

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

(DS491)

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

December 6, 2016

TABLE OF EXHIBITS

<u>Number</u>	<u>Exhibit</u>	<u>Abbreviation</u>
Exhibit US-81	Countervailing Duty Investigation of Coated Free Sheet Paper from Indonesia: Memorandum to File Regarding Verification Meeting with an Independent Expert (August, 24, 2007)	
Exhibit US-82 (BCI)	Government of Indonesia Initial Questionnaire Response (Dec. 29, 2009), Exhibit 26	
Exhibit US-83 (BCI)	Government of Indonesia Fifth Supplemental Questionnaire Response, Exhibit 5S-4, Terms of Reference	
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I. INTRODUCTION

1. Good morning, Mr. Chairman and distinguished members of the Panel. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. The United States appreciates very much the work of the Panel and the Secretariat assisting it in this dispute.

2. This dispute places before the Panel a number of important questions concerning the proper interpretation and application of the SCM Agreement¹ and the AD Agreement². To be direct, the United States does not think that the issues of interpretation or application are that difficult to resolve. Indonesia's proposed interpretations are not supported by the ordinary meaning of the terms of the covered agreements, in context, and in light of the object and purpose of those agreements. And Indonesia's proposed application would have the Panel find that the WTO agreements prevent an investigating authority from reaching conclusions where the record is a reflection of the information provided, and not provided, by that responding WTO Member itself. We do not think this would be a reasonable reading or application of the WTO agreements. Accordingly, Indonesia's legal claims lack merit, and the Panel should reject them.

3. In this regard, it is worth recalling the standard of review set forth in Article 17.6 of the AD Agreement in conjunction with DSU Article 11. Article 17.6, in relevant part, provides that "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective," and if so that "even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

4. Under these standards, a panel should not conduct a *de novo* review of the facts³ but rather should "review whether the authorities have provided a reasoned and adequate explanation

¹ *Agreement on Subsidies and Countervailing Measures*.

² *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

³ *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187-188 (emphasis in original)

as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.”⁴ The conclusions reached by the investigating authority should be examined for whether they “are reasoned and adequate in the light of the evidence on the record and other plausible alternative explanations.”⁵

5. Now Indonesia raises a variety of claims against the U.S. Department of Commerce’s determination that certain coated paper from Indonesia benefitted from countervailable subsidies, the U.S. International Trade Commission’s finding of threat of material injury from subject imports, and the U.S. statutory provision governing the handling of evenly divided votes of the independent, multi-member International Trade Commission (ITC). All of these claims are unfounded, and in this statement we will highlight certain key points demonstrating the baselessness of Indonesia’s claims. Before turning to each of these, however, the United States would like to comment briefly on Indonesia’s response to the U.S. preliminary ruling request (PRR).

I. INDONESIA AGREES WITH THE U.S. PRELIMINARY RULING REQUEST AND THE REPORTS IT CITES ARE NOT RELEVANT TO ITS CLAIMS

6. The United States notes Indonesia’s response to the PRR in which Indonesia has confirmed that it is not making a claim based on Article 1.1(a) of the SCM Agreement. We request the Panel to make the preliminary finding requested by the United States, or otherwise to

⁴ *China – Broiler Products*, para. 7.4 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103.).

⁵ *US - Tyres (AB)*, para. 123.

make a finding that Indonesia has advanced no claim pursuant to Article 1.1(a) of the SCM Agreement.

7. In its response, Indonesia highlights paragraphs 44, 45, and 79 of its first written submission,⁶ which, instead of clarifying how Indonesia’s arguments pertain to benefit and specificity, underscore that Indonesia’s arguments relate to an analysis of concerning financial contribution under SCM Agreement Article 1.1(a). The quote from the *US - Export Restraints* panel report excerpted in paragraph 44 references Article 1.1(a) alone.⁷ Similarly, paragraph 79 focuses on whether the Indonesian government “directed” or “entrusted” log suppliers to sell at suppressed prices. “Entrust” and “direct” are terms used in Article 1.1(a) – i.e., with respect to financial contribution – not Articles 1.1(b) or 14(d) on benefit, or Article 2.1 on specificity. Finally, while there are brief, conclusory sentences in paragraphs 45 and 79 which purport to connect the discussion to the benefit calculation of Article 14, these sentences are void of analysis. The bulk of the discussion is instead focused on financial contribution and prior WTO disputes discussing financial contribution.

8. The United States agrees with Indonesia that it is not precluded from citing to any source – including disputes discussing financial contribution.⁸ However, Indonesia is citing to the analysis and conclusions on financial contribution, not benefit or specificity. Thus, these citations are not relevant to the claims that Indonesia actually has brought in this dispute.

⁶ Indonesia Resp. to U.S. Prelim. Rul. Req., para. 4.

⁷ Indonesia First Written Submission, para. 44 & n.53 (quoting *US – Export Restraints (Panel)*, para. 8.75).

⁸ Indonesia Resp. to U.S. Prelim. Rul. Req., para. 3.

II. INDONESIA’S CLAIMS UNDER ARTICLE 14 OF THE SCM AGREEMENT ARE WITHOUT MERIT.

A. Indonesia’s Arguments Relating to Out-of-Country Benchmarks Are Based Largely on a Misunderstanding of Previous AB Reports

9. Indonesia’s claim under Articles 1.1(b) and 14(d) that there was no reasoned or adequate explanation for USDOC’s determination to resort to out-of-country prices for timber is largely based on its understanding of the Appellate Body report in *US – Countervailing Duties (China)*. In that report, the Appellate Body found the investigating authority must explain “how … market shares held by … [the government] … resulted in the government’s *possession* and *exercise* of market power, such that … price distortion occurred [and] … private suppliers aligned their prices with those of the government-provided goods [or] … were *market determined*.⁹ But as the Appellate Body also found in *Carbon Steel*, the analysis of prices in a market “will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.”¹⁰ Thus, the facts that will be necessary or relevant to show distortion of internal market prices, such that resort to an out-of-country benchmark is appropriate, will vary depending on the types of entities and transactions at issue.

