Appellate Body explained in *US – Line Pipe*, “entirely up to

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<sup>91</sup> See U.S. Responses to the Panel’s First Set of Questions, paras. 172.

<sup>92</sup> See U.S. Responses to the Panel’s First Set of Questions, paras. 174.

<sup>93</sup> See U.S. Responses to the Panel’s First Set of Questions, paras. 174; U.S. first written submission, paras. 330-332.

WTO Members in the exercise of their sovereignty.”<sup>94</sup> And contrary to what Indonesia asserts,<sup>95</sup> *Line Pipe* is fully applicable to the present situation. Indeed, the Appellate Body explained that: “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.”<sup>96</sup> The Appellate Body’s statements in no way suggest limitation to the circumstance at issue in *Line Pipe*. And the logic and rationale of the Appellate Body’s finding apply with equal force to the issue raised in this dispute.

57. Contrary to what Indonesia contends,<sup>97</sup> the United States is not reading any words out of the AD Agreement or SCM Agreement. Indeed, the definitions cited by Indonesia in its second written submission<sup>98</sup> in no way suggest that considering and deciding do not relate to substance. “View[ing],” “contemplat[ing] attentively,” “survey[ing],” “examin[ing],” “inspect[ing],” and “scrutinize[ing],” all involve non-decisional consideration and analysis. This understanding of consideration is confirmed by the language of Article 3.7/15.7, which notes factors which must be “consider[ed].” By contrast, “deciding” – “bring[ing] to a resolution or conclusion” – involves assessment of the ultimate question. In other words, the special care requirement speaks to both the substantive analysis of the ultimate question and the way that underlying or intermediate issues were viewed, contemplated, or scrutinized. Understanding that the

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<sup>94</sup> *US – Line Pipe (AB)*, para. 158.

<sup>95</sup> Indonesia’s Second Written Submission, para. 83.

<sup>96</sup> *US – Line Pipe (AB)*, para. 158.

<sup>97</sup> Indonesia’s Second Written Submission, para. 81.

<sup>98</sup> Indonesia’s Second Written Submission, para. 81.

requirement is about substantive analysis is fully consistent with the wording of 3.8/15.8 even when it is taken in isolation.

58. Perhaps recognizing the weakness of the claim it actually brought, Indonesia has now latched onto Canada's claim that the tie vote provision breaches Articles 3.1/15.1 and breaches Articles 3.8/15.8 as a consequence.<sup>99</sup> The U.S. second written submission amply explains why this claim lies outside the Panel's terms of reference and should not be addressed.<sup>100</sup> It also explains fully why there is nothing about the tie vote provision that conflicts with Article 3.1 of the AD Agreement or Article 15.1 of the SCM Agreement.<sup>101</sup>

59. Moreover, as the United States has explained in detail before,<sup>102</sup> while Indonesia claims not to be alleging that Members cannot have threat determined by a unitary decision maker,<sup>103</sup> the logic of its arguments would not permit such a decision-maker to determine threat. A single, politically motivated individual's vote would result in a threat determination in that context – even if countless professional staff serving under the political decision maker had concluded that threat had not been established. As the United States has explained, however, the number of decision makers at an investigating authority or the means of resolving disagreements among them simply are not addressed by the AD Agreement or SCM Agreement. By contrast, those agreements have detailed provisions on the substance of determinations to ensure that they are adequately grounded.

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<sup>99</sup> See Indonesia's Second Written Submission, para. 82.

<sup>100</sup> See U.S. Second Written Submission, paras 179-182.

<sup>101</sup> See U.S. Second Written Submission, paras 183-185.

<sup>102</sup> See U.S. Second Written Submission, paras 164-165.

<sup>103</sup> See Indonesia's Second Written Submission, para. 83.

60. In sum, nothing about the tie vote provision breaches Article 3.8 of the AD Agreement, Article 15.8 of the SCM Agreement, or any other provision of the WTO Agreements. Indonesia's claims to the contrary should be rejected.

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61. The United States thanks the Panel for its attention and looks forward to answering any questions that the Panel may have.