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UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

REPORT OF THE PANEL

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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641

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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AFA	Adverse facts available
AR	Administrative review
BCI	Business confidential information
CFR	Code of Federal Regulations
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECSC	European Coal and Steel Community
Fed. Reg. (or FR)	Federal Register
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of India
JPC	Joint Plant Committee
JSIP	Jharkhand State Industrial Policy
JSW	Jindal Steel Works
KIP	State Government of Karnataka's New Industrial Policy and Package of Incentives and Concessions
MAI	Market Access Initiative
MDA	Market Development Assistance
MMDR Act	Mines and Minerals (Development & Regulation) Act, 1957
MML	Mysore Minerals Limited.
NMDC	National Mineral Development Corporation
PLR	Prime lending rate
POR	Period of review
RBI	Reserve Bank of India
SCM Agreement (or ASCM)	Agreement on Subsidies and Countervailing Measures
SDF	Steel Development Fund
SEZ	Special Economic Zone
SGAP	State Government of Andhra Pradesh
SGOC	State Government of Chhattisgarh
SGOG	State Government of Gujarat
SGOJ	State Government of Jharkhand
SGOK	State Government of Karnataka
SGOM	State Government of Maharashtra
TPS	Target Plus Scheme
United States (or US)	United States of America
USC	United States Code
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
VMPL	Vijayanagar Minerals Pvt. Ltd.
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by India

1.1. On 24 April 2012, India requested consultations with the United States pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 30 of the SCM Agreement, with regard to the imposition of countervailing duties on certain hot-rolled carbon steel flat products from India by the United States as described in document WT/DS436/1/Rev.1.

1.2. Consultations were held on 31 May and 1 June 2012, but were unsuccessful in resolving the dispute.

1.2 Panel establishment and composition

1.3. On 12 July 2012, India requested, pursuant to Articles 4.7 and 6 of the DSU and Article 30 of the SCM Agreement, that the DSB establish a panel with standard terms of reference.[1] At its meeting on 31 August 2012, the DSB established a panel pursuant to the request of India in document WT/DS436/3, in accordance with Article 6 of the DSU.[2]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS436/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[3]

1.5. On 7 February 2013, India requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Hugh McPhail
Members:	Mr Anthony Abad Mr Hanspeter Tschaeni

1.6. Australia, Canada, China, the European Union, the Kingdom of Saudi Arabia (Saudi Arabia) and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[4] and timetable on 8 March 2013. The Panel introduced modifications to its timetable on 18 July 2013.

1.8. The Panel held a first substantive meeting with the parties on 9-10 July 2013. A session with the third parties took place on 10 July 2013. The Panel held a second substantive meeting with the parties on 8-9 October 2013. On 25 October 2013, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 31 January 2014. The Panel issued its Final Report to the parties on 11 April 2014.

[1] WT/DS436/3.
[2] See WT/DSB/M/321.
[3] WT/DS436/4.
[4] See the Panel's Working Procedures in Annex A-1.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.9. After consultations with the parties, the Panel adopted, on 28 March 2013, additional procedures for the protection of BCI.[5]

1.3.3 Preliminary ruling

1.10. On 3 May 2013, the United States submitted to the Panel two requests for preliminary rulings concerning the consistency of India's request for the establishment of a panel[6] with Article 6.2 of the DSU. On 21 May 2013, in advance of the first substantive meeting of the Panel with the parties, India provided a written response to the United States' requests for preliminary rulings.

1.11. On 16 August 2013, the Panel issued the following preliminary rulings to the parties to the dispute.

1.3.3.1 Introduction

1.12. In its first written submission, the United States submitted two requests for preliminary rulings that certain claims advanced by India in its first written submission fall outside the Panel's terms of reference. The United States' requests are based on Article 6.2 of the DSU, which provides in relevant part:

> The request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.13. The United States' first request concerns India's claims under Article 11 of the SCM Agreement. In its panel request, India alleged a violation of:

> Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.[7]

1.14. In its first written submission, India argued claims relating to (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application. With respect to the former, India argued its claim under the following heading of its first written submission:

> Section XII.C.4: The United States violated Article 11.1 by failing to 'Initiate' an investigation into the New Subsidies.

1.15. With respect to the claims relating to the initiation of an investigation despite the insufficiency of evidence, India argued its claims under the following headings of its first written submission:

> Section XII.C.1: The United States violated Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies.
>
> Section XII.C.2: The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.

[5] Additional Working Procedures on BCI.
[6] WT/DS436/3 (referred to hereafter as "panel request").
[7] Ibid.

1.16. The United States' second request concerns India's argument in its first written submission with respect to a claim that the United States' 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement. India did not explicitly refer to the 2013 sunset review determination in its panel request.

1.17. Pursuant to Paragraph 7 of the Panel's working procedures, the Panel invited India to respond to the United States' requests prior to the first substantive meeting of the Panel with the parties.[8] In addition, the Panel posed certain questions relating to the requests for preliminary rulings and gave both parties the opportunity to comment on each other's answers.

1.18. The United States requested the Panel to make certain findings as a preliminary matter.[9] In contrast, India requested the Panel to reserve its findings on the preliminary ruling requests until the final report.[10] As the United States' requests concern the Panel's terms of reference, and given the clarifications provided by the parties, the Panel decided to issue its rulings prior to the second substantive meeting of the Panel with the parties in order to clarify the scope of the dispute.

1.3.3.2 Arguments of the Parties

1.3.3.2.1 United States

1.19. The United States requests the Panel to find that India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination are outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU.