10. In considering the circumstances in which resort to an out-of-country benchmark is appropriate, we recall that the *chapeau* of Article 14 refers to “any method” used by an investigating authority “to calculate the benefit to the recipient,” and describes the subparagraphs

⁹ Indonesia First Written Submission, para. 42 (quoting *US – Countervailing Measures (China)* (AB), para. 4.101) (emphasis added).

¹⁰ *US – Carbon Steel India* (AB), para. 4.157.

of Article 14 as “guidelines.” In *US – Softwood Lumber*, the Appellate Body confirmed that “[t]he reference to ‘any’ method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”¹¹ The second sentence of Article 14(d) reflects the role of the market in determining the adequacy of remuneration – i.e., “in relation to prevailing market conditions...in the country of provision.”¹²

11. Accordingly, “the *starting point* of the analysis is the [price] at which the same or similar goods are sold by private suppliers in arm’s-length transactions in the country of provision.” However, in-country prices will not be the *ending point* of the analysis, if they are not market-determined as a result of governmental intervention in the market.¹³ To determine the adequacy of remuneration for purposes of analyzing whether a benefit is being conferred on the recipient of a good or a service, a basis for finding that in-country prices are not suitable as benchmarks is when the government “distort[s] in-country private prices by setting an artificially low price with which the prices of private providers in the market align,”¹⁴ so that “the comparison contemplated by Article 14 would become circular.”¹⁵

12. The United States agrees that when the government or government-related entities participate in a market, there is no threshold market share above which an investigating authority may conclude *per se* that price distortion exists such that in-country prices cannot be used for

¹¹ *US – Softwood Lumber IV (AB)*, paras. 91-92.

¹² See also *US – Carbon Steel (India) (AB)*, para. 4.150 (“Such conditions ‘consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.’”).

¹³ *US – Carbon Steel (India) (AB)*, para. 4.155.

¹⁴ *US – Carbon Steel (India) (AB)*, para. 4.155 (referring to *US – Softwood Lumber IV (AB)*, para. 90).

¹⁵ *US – Softwood Lumber IV (AB)*, para. 93.

purposes of the Article 14(d) comparison. However, as past reports have reasoned, the more predominant a government’s role in the market, the more likely that role results in the distortion of private prices.¹⁶ For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that China’s predominant role in the input market shows that it is “likely that the government as the predominant supplier has the market power to affect … the pricing by private providers for the same goods, and induce them to align with government prices.”¹⁷ In that case, the Appellate Body noted 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.”¹⁸

13. The facts attending Indonesia’s provision of standing timber in fact align closely with the record in *US – Anti-Dumping and Countervailing Measures (China)* and *US – Softwood Lumber IV*. Through concessions and licensing, the government directly provides standing timber which is used to make coated paper. The government owns virtually all of the harvestable forests in Indonesia and administratively controls the stumpage fees charged. Although Indonesia emphasizes that logs are harvested from private forest land in Indonesia,¹⁹ the record shows that only 6% of harvested timber in the period of investigation was attributable to private forests. In addition, the government controls 99.5% of harvestable forest land in Indonesia.²⁰ Private

¹⁶ *US – Anti-Dumping and Countervailing Duties (AB)*, para. 444.

¹⁷ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454. See also *US – Softwood Lumber IV (AB)*, para. 100 (“Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods . . .”).

¹⁸ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

¹⁹ Indonesia First Written Submission, para. 40.

²⁰ Ex. US-31 at 8; Ex. US-43 at 18.

transactions with respect to this input in the Indonesian market are nominal. Indonesia points to no record evidence of significant market determined activity.

14. This is a situation in which the facts demonstrate that the government’s role as a supplier of the input in question is overwhelmingly predominant,²¹ and nearly exclusive. Through its setting of stumpage fees, Indonesia also effectively sets the price for standing timber. As the Appellate Body has noted on several occasions, circumstances in which fewer elements of a market analysis will be necessary to arrive at a proper benchmark “include where the government is the sole provider of the good in question, and where the government administratively controls all of the prices for the goods at issue.”²² Under such facts, there would be a basis to find “*possession and exercise* of market power, such that … price distortion occurred [and] … private suppliers aligned their prices with those of the government-provided goods.”²³

15. USDOC’s conclusion that there were no in-country prices that were suitable for use as a benchmark in assessing whether a benefit was being conferred was reasoned and adequate. USDOC assessed *all* of the evidence and explained its assessment at length in the Issues and Decision Memorandum and other documents.²⁴ USDOC analyzed the Indonesian government’s market dominance and also identified other features of the market for standing timber that rendered it distorted. These included the government of Indonesia’s ownership of virtually all

²¹ See *US – Anti-Dumping and Countervailing Measures (China)* (AB), para. 454.

²² *US – Countervailing Measures (China)* (AB), para 4.62 & n. 552; *US – Antidumping and Countervailing Measures (China)*, paras. 443, 446.

²³ Indonesia First Written Submission, para. 42 (quoting *US – Countervailing Measures (China)* (AB), para. 4.101) (emphasis added).

²⁴ See Ex. US-31 at 6-12, 24-47; Ex. US-43 at 18-25, 63-93.

harvestable forest land, the presence of a log export ban (which, while a separate countervailable program, worked in tandem with the stumpage program to keep prices artificially low), the negligible level of pulp log imports, and Indonesia’s comparatively low prices for logs in the region.

16. USDOC also sought additional information through its questionnaires, and considered and addressed the respondents’ arguments regarding the use of certain import data as an in-country benchmark.²⁵ Although Indonesia contends that USDOC did not make the requisite evidentiary findings that prices for standing timber from both public (that is, government owned and controlled) and privately-owned forests in Indonesia were not market-determined, tellingly, Indonesia fails to identify what other record information was relevant to the distortion analysis but not considered by USDOC. Indeed, Indonesia and APP/SMG did not dispute that stumpage prices from Indonesian public or private forests could not provide a viable benchmark in the underlying investigation.²⁶

B. Indonesia’s Unsupported Assertion that the Chosen Benchmark Was “Aberrational”

17. Indonesia asserts that USDOC’s selection of an out-of-country benchmark based on Malaysia export data was “aberrational.”²⁷ Aside from this cursory statement, Indonesia fails to identify *how* it is aberrational. And USDOC’s selection of the Malaysian export price was reasoned and adequate.

²⁵ Ex. US-31 at 28-37.

²⁶ See Government of Indonesia and APP-Indonesia Case Brief at 11-42 (Aug. 16, 2010).

²⁷ E.g., Indonesia First Written Submission, para. 29.

18. USDOC evaluated potential benchmarks (in accordance with U.S. law) in the following order of preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles.²⁸

19. USDOC selected the same benchmark data – species-specific World Trade Atlas statistics reflecting log exports from Malaysia – as an out-of-country benchmark for similar reasons as in its evaluation of the stumpage benefit. As explained, USDOC’s analysis was based on record evidence, including that 94 percent of logs harvested during the period of investigation was from public land, and the fact that the GOI controlled over 99 percent of harvestable forest land, in finding that the GOI distorted in- country prices for logs.²⁹ USDOC also explained that “without the ban domestic consumers would have to compete with foreign consumers.”³⁰ USDOC explained that a large disparity existed between timber prices paid within Indonesia and the prices paid by purchasers in Malaysia, according to the Malaysian export data available from the World Trade Atlas and as provided by the respondents’ own consultant.³¹ Thus, the World Trade Atlas data that USDOC relied on was not “aberrational,” as Indonesia argues, but rather is consistent with the Malaysian export data that Indonesia provided in the underlying investigation, after removing imports to Indonesia.³²

²⁸ 19 C.F.R. § 351.511(a)(2)(i)-(iii).

²⁹ Ex. IDN-05.

³⁰ Ex. US-31 at 27.

³¹ Indonesia First Written Submission, para. 43.

³² See Ex. US-31 at 27, 40.

20. The sole in-country prices urged by the respondents were certain import data from Sabah, Malaysia, into Indonesia, which was offered for both the stumpage and log export ban programs. USDOC explained why the Sabah data and alternative benchmarks were not representative.

II. INDONESIA’S CLAIM UNDER ARTICLE 12 OF THE SCM AGREEMENT IS WITHOUT MERIT

21. We now turn to Indonesia’s Article 12.7 claim on the use of facts available. The United States will focus here on what appear to be Indonesia’s primary arguments.

A. The Missing Strategic Asset Sales Program Debt Sales Information Was “Necessary”

22. The necessity of the information that Indonesia failed to provide in connection with the debt buyback must be considered in light of the facts of this investigation. Significantly, Indonesia’s law, which governed the Strategic Asset Sales Program (PPAS), prohibited the Indonesia Bank Restructuring Agency (IBRA) “to perform such sale of assets to and or cause a buyback of assets by: . . . Original owner” or “[t]he Affiliated Parties of the Original Owner.”³³ Given the allegation that APP/SMG purchased \$880 million of its own debt from Indonesia through Orleans for \$214 million, the potential affiliation between APP/SMG and Orleans was paramount to USDOC’s investigation of this debt sale as debt forgiveness and, consequently, as a countervailable subsidy. Therefore, in this investigation, USDOC requested that if Indonesia disagreed with USDOC’s prior CFS determination that Orleans was affiliated with APP/SMG,

³³ Government of Indonesia Third Supplemental Questionnaire Response, Exhibit 1, Article 1, Ex. US-84.

then it should provide complete information about the sale to Orleans and provide documentation demonstrating that Orleans had no affiliation with APP/SMG.³⁴

23. Knowing Orleans' ownership, and how the IBRA handled this debt sale, was especially important given record facts from the prior *CFS* investigation, which are on the record of this investigation. Notably, during verification in that investigation, USDOC met with an independent expert knowledgeable about the debt and banking crisis in Indonesia.³⁵ That expert explained that: “The methods and structures employed by Indonesia corporates to ‘buyback’ their debt using investment banks and offshore special purpose vehicles as fronts for the founding shareholders [of the debtors] is well known.”³⁶ These facts further justify USDOC’s need to know more about the APP/SMG sale.

24. Indonesia provided Orleans’ bidding documents.³⁷ These documents contained *no* ownership information for Orleans. Thus, necessary information was missing for USDOC to analyze possible affiliation between APP/SMG and the successful bidder, Orleans.

25. Considering the absence of ownership information, and also that the IBRA was legally prohibited from selling debt back to the original debtor or an affiliated party of the original debtor, USDOC alternatively sought to develop further the record so that it could analyze the due diligence procedures that the IBRA employed under the PPAS, including on affiliation.

26. Evident from Indonesia’s reporting to USDOC was the substantial emphasis the IBRA placed on the bidding documents themselves in examining possible affiliation between the bidder

³⁴ Ex. US-48, 75 FR 10,772.

³⁵ See Ex. US-43, at 45.

³⁶ See Countervailing Duty Investigation of Coated Free Sheet Paper from Indonesia: Memorandum to File Regarding Verification Meeting with an Independent Expert (August, 24, 2007), at 2, Ex. US-81.