1.3.3.2.1.1 Article 11 of the SCM Agreement

1.20. The United States recalls that India's panel request only includes a general reference to Article 11 of the SCM Agreement. The United States asserts that Article 11 contains 11 subparagraphs with different obligations, and submits that India failed to identify in its panel request any specific Article 11 obligation that the United States had allegedly violated.[11] Thus, the United States submits that India's panel request failed to comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[12]

1.21. Moreover, the United States notes that India's panel request suggests that the alleged violation lies in the failure to initiate or conduct an investigation at all with respect to new subsidies. However, in the United States' view, Article 11 of the SCM Agreement does not contain any obligation to initiate an investigation.[13]

1.22. With respect to the claims relating to the initiation of an investigation despite insufficient evidence in the domestic industry's written application, the United States points out that India's panel request alleges that "no investigation was initiated or conducted".[14] However, the relevant arguments in India's first written submission allege that the United States erred by actually initiating an investigation into the NMDC and TPS programmes in 2004 despite an insufficient written application. The United States submits that the sufficiency of evidence in an application is a distinct issue from whether an investigation was initiated.[15] Raising due process concerns, the

[8] India considered that the United States had not properly raised a request for preliminary ruling with regard to the claim in Section XII.C.4 of India's first written submission. During the first substantive meeting of the Panel with the parties, the United States clarified that its requests also covered this claim. In light of the United States' explanation, the Panel accepted that the United States' requests for preliminary rulings covered the claim in Section XII.C.4 of India's first written submission, and invited India to respond to this aspect of the United States' requests.

[9] United States' first written submission, para. 3.

[10] India's response to the United States' requests for preliminary rulings, para. 35.

[11] United States' first written submission, paras. 15, 17-19 and 22; and response to Panel question No. 38, para. 2.

[12] United States' first written submission, paras. 18 and 22.

[13] Ibid. paras. 17 and 22.

[14] Ibid. paras. 17 and 20.

[15] Ibid. para. 20.

United States contends that it could not have anticipated that India would bring these claims because they were not articulated in India's panel request.[16]

1.3.3.2.1.2 2013 sunset review

1.23. Concerning India's claims under Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination, the United States understands India to refer to the final results in the most recent sunset review issued by the US Department of Commerce on 14 March 2013. The United States submits that this determination could not have been included in India's request for consultations or request for the establishment of a panel, since it was issued eight months after the latter.[17] Furthermore, although this sunset review was initiated on 1 November 2010, India does not refer to the initiation in its consultations or panel requests. Thus, the United States submits that the final results of the 2013 sunset review fall outside the Panel's terms of reference.[18]

1.3.3.2.2 India

1.3.3.2.2.1 Article 11 of the SCM Agreement

1.24. India contends that its panel request need not be identically worded as the claims pursued in its first written submission, and argues that the Panel should examine the panel request as a whole and in light of "attendant circumstances".[19] India contends that the United States attributed an "extremely narrow and acontextual meaning" to India's panel request. India argues that the term "initiated" in its request is to be construed in light of footnote 37 of the SCM Agreement. This would necessarily imply that "India's panel request is directed to the manner in which investigations into new subsidy programs were initiated and conducted", i.e. the fact that they were "not [] initiated, commenced and performed in the manner '*provided* [*for*] *in Article 11*' of the SCM Agreement."[20]

1.25. Moreover, India contends that its panel request clearly connects the challenged measures with the relevant obligations under Article 11 of the SCM Agreement.[21] According to India, the United States fails to appreciate that "India's panel request covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".[22] India contends that its panel request delineates that violations are limited to (i) Article 11, (ii) the initiation and conduct of investigations, and (iii) new subsidy programmes. Thus, according to India, Articles 11.6, 11.8, 11.10 and 11.11 of the SCM Agreement are logically excluded due to the words used in the panel request. India also argues it has the discretion in its first written submission to only elaborate on a sub-set of the remaining provisions in Article 11 covered by India's panel request, namely Articles 11.1, 11.2 and 11.9. However, India contends that Articles 11.3, 11.4, 11.5 and 11.7 of the SCM Agreement have also been breached, but India chose not to press these violations in its first written submission.[23] Moreover, India submits that all subparagraphs of Article 11 are closely related and interlinked, and the reference to a common obligation, i.e. the manner in which investigations are to be initiated and conducted, is sufficient to meet the standard of Article 6.2 of the DSU.[24]

1.26. Finally, India contends that the due process rights of the United States have not been prejudiced, and the United States' first written submission shows that it was in a position to file detailed responses to India's claims. India also notes that the claims at issue here only refer to determinations made by the United States and documents made publicly available by the United States. Moreover, the consultations between the United States and India prior to the establishment of this panel revealed India's point of concern with respect to these claims.

[16] United States' first written submission, para. 21.
[17] Ibid. para. 24.
[18] Ibid. para. 27.
[19] India's response to the United States' requests for preliminary rulings, paras. 7-8 and 14-15.
[20] Ibid. paras. 10-11. (emphasis original)
[21] Ibid. para. 13.
[22] Ibid. para. 16.
[23] Ibid. paras. 17-19.
[24] Ibid. paras. 20-22.

Therefore, according to India, it cannot be said that "the United States was completely unaware that India would raise claims in relation to sufficiency of evidence for commencing investigations into new subsidies."[25]

1.3.3.2.2.2 2013 sunset review

1.27. Regarding the 2013 sunset review, India notes that paragraph 5 of its panel request "covers all amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein." India submits that all determinations and orders issued by the United States are measures covered in the panel request, and the 2013 sunset review determination amends the determinations included in the panel request. Referring to the understanding of past panels and the Appellate Body, India notes that the 2013 sunset review determination does not change the nature of the measures challenged, and India has not raised different claims in relation to this determination. India submits that agreeing with the United States' preliminary objection would allow the United States to evade adjudicatory review and prevent a positive resolution of the dispute on a purely technical point.[26]

1.3.3.3 Evaluation

1.28. The United States' requests for preliminary rulings concern India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review. We examine each request in turn.

1.3.3.3.1 Whether India's panel request relating to Article 11 of the SCM Agreement satisfies the requirements of Article 6.2 of the DSU

1.29. The main issue before the Panel is whether the general reference to Article 11 of the SCM Agreement in India's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[27] India contends that its panel request refers to two different inconsistencies with Article 11, namely: (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application.[28] We consider each alleged inconsistency separately.