³⁷ Ex. US-34 at 32-36 & Exs.24, 26-29, 34-35 (BCI version).

and original debtor.³⁸ Indonesia also asserted that the “IBRA did not have any written due diligence procedures for evaluating the documentation and other information submitted by potential bidders other than those listed in the terms of reference.”³⁹ Therefore, to understand whether the IBRA approached possible affiliation any differently in the APP/SMG debt sale, USDOC reasonably requested the bidding documents for other PPAS sales to satisfy itself as to the accuracy of Indonesia’s assertion that the IBRA would not sell the debt to an affiliated buyer and that the IBRA followed its own law with a level of diligence typical of other IBRA transactions.⁴⁰ That is, with no baseline for comparison, USDOC could not confirm whether IBRA’s due diligence procedures were followed, or whether the Orleans transaction was subject to less scrutiny of whether the bidder and debtor were affiliated when the government of Indonesia itself was proposing that USDOC accept that a lack of affiliation had been demonstrated on the basis of those procedures. In light of the fact that the bidding documents for APP/SMG debt lacked ownership information, this information pertaining to the other debt transactions that Indonesia failed to provide – twice – was “necessary” for USDOC to make a fuller evaluation of the issue.

B. Indonesia Failed to Provide Information Within a Reasonable Period Of Time

27. Instead of providing the information or seeking an extension, Indonesia stalled USDOC’s investigatory process. In its first failure to provide this information, Indonesia stated: “These

³⁸ See Ex. IDN-15 at 7-8 (BCI version) (“IBRA had the legal authority to undertake further due diligence, but given the circumstances of the times IBRA relied primarily upon the contractual obligations and the enforceability of those provisions” in the bidding documents).

³⁹ Ex. IDN-15 at 7 (BCI version).

⁴⁰ See Government of Indonesia Fifth Supplemental Questionnaire Response, Exhibit 5S-4, Terms of Reference, Ex. US-83 (BCI).

documents are not available at this time. Since those documents are unrelated to the APP/SMG transaction at issue in this investigation, and since those other transactions are not at issue in this investigation, the GOI is not sure of the relevance of these documents.” Indonesia’s statement, which merely amounted to a promise to keep searching for the documents, did not constitute a response to USDOC’s information request.⁴¹ We underline that the decision as to what information was necessary to USDOC’s investigation was not Indonesia’s to make.

28. USDOC nevertheless provided Indonesia with another opportunity to cure its evidentiary failure.⁴² USDOC also reiterated that should Indonesia continue to fail to submit the requested information, it may resort to relying on the facts available.⁴³ USDOC provided some flexibility to the GOI. Indonesia could have requested an extension of time. However, Indonesia chose not to exercise this option. Given the reasonable period that Indonesia had – 7 weeks – “it was reasonable to expect the GOI to be more forthcoming with this information.”⁴⁴ The Appellate Body has recognized the importance of investigating authorities being able to set deadlines for the submission of information,⁴⁵ and the timeline for this limited information request exceeds the 37 days under the “general rule” in Article 12.1.1 for replying to a *full* initial subsidy questionnaire.⁴⁶

29. Indonesia’s assertions that it was difficult to gather the information also lack merit.⁴⁷ Difficulties in gathering necessary information may be relevant to a decision to resort to Article

⁴¹ Ex. 31 at 54.

⁴² See Ex. US-42.

⁴³ Ex. US-42 at cover.

⁴⁴ Ex. US-31 at 54.

⁴⁵ See *US – Hot-Rolled Steel (AB)*, para. 73.

⁴⁶ SCM Agreement, art. 12.1.1 & n.40.

⁴⁷ See Indonesia First Written Submission, paras. 57, 59, 61, 62.

12.7. “[D]ifficulties,” for example those based on “resource constraints,” could “relate, *inter alia*, to the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond.”⁴⁸ However, “[w]hether and how such procedural circumstances should be taken into account by an investigating authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation.”⁴⁹ Here, “there was nothing overly burdensome” in USDOC’s request.⁵⁰

C. To the Best of Indonesia’s Ability

30. Because necessary information was absent from the record, because of Indonesia’s failure to provide it, USDOC appropriately “fill[ed] in gaps.”⁵¹ USDOC further determined that Indonesia had not acted to the best of its ability.⁵² Again, Indonesia had multiple opportunities to submit information on ownership and was aware the affiliation question would be key to the investigation. Indonesia was provided seven weeks to provide information on the other PPAS transactions – after the passage of several months during which USDOC’s inquiry into the other PPAS transactions should have been foreseeable and the information should have been within Indonesia’s custody and control according to its own guidelines on record retention. From Indonesia’s response that the PPAS inquiry was not “relevant,” the United States’ determination

⁴⁸ *US – Carbon Steel (India) (AB)*, para. 4.422.

⁴⁹ *US – Carbon Steel (India) (AB)*, para. 4.422.

⁵⁰ See Ex. US-31, at 54.

⁵¹ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

⁵² See Ex. US-31, at 54.

on the government of Indonesia’s failure to cooperate is consistent with the Appellate Body’s recognition that “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact.”⁵³ Even though the selected facts available created a less favorable result for Indonesia, USDOC acted consistently with Article 12.7.⁵⁴

31. Second, Indonesia argues that the “best of its ability” standard for a failure to cooperate finding must be balanced against the “special interests” of Article 27 of the SCM Agreement. Although Article 27 contains multiple carve-outs and qualifications to application of other articles of the SCM Agreement with regard to developing country Members, Article 27 contains no limitation or prohibition to an investigating authority having resort to Article 12.7. Additionally, as the EU notes in its third party submission, Indonesia does not articulate any “concrete” difficulties related to its status as a developing country. Thus, Article 27 provides no basis to conclude that USDOC’s finding that Indonesia failed to cooperate to the best of its ability was not based on fact.

D. Reasonably Replace

32. The use of facts available must reasonably replace what is missing. Indonesia claims that the “facts available” USDOC relied on in finding affiliation did not “reasonably replace” the missing information under Article 12.7.⁵⁵ The “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”⁵⁶ An Article 12.7

⁵³ See *US – Carbon Steel (India) (AB)*, para. 4.426.

⁵⁴ See *US – Carbon Steel (India) (AB)*, para. 4.426.

⁵⁵ Indonesia First Written Submission, paras. 66-71.

⁵⁶ *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

determination “cannot be made on the basis of non-factual assumptions or speculation.”⁵⁷

Indonesia’s argument is that USDOC unreasonably relied on “speculative” “newspaper articles and reports,”⁵⁸ while ignoring record evidence that demonstrated the companies’ non-affiliation.⁵⁹ Specifically, Indonesia avers that “what was on the record were all of the records concerning Orleans’ purchase of the APP/SMG debt that [USDOC] requested,” and “[n]one of those records suggested an affiliation between Orleans and APP/SMG.”⁶⁰

33. Absence of ownership information, however, is not the same as positive evidence of non-affiliation. The latter might occur, for example, if Orleans’ bid package reflected the names of the principals and those individuals were known to be unrelated to APP/SMG. However, that was not the case here because the bid documents contained no ownership information. In this investigation, USDOC relied on several newspaper articles and reports - including a consultant’s report received at verification in CFS - as facts available in finding APP/SMG and Orleans affiliated. This information was placed on the record in this investigation.⁶¹

34. Contrary to Indonesia’s position, in *US – Carbon Steel (India)*, the Appellate Body disagreed that a “comparative evaluation” of information to use as “facts available” “is a necessary pre-requisite to making a determination in *every* instance.”⁶² The Appellate Body pointed to an example where a “comparative approach” would not be “feasible” because “there is only one set of reliable information on the record that is relevant to a particular issue and may

⁵⁷ *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); *see also US – Carbon Steel (India) (AB)*, para. 4.428.

⁵⁸ *See* Indonesia First Written Submission, paras. 61, 67, 70-71.

⁵⁹ *See* Indonesia First Written Submission, paras. 60-61.

⁶⁰ Indonesia First Written Submission, para. 61.

⁶¹ Ex. US-31, at 6 (citing Ex. US-40 at Exs.10-12, 16, 18, 22, 24, 33, 36).

⁶² *US – Carbon Steel (India) (AB)*, para. 4.435 (emphasis added).

thus serve as a factual basis for a determination.”⁶³ This case presents such a scenario. The question of whether APP/SMG and Orleans were affiliated is necessarily a binary one. Because necessary information to come to a final conclusion on affiliation was not available, but information relevant to that question had been requested and not supplied, it was appropriate for USDOC to resort to facts available, and those facts suggested debt buy-backs in Indonesia by companies affiliated with the debtors.

III. INDONESIA’S CLAIMS UNDER ARTICLE 2 OF THE SCM AGREEMENT ARE WITHOUT MERIT

35. Finally, we turn to Indonesia’s specificity claims under Article 2.1, which is aimed at determining whether a subsidy is specific by virtue of its limitation to an enterprise or industry or group of enterprises or industries.⁶⁴

A. Debt Buyback Program (Debt Forgiveness) as a “Subsidy Programme”

36. With regard to the debt buyback program, USDOC found 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, [USDOC] determine[d] that the sale was *company-specific*.⁶⁵ We highlight that Indonesia does not challenge the evidence upon which USDOC relied in finding this subsidy program *de facto* specific to one company, APP/SMG.

37. Instead, Indonesia claims that USDOC acted inconsistently with Article 2.1(c) because USDOC cited to no supporting evidence “that the GOI or any regional, or local government

⁶³ *US – Carbon Steel (India) (AB)*, para. 4.435.

⁶⁴ *US – Antidumping and Countervailing Duties (AB)*, para. 364.

⁶⁵ Ex. US-31, at 20 (emphasis added).

entity had in place a plan, scheme, or systematic series of actions to confer a benefit.”⁶⁶ As an overarching point, the Panel should reject Indonesia’s argument that a subsidy program can only be demonstrated both by “a plan or scheme *and* systematic series of actions that confer a benefit.”⁶⁷ In making this argument, Indonesia again misunderstands the Appellate Body’s analysis in *US – Countervailing Measures (China)*. There, the Appellate Body underlined that, generally, “[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms.”⁶⁸ In that dispute, which involved the consistent provision of inputs for less than adequate remuneration by state-owned enterprises pursuant to “unwritten measures,” the Appellate Body envisioned that a subsidy program could be evidenced by “a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.”⁶⁹ However, here, the debt buyback constituted a written “plan or scheme.”⁷⁰

38. Indonesia’s application of its flawed reading of the Appellate Body’s analysis to the debt buyback, if adopted by this Panel, would undercut an investigating authority’s ability to remedy countervailable subsidies to particular companies in the exporting market. Imputing a requirement that the subsidy must be a “systematic series of actions” in all instances voids the definition of a subsidy under Article 1.1. A “subsidy” under Article 1 is not limited in nature to a series of financial contributions.

⁶⁶ Indonesia First Written Submission, paras. 81-82.

⁶⁷ Indonesia First Written Submission, paras. 78, 81 (internal quotations omitted, emphasis added).

⁶⁸ *US – Countervailing Measures (China) (AB)*, para. 4.141.

⁶⁹ See *US – Countervailing Measures (China) (AB)*, para. 4.141.

⁷⁰ US First Written Submission, paras. 195-196.

39. In the fact-specific context where only the specific company debtor is “eligible to receive that same subsidy,”⁷¹ the “limited number of enterprises” factor is relevant. The subsidy that USDOC identified is the very definition of a company-specific measure, as only the specific company debtor is “eligible to receive that same subsidy.”⁷²

B. Jurisdiction of the Granting Authority with Respect to Standing Timber

40. Finally, we touch on the specificity claim based on the chapeau of Article 2.1 with respect to the standing timber program. Indonesia claims that USDOC failed to identify the “relevant jurisdiction” of the granting authority with regard to the provision of standing timber for less than adequate remuneration.