1.3.3.3.1.1 Alleged failure to initiate an investigation into new subsidies

1.30. It is undisputed that India's panel request refers generally to Article 11 of the SCM Agreement, without explicitly identifying any specific paragraphs of that provision as the legal basis of its complaint. We note that Article 11 contains several paragraphs that set out multiple distinct obligations.

1.31. While the Appellate Body has explained that when "a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged"[29], the Appellate Body has also indicated that "compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[30] Thus, the mere fact that India failed to explicitly specify in its panel request the particular paragraphs of Article 11 at issue does not necessarily mean that India's panel request fails to meet the requirements of Article 6.2 of the DSU. This is because the relevant WTO obligations may nevertheless be identifiable from a careful reading of the panel request as a whole.[31] Accordingly, we shall examine whether a careful reading of India's panel request,

[25] India's response to the United States' requests for preliminary rulings, paras. 24-26.
[26] Ibid. paras. 27-33.
[27] Article 6.2 of the DSU.
[28] See paragraphs 1.14 and 1.15 above.
[29] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598.
[30] Appellate Body Report, *US – Carbon Steel*, para. 127.
[31] With similar understanding, see the preliminary ruling of the panel in *US – Countervailing and Anti-Dumping Measures (China)*, para. 3.35, document WT/DS449/4 dated 7 June 2013.

including any narrative explanation contained therein[32], permits a sufficiently clear identification of which particular obligation(s) in Article 11 of the SCM Agreement form(s) the legal basis of India's complaint regarding Article 11, to enable us to conclude that it is consistent with Article 6.2 of the DSU.

1.32. In addition to the general reference to Article 11 of the SCM Agreement, India's panel request explains India's concern that "no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews". This text indicates that the issue raised by India concerns the United States' alleged failure to initiate or conduct an investigation into the effects of new subsidy allegations. We note that similar language in Article 11.1 of the SCM Agreement may contain a "potentially relevant obligation"[33] relating to the initiation of "an investigation to determine the existence, degree and effect of any alleged subsidy".[34] In our view, therefore, the general reference to Article 11 and the above-mentioned narrative explanation together are sufficient to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", consistent with Article 6.2 of the DSU. Consequently, the claim in Section XII.C.4 of India's first written submission[35] falls within the Panel's terms of reference.[36]

1.3.3.3.1.2 Alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application

1.33. However, we are not persuaded that the general reference to Article 11 of the SCM Agreement and the above-mentioned narrative explanation in India's panel request are sufficient to bring India's remaining Article 11 claims within the Panel's terms of reference.

1.34. We note that the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to the fact that an investigation was allegedly initiated despite the fact that the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of certain subsidies.[37] We agree with the United States that whether an investigation was initiated despite insufficiency of evidence is an issue entirely distinct from whether an investigation to determine the effects of new subsidies was initiated or conducted at all.[38] Indeed, the narrative in India's panel request states that "no investigation was initiated or conducted". India contends that its panel request should be read as relating to "investigations not being initiated, commenced and performed in a manner '*provided in Article 11*' of the SCM Agreement."[39] We must objectively determine our terms of reference on the basis of the panel request as it existed at the time of filing.[40] In our view, by clearly and only stating that an

[32] We note in this regard that, in applying Article 6.2 of the DSU, the panel in *Mexico – Anti-Dumping Measures on Rice* considered the listing of the relevant provisions of the WTO Agreement together with the narrative which accompanied that listing. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.30)

[33] We note that the panel in *EC – Approval and Marketing of Biotech Products* referred to the concept of "potentially relevant obligations". See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 77 of the preliminary ruling reproduced at para. 7.47 of the reports.

[34] Article 11.1 of the SCM Agreement.

[35] For a brief summary of this claim, see paragraph 1.14 above.

[36] We emphasize, however, that in considering whether this aspect of India's panel request complies with the requirements of Article 6.2 of the DSU we express no opinion on the merits of India's complaint. As clarified by the Appellate Body in *EC – Selected Customs Matters*, the "question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether the measure is consistent or not with the legal provision(s) of the covered agreement(s) to which the panel request refers." (Appellate Body Report, *EC – Selected Customs Matters*, para. 131)

[37] For a brief summary of these claims, see paragraph 1.15 above.

[38] See United States' first written submission, para. 20.

[39] India's response to the United States' requests for preliminary rulings, para. 11. (emphasis original) India refers to footnote 37 of the SCM Agreement to argue that it "clearly suggests that an investigation should commence in a manner provided in Article 11." See India's response to the United States' requests for preliminary rulings, paras. 9-11. However, it remains unclear to us, and India has not sufficiently explained, how the meaning in footnote 37, including the reference to a *procedural action to formally commence* an investigation as provided in Article 11, permits a sufficiently clear identification of which particular obligations in Article 11 of the SCM Agreement form the legal basis of India's complaints at issue regarding Article 11.

[40] The Appellate Body has stated that "[a]lthough subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it

investigation was *not* initiated or conducted, India's panel request precludes claims relating to the alleged initiation of an investigation, or the manner in which an investigation was conducted, being included in the scope of the dispute.

1.35. India submits that the Panel should examine India's panel request in light of "attendant circumstances". India argues that its panel request "covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".[41] However, we are unable to reconcile India's view with the general reference to Article 11 read together with the narrative in India's panel request. Had India intended to raise claims under Articles 11.1, 11.2 and 11.9 of the SCM Agreement relating to the initiation of an investigation despite insufficient evidence, India should have provided some summary of the relevant legal basis sufficient to present this particular problem clearly, which in our view it did not. As it is, India's panel request is not reasonably open to the reading advanced by India.[42]

1.36. India also argues that the due process rights of the United States have not been prejudiced because the claims at issue "only refer to determinations already made by the United States and only refers to documents made publicly available by the United States."[43] We do not consider that the United States would be made aware of the "legal basis of the complaint sufficient to present the problem clearly", simply because India's claims refer to determinations or documents issued by the United States.[44] The fact that the respondent has detailed information relating to the measure at issue does not necessarily imply that the problem raised by the complainant in WTO dispute settlement will become obvious for purposes of Article 6.2 of the DSU. We recall in this regard that, in the context of the AD Agreement, the Appellate Body in *Thailand – H-Beams* found that even when specific issues were raised before the investigating authority, the "underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel."[45]

1.37. Finally, India contends that a certain list of questions filed during consultations reveals India's concerns relating to the claims at issue here.[46] The Panel was not privy to those consultations, and is therefore unable to refer to the substance of the consultations for present purposes. We note in this regard that the Appellate Body in *US – Upland Cotton* agreed with the finding of the panel in *Korea – Alcoholic Beverages* that "[w]hat takes place in [] consultations is not the concern of a panel."[47]

existed at the time of filing." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642)

[41] India's response to the United States' requests for preliminary rulings, para. 16.