41. Although Indonesia has stated today that it is no longer pursuing this claim, we nevertheless put forth this argument for the sake of completeness. The chapeau to Article 2.1 has not typically been a basis for SCM Agreement claims.⁷³ The Appellate Body nevertheless addressed the relationship between Articles 1.1 and 2.1 when it stated that, “Article 2.1 requires a proper determination of whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level.”⁷⁴ However, “the chapeau of Article 2.1 does not

⁷¹ See *US – Countervailing Measures (China) (AB)*, para. 4.140.

⁷² See *US – Countervailing Measures (China) (AB)*, para. 4.140.

⁷³ Cf. *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 756 (“While the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is *not the purpose of a specificity analysis* to determine whether the authorities involved in granting the subsidies constitute a single subsidy grantor or several grantors”) (emphasis added).

⁷⁴ *US – Countervailing Measures (China) (AB)*, para. 4.167 (emphasis in original).

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.”⁷⁵

42. The jurisdiction of the granting authority for the standing timber program is “discernible from the determination,”⁷⁶ and identified through USDOC’s questionnaires to Indonesia.⁷⁷ To the extent that Indonesia casts doubt on this finding, based on its assertions that regencies and provinces were involved in the licensing regime, Indonesia’s arguments unnecessarily confuse matters. Critically, Indonesia’s own regulations, issued by the national-level Ministry of Forestry, demonstrate that the national Ministry of Forestry *granted* the stumpage licenses.⁷⁸ On the record before USDOC, the role of the regencies and provinces in the licensing regime was created through regulations emanating from the government of Indonesia.

43. Equally significant, stumpage fees are administratively set by the national government which – once again – owns and controls 99.5% of the land from which this input is harvested.⁷⁹ Finally, all stumpage fees and fines for failure to pay stumpage fees, both of which are collected by the regencies or provinces, are ultimately forwarded to the national government.⁸⁰ For these reasons, the Panel should reject Indonesia’s specificity claims under Article 2.1.

⁷⁵ *US – Countervailing Measures (China) (AB)*, para. 4.169.

⁷⁶ *US – Countervailing Measures (China) (AB)*, para. 4.169.

⁷⁷ US First Written Submission, paras. 206-208.

⁷⁸ See GOI Initiation Questionnaire Response (Dec. 29, 2009), at 9 & Exhibit 10 (Ex. US-32).

⁷⁹ See Ex. US-31, at 6 (citing Ex. US-43 at 18, 69).

⁸⁰ See Ex. US-38, at 7, 10 (“The GOI explained that the payment fees, along with the supporting SPP, [(a type of harvesting payment)], will eventually be sent to the national treasury.”); see also GOI Initial Questionnaire Response (Dec. 29, 2009), at Exhibit 32 (public version) (Verification Report of the GOI in the CFS Investigation (Aug. 24, 2007), at 5, 7 (explaining that “MOF officials noted that these additional payments are still sent to the central government and not the provincial governments” and that “the local government is in charge of issuing and collecting the fines from the company, and reporting the violation and sending the payments to the central government”)).

II. Indonesia’s Claims Regarding Threat of Material Injury are Without Merit

44. The United States will next address Indonesia’s claims concerning the U.S. International Trade Commission’s determination of threat of material injury. As the United States explained in detail in its first written submission, these claims are without merit.

A. The Commission’s Analysis was Fully Consistent with AD Agreement Article 3.7 and SCM Agreement Article 15.7

45. The Commission’s analysis was based on facts and clearly foreseen and imminent changes in circumstances, consistent with AD Agreement Article 3.7 and SCM Agreement Article 15.7. This is true both with respect to the likely impact of subject imports on domestic industry sales volume and the likely price effects of subject imports.

46. With respect to domestic industry sales volume, Indonesia does not dispute that subject import volume was likely to increase significantly in the imminent future. Indonesia’s argument that the Commission provided no reasoned and adequate explanation for its finding that this significant increase would come partly at the domestic industry’s expense is belied by the Commission’s determination. The Commission pointed to ample evidence supporting that finding.” Of particular note, the significant increase in subject imports that took place from 2007 to 2009 did not come only at the expense of nonsubject imports. Rather, the Commission stressed that the increase coincided with declining domestic industry U.S. shipments.⁸¹ The Commission also found that the likely significant increase in subject import volume would necessarily take sales from current suppliers in light of RISI’s projection that apparent U.S.

⁸¹ USITC Pub. 4192 (Exhibit US-1) at 26-27.

consumption would decline 3.3 percent in 2011 and 2.5 percent in 2012.⁸² As further support, the Commission reasonably concluded that the likely increase would come partly at the domestic industry's expense given the likelihood that subject producers would seek to recoup the 6.8 percentage points of market share lost to the domestic industry during the interim period due to the pendency of the investigation.⁸³ The Commission also explained that subject producers would be in a *better position* to take sales from domestic producers in the imminent future than during the 2007-2009 period due to the 1.5 million short ton increase in Chinese CCP capacity through 2011 and the establishment of Eagle Ridge, a distributor of subject imports, in the second half of 2009.⁸⁴ In sum, the Commission's conclusion that the increase in subject import volume would come partly at the expense of domestic industry was reasoned and adequate.

47. Similarly, Indonesia's claim that the Commission failed to provide a reasoned and adequate explanation for its analysis of the likely price effects of subject imports on the domestic industry is disproven by the Commission's determination, which was based on and articulated the relevant facts and clearly foreseen and imminent changes in circumstances. The Commission fully explained and supported its finding that subject imports were likely to have significant adverse price effects in the imminent future. Of note, the Commission found some evidence that subject imports depressed domestic prices in 2009. This finding was based on significant subject import underselling, with underselling margins peaking in 2009, as well as on the relationship

⁸² USITC Pub. 4192 (Exhibit US-1) at 38; Petitioners' posthearing brief, responses to question 3, exhibit 1 (Exhibit US-4).

⁸³ USITC Pub. 4192 (Exhibit US-1) at 39.

⁸⁴ USITC Pub. 4192 (Exhibit US-1) at 28-29.

between subject import and domestic prices during the 2008-2009 period, and in particular, the fact that subject import price declines were followed by domestic price cuts.⁸⁵

48. The Commission did not find present significant price depression or suppression by reason of subject imports, however, because two other factors contributed to the decline in domestic prices: the black liquor tax credit, which reduced pulp prices, and the 14.7 percent decline in CCP demand between 2008 and 2009.⁸⁶ To be clear, the Commission was not affirmatively finding that subject imports caused no price depression or suppression during the period of investigation. Rather, the Commission simply concluded the black liquor tax credit and the demand decline rendered the Commission “unable to gauge whether there [we]re significant effects attributable to subject imports.”⁸⁷

49. The Commission found it likely that significant subject import underselling would continue in the imminent future, as a means of capturing market share, and Indonesia does not contest this finding.⁸⁸ The Commission also highlighted two changes in circumstances that would clarify the role of subject imports as a key driver of prices in the U.S. market in the imminent future: the expiration of the black liquor tax credit in 2009, and the projected moderation in the rate of the decline in CCP demand from 14.7 percent from 2008-2009 to 3.3 percent from 2010-2011.⁸⁹ While these other factors that contributed to domestic price declines would disappear or diminish in magnitude, the Commission found that there was likely to be a significant increase in subject import volume, and a likely continuation of significant

⁸⁵ USITC Pub. 4192 (Exhibit US-1) at 32-33.

⁸⁶ USITC Pub. 4192 (Exhibit US-1) at 33.

⁸⁷ USITC Pub. 4192 (Exhibit US-1) at 33.

⁸⁸ USITC Pub. 4192 (Exhibit US-1) at 34.

⁸⁹ USITC Pub. 4192 (Exhibit US-1) at 34.

underselling.⁹⁰ Accordingly, the Commission provided a reasoned and adequate explanation for its conclusion that subject imports would likely depress domestic prices to a significant degree in the imminent future, and that conclusion is fully consistent with the Commission’s decision not to make a finding that subject imports depressed or suppressed prices during the period of investigation.

50. We note that Indonesia and the European Union may have been confused by the ITC determination’s use of the phrase “significant price depression or suppression.” As explained in the U.S. first written submission, the Commission expressly found that subject imports were likely to depress domestic prices significantly in the imminent future, not suppress them.⁹¹ The determination referred to “significant price depression or suppression” in order to match the terminology of its finding with the terms of the relevant domestic statute, which requires the Commission to consider “whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices.”⁹² In other words, this was simply a means of demonstrating that the Commission had satisfied its domestic legal requirement, and was not a finding of both imminent price depression and imminent price suppression.

⁹⁰ USITC Pub. 4192 (Exhibit US-1) at 27-31, 34, 38-39.

⁹¹ See USITC Pub. 4192 (Exhibit US-1) at 35; see also United States’ First Written Submission, para. 285.

⁹² See USITC Pub. 4192 (Exhibit US-1) at 35, 39; 19 U.S.C. § 1677(7)(F)(i)(IV) (emphasis added) (Exhibit US-12); see also United States’ First Written Submission, para. 285.

B. The Commission’s Analysis was Fully Consistent with AD Agreement Article 3.5 and SCM Agreement Article 15.5

51. Turning to AD Agreement Article 3.5 and SCM Agreement Article 15.5, the Commission provided a reasoned and adequate explanation for its finding of a causal link between subject imports and the threat of material injury to the domestic industry, examining other known factors in a manner fully consistent with WTO obligations.

52. First, as discussed in the U.S. first written submission, Indonesia’s argument reflects a misunderstanding of the Commission’s vulnerability analysis. 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.⁹³ For this reason, the Commission considered the domestic industry’s vulnerability as part of its threat analysis. While recognizing that declining demand and expiration of the black liquor tax credit contributed to the domestic industry’s vulnerability, the Commission in no way attributed the effects of these factors to subject imports, or even mentioned subject imports in its discussion of vulnerability.

53. Acceptance of Indonesia’s argument would create a Catch-22 situation for investigating authorities considering 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 injury sustained by the industry in the imminent future 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. This

⁹³ *Egypt – Steel Rebar*, para. 7.91; *Mexico – High Fructose Corn Syrup*, para. 7.140.

cannot be the case without emptying threat of material injury of any utility at all and rendering Articles 3.7 and 3.8 of the AD Agreement and 15.7 and 15.8 of the SCM Agreement meaningless. The panel here should continue to recognize that vulnerability is properly considered due to its bearing on the magnitude of the change in circumstances necessary for material injury to be imminent, and that vulnerability is not, as Indonesia’s theory suggests, preclusive of attribution of a threat of material injury to subject imports.

54. Second, the Commission properly separated and distinguished the effects of projected demand declines and nonsubject imports from the injury caused by subject imports, demonstrating that subject imports had injurious effects independent of those factors. The Commission first established a strong causal link between subject imports and the threat of material injury to the domestic industry. Drawing from its findings of vulnerability, likely subject import volume, and likely subject import price effects, the Commission found it likely that subject producers would continue to significantly undersell the domestic like product as a means of significantly increasing their exports to the United States in the imminent future, as they had during the period of investigation.⁹⁴ Given the projected decline in U.S. demand of 3.3 percent in 2011 and 2.5 percent in 2012, the Commission reasoned that the likely significant increase in subject imports would take sales from existing suppliers, including the domestic industry.⁹⁵ The Commission found that the aggressive underselling that was likely, as subject producers sought to recapture the 12.8 percentage points of market share lost to domestic producers and nonsubject imports during the interim period, would likely force domestic

⁹⁴ See USITC Pub. 4192 (Exhibit US-1) at 28-29 & n.188, 34-35, 38.