[42] We find support in the Appellate Body Report in *EC – Fasteners (China)*, where it was found that the mere reference to a general provision would not allow a complaining party to introduce an issue that does not fall within the scope of the narrative explanation or description included in the panel request. See Appellate Body Report, *EC – Fasteners (China),* paras. 595-599.

[43] India's response to the United States' requests for preliminary rulings, para. 24.

[44] In *EC and certain member States – Large Civil Aircraft*, the Appellate Body clarified that the "due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction. The principal task of the adjudicator is therefore to assess what the panel's terms of reference encompass, and whether a particular measure or claim falls within the panel's remit." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640)

[45] Appellate Body Report, *Thailand – H-Beams*, para. 94. The Appellate Body found that it is not necessarily the case that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. The Appellate Body noted that "[t]he parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not." (Appellate Body Report, *Thailand – H-Beams*, para. 94)

[46] India's response to the United States' requests for preliminary rulings, para. 25.

[47] Appellate Body, *US – Upland Cotton*, para. 287, quoting Panel Report, *Korea – Alcoholic Beverages*, para. 10.19. The Appellate Body also stated that "the Panel should have limited its analysis to the request of consultations … Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU … In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed." (Appellate Body, *US – Upland Cotton*, para. 287)

1.38. Thus, with respect to the issue of the initiation of an investigation despite insufficient evidence under Article 11 of the SCM Agreement, we conclude that India's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to claims that are not within the Panel's terms of reference.

1.3.3.3.2 Whether the 2013 sunset review is included in the Panel's terms of reference

1.39. We now turn to India's claims relating to the 2013 sunset review. The main issue before the Panel is whether the 2013 sunset review is one of the "specific measures" (within the meaning of Article 6.2 of the DSU) identified in India's panel request.

1.40. In considering this issue, we note that the Appellate Body in *US – Carbon Steel* explained that "compliance with the requirements of Article 6.2 [of the DSU] must be demonstrated on the face of the request for the establishment of a panel … [and] determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[48] The Appellate Body also found that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[49] Accordingly, we shall examine India's panel request as a whole, to determine whether or not that request identifies the 2013 sunset review with the requisite particularity. In this regard, we recall that India's panel request identifies the relevant measures at issue in the following terms:

> The United States conducted a countervailing duty (the "CVD") investigation (No. C 533 821) and levied countervailing duties on the subject goods. The provisional measures were imposed with effect from 20 April 2001 and the final measures were imposed with effect from 3 December 2001. The United States concluded a sunset review in 2007 and continued the duties for a further period of five years. The United States also conducted several Administrative Reviews (the "AR") to determine the CVD rate/s to be applied on the imports made during the relevant AR period. The measures continue to be in force. This request covers the countervailing duties applied on the subject goods by the United States from time to time. A non-exhaustive list of determinations, orders, etc. issued by the United States in Case No. C-533-821 is enclosed as Annex 1.[50]

India's panel request also states that it "covers all the amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein."[51]

1.41. Turning first to the statement that India's panel request "covers the countervailing duties applied on the subject goods by the United States from time to time", we consider that the 2013 sunset review may reasonably be treated as a measure concerned with the application of countervailing duties on the subject goods. We also note that India explicitly referred to the only sunset review determination that had been issued prior to its panel request: the 2007 sunset review. In our view, this indicates that sunset reviews were of interest to India. Finally, we note that India's request "covers … any other related measure in connection with the measures referred herein." We consider that the 2013 sunset review may reasonably be considered a "related measure in connection with the measures" explicitly referred to in India's panel request. Considering these factors together, we are of the view that India's panel request, read as a whole, indicates the nature of the measure and the gist of what is at issue with sufficient particularity to put the United States on notice that the 2013 sunset review, when issued, would be covered by India's claims.

[48] Appellate Body Report, *US – Carbon Steel*, para. 127.
[49] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[50] India's panel request, para. 3.
[51] Ibid. para. 5. Similar language is also found in Annex 1 of India's panel request.

1.3.3.3.3 Conclusion

1.42. The Panel concludes that, with respect to the alleged failure to initiate or conduct an investigation into the effects of new subsidy allegations under Article 11 of the SCM Agreement, India's panel request complies with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Section XII.C.4 of India's first written submission relate to a claim that falls within the Panel's terms of reference. In addition, the Panel concludes that the 2013 sunset review is within the Panel's terms of reference. Therefore, we will consider these claims and the arguments pertaining to them in our disposition of the issues in this case.

1.43. However, the Panel concludes that, with respect to the issue under Article 11 of the SCM Agreement relating to the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application, India's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to alleged claims that fall outside the Panel's terms of reference, and we will not consider them or make any rulings with respect to the alleged claims.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India has challenged the following measures, and their amendments, replacements, implementing acts or any other related measure in connection with them:

a. Original Investigation

   i. Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determinations: Certain Hot-Rolled Carbon Steel Flat Products From India:, 66 FR 20240-01, 20 April 2001;

   ii. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigations: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 ITADOC 49635, 21 September 2001;

   iii. Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635-01, 28 September 2001;

   iv. Injury Determination: Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, 701-TA-405-408 and 731-TA-899-904 and 906-908, Pub. 3468, United States International Trade Commission, November 2001;

   v. Amended Final Results of Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products From India and Indonesia, 66 FR 60198-01, 3 December 2001; and

   vi. Countervailing Duty Order in the Investigation: Certain Hot-Rolled Carbon Steel Flat Products from India, 8 January 2002;

b. Administrative Review: POR 20 April 2001 through 31 December 2002 (2002 administrative review)

   i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 907-01, 7 January 2004;

ii. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products From India, 69 ITADOC 26549, 6 May 2004; and

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 26549-01, 13 May 2004;

c. Administrative Review: POR 1 January 2004 through 31 December 2004 (2004 administrative review)

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512-01, 10 January 2006;

ii. Issues and Decision Memorandum – Final Results of Administrative Review of the Countervailing Duty Order : Certain Hot-Rolled Carbon Steel Flat Products from India, 71 ITADOC 28665, 10 May 2006; and

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-rolled Carbon Steel Flat Products from India, 71 FR 28665-01, 17 May 2006;

d. Sunset Review

i. Issues and Decision Memorandum – Final Results of Expedited Sunset Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 ITADOC 70960, 7 December 2006;

ii. Final Results of the Expedited Five-Year (Sunset) Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 FR 70960-03, 7 December 2006;

iii. Injury Determination – Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, Argentina, Romania, South Africa, Taiwan, Thailand, and Ukraine, 701-TA-404-408 and 731-TA-898-902 and 904-908(Review), Pub. 3956, United States International Trade Commission, October 2007; and

iv. Continuation of Antidumping Duty and Countervailing Duty Orders – Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine, 72 FR 73316-03, 27 December 2007;

e. Administrative Review: POR 1 January 2006 through 31 December 2006 (2006 administrative review)

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 1578-02, 9 January 2008;

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 ITADOC 40295, 7 July 2008; and

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 FR 40295-02, 14 July 2008;

f. Administrative Review: POR 1 January 2007 through 31 December 2007 (2007 administrative review)

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 79791-01, 30 December 2008;

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 ITADOC 20923, 29 April 2009; and

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 FR 20923-01, 6 May 2009;

g. Administrative Review: POR 1 January 2008 through 31 December 2008 (2008 administrative review)

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 1496-01, 11 January 2010;

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 75 ITADOC 43488, 19 July 2010; and

iii. Final Results of Countervailing Duty Administrative Review – Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 43488-01, 26 July 2010.

2.2. The challenged measures also cover the following provisions of the United States Tariff Act, 1930 as codified in the United States Code, Title 19, Chapter 4, Subtitle IV (US statue), and the United States Code of Federal Regulations, Title 19, Volume 3, Chapter III, Part 351 (US regulations), and their amendments, replacements, implementing acts or any other related measure in connection with them:

a. 19 CFR § 351.511(a)(2)(i) to (iii);

b. 19 CFR § 351.511(a)(2)(iv);

c. 19 USC § 1677(7)(G);

d. 19 USC § 1675a(a)(7);

e. 19 USC § 1675b(e)(2);

f. 19 USC § 1677e (b); and

g. 19 CFR § 351.308.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. India requests the Panel to find that:

a. The provisions contained in 19 CFR § 351.511(a)(2) (i) to (iii) are inconsistent "as such" with Article 14(d) of the SCM Agreement;

b. The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent "as such" with Article 14(d) of the SCM Agreement;

c. The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent "as such" with Articles 19.3 and 19.4 of the SCM Agreement;

d. The provisions contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1675b(e)(2) are "as such" inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement;

e. The provisions contained in 19 USC § 1677e (b) and the implementing regulations contained in 19 CFR § 351.308 are "as such" inconsistent with Article 12.7 of the SCM Agreement;

f. In connection with the provision of "High Grade Iron Ore" by the NMDC:

   i. The United States' determination as to the existence of financial contribution is inconsistent with Article 1.1(a)(1) of the SCM Agreement;

   ii. The United States' determination of specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement;

   iii. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and

   iv. The United States' imposition of countervailing duty is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;

g. In connection with the provision of "Captive Mining Rights of Iron Ore":

   i. The United States' identification of, and investigation into, the program is inconsistent with Article 12.5 of the SCM Agreement;

   ii. The United States' determination that grant of mining rights amounts to provision of iron ore is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement;

   iii. The United States' determination regarding specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement;

   iv. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and

   v. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;

h. In connection with the provision of "Captive Mining Rights for Coal":

   i. The United States' determination that grant of mining rights amounts to provision of coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement;

   ii. The United States' determination regarding specificity is inconsistent with Articles 2.1(a) and (b) of the SCM Agreement;

   iii. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and

   iv. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;

i. In connection with "SDF":

   i. The United States' determination that the loans from SDF constituted a financial contribution is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement;

   ii. The United States' determination regarding existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(b) of the SCM Agreement; and

   iii. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;

j. The injury determination by the United States is inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement;

k. The initiation of investigation into new subsidies during Administrative Reviews is inconsistent with Articles 11.1, 11.2 and 11.9 of the SCM Agreement;

l. The failure to invite India for consultation at the time of initiating investigation into new subsidies is inconsistent with Article 13.1 of the SCM Agreement;

m. The investigation into new subsidies during Administrative Reviews is inconsistent with Articles 21.1 and 21.2 of the SCM Agreement;

n. The failure to issue a public notice of initiation of investigation into new subsidies during Administrative Reviews is inconsistent with Article 22.1 and Article 22.2 of the SCM Agreement;

o. The application of adverse facts available standard is inconsistent with Article 12.7 of the SCM Agreement;

p. The United States' determinations are inconsistent with Article 22.5 of the SCM Agreement; and

q. As a consequence of inconsistencies mentioned hereinabove, the United States' determinations are inconsistent with Articles 10 and 32.1 of the SCM Agreement, Article VI of the GATT 1994 and Article XVI: 4 of the WTO Agreement.

3.2. Pursuant to Article 19 of the DSU, India requests the Panel to suggest the following specific ways by which the United States may bring its measures into conformity with the SCM Agreement, the GATT 1994 and the WTO Agreement:

a. the United States repeals or amends the impugned provisions of law; and

b. the United States withdraws the countervailing duty on hot-rolled carbon steel flat products from India.