⁹⁵ USITC Pub. 4192 (Exhibit US-1) at 38.

producers to lower their prices to compete.⁹⁶ In light of the domestic industry’s weakened condition, the Commission concluded that the likely significant increase in low-priced subject imports would likely have an imminent material adverse impact on the domestic industry, in terms of lower employment, net sales, and profitability.⁹⁷

55. Turning to the other known causal factors, the Commission demonstrated that subject imports would have adverse effects on the domestic industry independent of the moderate decline in demand that was projected, relying partly on the analysis contained in previous sections of the determination. The Commission also demonstrated that subject imports had injurious effects on the domestic industry independent of nonsubject imports, which had no injurious effects on the industry during the period of investigation, and were generally priced higher than subject imports.⁹⁸ As explained in the U.S. first written submission, there is no merit to Indonesia’s criticisms of the Commission’s non-attribution analysis. The Commission was required only to assess and conclude that imminent injurious effects from subject imports were not those of nonsubject imports or other factors, and the Commission did so.

C. The Commission’s Analysis is Consistent with the Special Care Requirement

56. Having shown that the Commission’s determination of threat of injury was consistent with AD Agreement Articles 3.5 and 3.7 and SCM Agreement Articles 15.5 and 15.7, the United States observes that Indonesia raises no independent argument that the Commission’s analysis conflicts with the AD Agreement and SCM Agreement “special care” requirement. Because

⁹⁶ USITC Pub. 4192 (Exhibit US-1) at 34-35.

⁹⁷ USITC Pub. 4192 (Exhibit US-1) at 38.

⁹⁸ USITC Pub. 4192 (Exhibit US-1) at 39.

Indonesia’s “special care” claims are consequential, Indonesia has accordingly failed to make out any basis for these claims.⁹⁹

III. ITC’s Tie Vote Provision Is Fully Consistent with AD Agreement Article 3.8 and SCM Agreement Article 15.8

57. The United States will turn lastly to Indonesia’s “as such” challenge to the use in threat of injury cases of the statutory “tie vote” provision governing ITC determinations. As explained in the U.S. First Written Submission, the “tie vote” provision of the U.S. statute, 19 U.S. Code section 1677(11)(B), is fully consistent with AD Agreement Article 3.8 and SCM Agreement Article 15.8. Neither of these provisions contains any text relating to a Member’s internal decision-making structure or processes.

58. In *U.S. – Line Pipe*, the Appellate Body made clear that the internal decision making process of a Member is entirely within the discretion of that Member, and hence not subject to dispute settlement.¹⁰⁰ As the Appellate Body explained, the Appellate Body, and by extension panels, “are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement.”¹⁰¹ As with the Safeguards Agreement at issue in *Line Pipe*, the AD and SCM Agreements do not prescribe the structure of investigating authorities, much less the internal decision-making process authorities must follow in reaching antidumping and countervailing duty determinations. Rather, the AD and SCM Agreements prescribe substantive requirements for determinations themselves. Consistently with *U.S. – Line Pipe*, the panel’s analysis in *Softwood Lumber VI* shows that “special care” is

⁹⁹ See *US – Softwood Lumber VI (Panel)*, para. 7.34.

¹⁰⁰ *US – Line Pipe (AB)*, para. 158.

¹⁰¹ *Id.*

about the substantive analysis used to make an affirmative threat determination.¹⁰² That substantive analysis is therefore the appropriate focus of dispute settlement panels, not the manner in which different views of an investigating authority's individual members are aggregated to determine the authority's ultimate decision.

59. The tie vote provision concerns the internal decision-making process of the United States for reaching injury determinations in antidumping and countervailing duty investigations. The U.S. has assigned responsibility for determinations of injury or threat thereof to an independent Commission. Each Commissioner will have already conducted his or her analysis, exercising special care as necessary, before voting in an investigation. The reasons for each Commissioner's determination are detailed in the subsequent written opinion, issued a short time after the vote. The tie vote provision thus addresses one procedural aspect of the Commission's decision-making process, namely the significance of a tie vote, but has no effect on the resulting written determination. When the tie vote provision applies, nothing under that provision would prevent the Commissioners voting in the affirmative from demonstrating in their written determination that they exercised special care in reaching an affirmative threat determination. Accordingly, the tie vote provision is not inconsistent with the special care requirement of the AD and SCM Agreements.

60. Finally, we note that Canada, as a third party, takes the position that the provision breaches the “objective examination” requirement of AD Agreement Article 3.1 and SCM Agreement Article 15.1. But Indonesia’s panel request asserts no claims under AD Agreement Article 3.1 and SCM Agreement Article 15.1. Those provisions are thus outside the Panel’s

¹⁰² *US – Softwood Lumber VI (Panel)*, para. 7.33-34.

terms of reference, and Indonesia’s First Written Submission made no argument concerning the “objective examination” provisions. Accordingly, the Panel may not accept Canada’s invitation to opine on claims outside its terms of reference or to find a consequential breach of the AD or SCM Agreement “special care” provisions on the basis of such non-claims.

61. The DSB established this panel under Article 6, with standard terms of reference under Article 7, to examine the matter referred by Indonesia to the DSB. Under the panel’s terms of reference and DSU Article 11, the Panel’s role is to assist the DSB in making a recommendation under DSU Article 19 to bring any measure found WTO-inconsistent into conformity with WTO rules. Through this process, the Panel assists the parties in finding a positive solution to the dispute. It is regrettable that a third party would suggest that a panel use the dispute settlement procedures to make findings on arguments and claims that third party may consider would be useful for it in *other* proceedings but that are not part of the *actual* dispute between the parties.¹⁰³

* * *

62. In conclusion, the United States thanks the Panel for its attention and looks forward to answering any questions that the panel may have.

¹⁰³ See Request by Canada for Enhanced Third Party Rights, July 8, 2016 (noting that its interest in this dispute stems from, *inter alia*, the possibility of U.S. trade remedy investigations into Canadian lumber products due to expiry of the United States – Canada Softwood Lumber Agreement of 2006).