3.3. The United States requests that the Panel reject India's claims in this dispute.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the third parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel. These arguments are attached as addenda to this Report in Annexes D-1-D-11. The arguments of Australia, Canada, China, the European Union and Saudi Arabia are reflected in their written submissions, oral statements or executive summaries thereof, while the arguments of Turkey are reflected in its oral statement.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 31 January 2014, the Panel submitted its Interim Report to the parties. On 21 February 2014, both parties submitted written requests for review of precise aspects of the Interim Report. On 14 March 2014, both parties submitted written comments on each other's written requests. Neither party requested that the Panel hold an interim review meeting.

6.2. The Panel explains below its response to substantive issues raised by the parties in their comments on the Interim Report. The Panel has also corrected a number of typographical errors and other non-substantive errors, including those identified by the parties. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.2 United States' requests for changes to the Interim Report

6.2.1 Paragraph 7.51 (paragraph 7.51 of the Final Report)

6.3. The United States requests that paragraph 7.51 be modified to include an explanation of Section 351.511(a)(2)(ii) itself.[52]

6.4. India disagrees with the United States' request, because paragraph 7.51 is part of the Panel's evaluation. If the United States' suggestion is to be included, India (i) submits that it may be more appropriately placed in the paragraph summarizing the United States' submissions, and (ii) requests that India's position also be included, as explained in its written comments.[53]

6.5. We have decided not to accommodate the United States' request. Paragraph 7.51 is part of our evaluation, and sets forth our understanding of the measures at issue and resolution of the claim. In the absence of evidence regarding how the USDOC determines the availability of benchmarks, and bearing in mind the United States' reply to Panel question No. 84, the Panel is not persuaded that the United States has established that a standard referring to "a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question"[54] necessarily provides the type of analysis of "prevailing market conditions" envisaged by the Panel in this paragraph.

6.2.2 Paragraph 7.63 (paragraph 7.62 of the Final Report)

6.6. The United States requests the Panel to note that India did not provide any evidence in support of India's specific argument at issue.[55]

6.7. India disagrees with the United States' request, because India's claim at issue is an "as such" claim which does not depend on any factual evidence. In addition, India recalls that paragraph 7.63 is part of the Panel's evaluation. If the United States' suggestion is included, India (i) submits that it may be more appropriately placed in the paragraphs summarizing the United States' submissions, and (ii) requests that India's position be also included, as explained in its written comments.[56]

6.8. We have decided not to accommodate the United States' request, because we are able to resolve India's claim as a matter of law, without assessing whether India has established any factual basis for that claim.

6.2.3 Paragraph 7.87 (paragraph 7.86 of the Final Report)

6.9. The United States requests that paragraph 7.87 be modified to reflect that there is no evidence that Clause 49 applied to NMDC during the review periods, and consequently there is no need for the Panel to address the significance of Clause 49 on the question of whether NMDC

[52] United States' requests to review precise aspects of the Interim Report, paras. 3-5.
[53] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 1-2.
[54] United States' requests to review precise aspects of the Interim Report, paras. 4-5. (emphasis omitted)
[55] Ibid. para. 6.
[56] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 4-6.

directors are independent.[57] The United States also proposes deletion of the last sentence of paragraph 7.87.

6.10. India disagrees with the bulk of United States' requests. India submits that it did not concede to any non-compliance of Clause 49. In addition, India objects to the unfounded selective deletion proposed by the United States. India proposes the deletion of the entire paragraph 7.87.[58]

6.11. For the most part, we have decided not to accommodate the United States' requests. We do not consider that the WTO-consistency of the USDOC's public body determination should hinge on whether or not Clause 49 was complied with, since in any event that provision does not regulate the conduct of NMDC's governmental directors. We have, though, deleted the last two sentences of paragraph 7.87.

6.2.4 Paragraph 7.124 (paragraph 7.123 of the Final Report)

6.12. The United States requests the Panel to add a reference to the Panel Report in *US – Upland Cotton* as further support for the Panel's interpretation.[59]

6.13. India disagrees with the United States' request. India submits that the specific reference suggested by the United States concerns a factual finding in *US – Upland Cotton* and does not relate to the Panel's evaluation in paragraph 7.124. Alternatively, India submits a number of other references that the Panel could consider.[60]

6.14. We have decided not to accommodate the United States' request. While a reference to the findings in *US – Upland Cotton* would not be inconsistent with our evaluation, our reasoning focuses more on the issue of limited access.

6.2.5 Paragraph 7.179 (paragraph 7.178 of the Final Report)

6.15. The United States submits that the description of its arguments relating to India's alleged "comparative advantage" is incomplete, and suggests a revision to paragraph 7.179.[61]

6.16. India submits that, if the Panel accepts the United States' suggestions, the Panel should clarify that the text reflects the position of the United States. In addition, India requests the Panel to revise paragraph 7.176 (paragraph 7.175 of the Final Report) to fully capture India's arguments.[62]

6.17. We have modified paragraphs 7.176 and 7.179 to reflect the comments of both parties.

6.2.6 Paragraph 7.186 (paragraph 7.185 of the Final Report)

6.18. The United States requests that paragraph 7.186 be modified to reflect that India failed to present any actual evidence of a comparative advantage.[63]

6.19. India disagrees with the United States' request, because paragraph 7.186 is part of the Panel's evaluation and the United States' contention is already included in paragraph 7.179 (paragraph 7.178 of the Final Report), which summarized the United States' arguments.[64]

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[57] United States' requests to review precise aspects of the Interim Report, para. 7.
[58] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 8 and 10.
[59] United States' requests to review precise aspects of the Interim Report, para. 9.
[60] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 13-14.
[61] United States' requests to review precise aspects of the Interim Report, para. 10.
[62] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 15-16.
[63] United States' requests to review precise aspects of the Interim Report, para. 11.
[64] India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 17-18.

6.20. We have decided not to accommodate the United States' request, because we are able to resolve India's claim without assessing whether India advanced evidence of any comparative advantage.

6.2.7 Paragraph 7.199 (paragraph 7.198 of the Final Report)

6.21. The United States requests that paragraph 7.199 be modified to accurately reflect the United States' arguments.[65]

6.22. India does not comment on this request.

6.23. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.8 Paragraph 7.251 (paragraph 7.250 of the Final Report)

6.24. The United States requests the Panel to correct a factual inaccuracy with respect to the Indian laws at issue, and reconsider its findings in this respect.[66]

6.25. While India agrees with the factual inaccuracy identified by the United States, India submits that the Panel's conclusions need not be modified.[67]

6.26. We have corrected the factual inaccuracy in our evaluation, and modified paragraph 7.247 (paragraph 7.246 of the Final Report), which also refers to this matter, and paragraph 7.251 accordingly.

6.2.9 Paragraph 7.311 (paragraph 7.310 of the Final Report)

6.27. The United States requests that a footnote be added to the end of paragraph 7.311 to reflect that India does not dispute that the PLRs were the only interest rates on record that were comparable to SDF loans examined in the 2006 administrative review.[68]

6.28. India does not comment on this request.

6.29. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.10 Paragraphs 7.324 and 7.325 (paragraphs 7.323 and 7.324 of the Final Report)

6.30. The United States requests that paragraphs 7.324 and 7.325 be modified to reflect that imports from India were subsidized and dumped, and that all subsidized imports from other countries were also dumped.[69]

6.31. India does not comment on this request.

6.32. We have decided to accommodate the United States' requests and have made the adjustments sought, albeit not in the precise manner proposed by the United States.

[65] United States' requests to review precise aspects of the Interim Report, paras. 12-13.
[66] Ibid. paras. 14-15.
[67] India's comments on the United States' requests to review precise aspects of the Interim Report, para. 19.
[68] United States' requests to review precise aspects of the Interim Report, para. 17.
[69] Ibid. paras. 18-19.

6.2.11 Paragraph 7.376 and footnote 521 to paragraph 7.390 (paragraph 7.375 and footnote 646 to paragraph 7.389 of the Final Report)

6.33. The United States submits that the US provision referred to in these paragraphs is not at issue in this dispute, and India has acknowledged this fact. The United States requests that these paragraphs be revised accordingly.[70]

6.34. India does not comment on this request.

6.35. We have decided to partly accommodate the United States' requests. Although the United States contends that India acknowledged that the relevant provision is not at issue in this dispute, we note India only accepted that "the said provision has nothing to do with cumulation in changed circumstances review".[71] Thus, we have modified footnote 491 (footnote 616 of the Final Report) accordingly. However, we also note that India contends that "the sunset review [can be] conducted post such countries becoming members of the WTO."[72] For this reason, we have decided not to accommodate the United States' request regarding footnote 521.

6.2.12 Paragraphs 7.410, 7.415-7.418, 7.421 and 7.299 (paragraphs 7.409, 7.414-7.417, 7.420 and 7.298 of the Final Report), and abbreviations table

6.36. The United States submits that it may be confusing to refer to the US measures at issue using the abbreviation "AFA", defined as "adverse facts available", since this expression does not reflect the legal operation of such measures. The United States requests deleting the abbreviation "AFA Provisions" from the abbreviations table, and changing the references in the mentioned paragraphs to the expression "U.S. facts available provisions".[73]

6.37. India does not comment on this request.

6.38. We note that "AFA Provisions" is an expression repeatedly used in India's submissions and statements. Thus, a reference to it, including in the abbreviations table, is necessary for a proper understanding of India's arguments, as summarized in paragraphs 7.410 and 7.415-7.418. For this reason, we have decided not to accommodate the United States' requests in these places. We note, however, that paragraphs 7.421 and 7.299 do not specifically summarize India's arguments. Thus, although the USDOC itself uses the abbreviation "AFA", we have decided to accommodate the United States' request with respect to these paragraphs, and have modified them accordingly.

6.2.13 Paragraph 7.419 (paragraph 7.418 of the Final Report)

6.39. The United States requests a change to the wording in paragraph 7.419.[74]

6.40. India does not comment on this request.

6.41. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.14 Paragraphs 7.453 and 7.460 (paragraphs 7.452 and 7.459 of the Final Report)

6.42. The United States requests changes to the wording in paragraphs 7.453 and 7.460 to reflect the proper standard of review of the Panel.[75]

6.43. India does not comment on this request.

[70] United States' requests to review precise aspects of the Interim Report, paras. 20-21.
[71] India's response to Panel question No. 31.
[72] Ibid.
[73] United States' requests to review precise aspects of the Interim Report, paras. 22-23.
[74] Ibid. para. 24.
[75] Ibid. paras. 25-26.

6.44. We have decided to accommodate the United States' requests and have made the adjustments sought.

6.3 India's requests for changes to the Interim Report

6.3.1 Paragraphs 1.34-1.38 (paragraphs 1.34-1.38 of the Final Report)

6.45. India requests that the Panel examine the term "initiated" in India's panel request in light of footnote 37 of the SCM Agreement. India recalls its argument that the statement in its panel request that "no investigation was initiated or conducted" should be read as no investigation was "initiated, commenced and performed in the manner '*provided* [*for*] *in Article 11*' of the SCM Agreement".[76] India contends that "the Panel simply ignored the legal basis of India's claim", despite being required to evaluate such legal basis.[77]

6.46. The United States submits that India's request must be disregarded for the same reasons the Panel rejected India's arguments in its Interim Report. In addition, the United States notes that India's request is not for "review precise aspects of the interim report", but rather for the Panel to evaluate India's claim.[78]

6.47. We have decided not to accommodate India's request. We note that India's arguments, referred to above, were summarized in paragraph 1.24 of the Interim Report (paragraph 1.24 of the Final Report), and specifically addressed and rejected in paragraph 1.34. However, for the sake of clarity, we have made minor modifications to paragraph 1.34, including adding a sentence in footnote 39 to paragraph 1.34 (footnote 39 of the Final Report).

6.3.2 Section 7.2: India's third ground

6.48. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.[79]

6.49. The United States disagrees with India's request, because the Panel has in fact both noted and discussed India's argument at issue.[80]

6.50. We have decided not to accommodate India's request, because the matter raised by India is already addressed effectively by our evaluation set forth in Section 7.2.3. The fact that we have not followed the order set forth in India's first written submission does not mean that parts of India's claims have been overlooked, or misrepresented.

6.51. The third ground identified by India relates, in India's words, to the "hierarchical approach" provided for in Section 351.511(a)(2)(i)-(iii). This is evident from paragraphs 71 and 72 of India's first written submission. We addressed the issue of "hierarchical preference" in Section 7.2.3. In further support of its third ground, India also argues in its first written submission that "without the United States proving that the 'provision [of goods] is made for less than adequate remuneration', there is no benefit conferred by providing the goods".[81] This issue again relates to the substance of Section 7.2.3. The overlap with matters raised in Section 7.2.3 is further evidenced by the opening phrase of paragraph 67 of India's first written submission, which refers the reader to a previous section of India's submission. In that section, India argues that the "adequacy of remuneration referred to in Article 14(d) must be assessed from the perspective of

[76] India's requests to review precise aspects of the Interim Report, paras. 2-4. See also India's response to the United States' requests for preliminary rulings, paras. 9-11.
[77] India's requests to review precise aspects of the Interim Report, paras. 2 and 5.
[78] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 6-7, referring to Article 15.2 of the DSU.
[79] India's requests to review precise aspects of the Interim Report, para. 9.
[80] United States' comments on India's requests to review precise aspects of the Interim Report, para. 10.
[81] India's first written submission, para. 64.

whether the remuneration is adequate to the provider of the goods or not".[82] Again, this is precisely the matter addressed in Section 7.2.3.

6.3.3 Section 7.2: India's sixth ground

6.52. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.[83]

6.53. The United States disagrees with India's request, because the Panel has in fact both noted and considered India's argument at issue.[84]

6.54. We have decided not to accommodate India's request, because the matter raised by India is already addressed effectively in our findings. We note that this ground is based on India's allegations that the Tier-II approach (i) countervails the exporting Member's "comparative advantage"[85], and (ii) gives preference to the method "that is not in relation to the market in question"[86]. As stated above, we have already evaluated and rejected these arguments in our findings.

6.3.4 Paragraph 7.20 (Paragraph 7.20 of the Final Report)

6.55. India requests the Panel to (i) re-evaluate its argument concerning "commercial considerations" as an independent ground to challenge the measures at issue, and (ii) modify paragraph 7.20 by correcting one of its references and replacing the first sentence as proposed by India.[87]

6.56. The United States disagrees with India's requests, because the Panel has examined and rejected India's proposed two-step analysis, and contrary to India's statement, the first sentence and the reference at paragraph 7.20 support the Panel's view.[88]

6.57. We have decided not to accommodate India's request. With respect to India's first point, as stated in footnote 80 (footnote 195 of the Final Report), India's argument concerning "commercial considerations" is no longer relevant once one rejects the notion that Article 14(d) of the SCM Agreement requires a two-step analysis. For this reason, there is no need for us to evaluate this argument as an independent ground.

6.58. Turning to India's second point, in our view, the Panel's statement is a fair representation of paragraph 50 of India's first written submission, where India states that "a given 'remuneration' may be 'adequate' under Article 14(d) even if there is a difference between the price in question and the price for the similar goods transacted between private parties in the market concerned". Furthermore, we considered it unnecessary to include a reference to paragraphs 58-62 of India's first written submission, since paragraph 63 of that submission makes it clear that the basic issue addressed in those paragraphs concerns the fact that USDOC "determines a remuneration to be inadequate merely on the basis of a price difference with a certain benchmark price (i.e. Tier-I and Tier-II method), without actually evaluating whether the remuneration is otherwise justified by market or commercial considerations (i.e. Tier-III method)." This is precisely the point addressed by the Panel.

6.3.5 Paragraphs 7.19 and 7.31 (paragraphs 7.19 and 7.31 of the Final Report)

6.59. India recalls that India raised separate and independent arguments on the first and second sentences of Article 14(d) of the SCM Agreement, and submits that the Panel erroneously treated

[82] India's first written submission, para. 23.
[83] India's requests to review precise aspects of the Interim Report, para. 11.
[84] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 15-16.
[85] India's first written submission, para. 84.
[86] Ibid.
[87] India's requests to review precise aspects of the Interim Report, paras. 14-18.
[88] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 20-29.

these two grounds as if they were one. India requests the Panel to correct this error and review its evaluation in the relevant paragraphs accordingly.[89]

6.60. The United States disagrees with India's request, because the Panel found that it was not necessary to evaluate India's arguments with respect to "commercial considerations" in light of the fact that the adequacy of remuneration is assessed from the perspective of the recipient and not the government provider.[90]

6.61. We have decided not to accommodate India's request. As noted above, footnote 80 (footnote 195 of the Final Report) makes it clear that, once Article 14(d) of the SCM Agreement is interpreted properly, the issue of "commercial considerations" is not legally relevant. Furthermore, India improperly suggests that the Panel's findings in section 7.2.3 are concerned exclusively with the first sentence of Article 14(d), when in fact, at paragraph 7.33 (paragraph 7.33 of the Final Report), the Panel also considers aspects relating to the second sentence thereof, particularly the requirement that the adequacy of remuneration be assessed "in relation to prevailing market conditions … in the country of provision".

6.3.6 Section 7.2: India's second ground

6.62. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has failed to do so in the Interim Report.[91]

6.63. The United States disagrees with India's request, because the Panel has already considered and rejected India's argument at issue.[92]

6.64. We have decided not to accommodate India's request, because, as noted above, footnote 80 (footnote 195 of the Final Report) makes it clear that, once Article 14(d) of the SCM Agreement is interpreted properly, the issue of "commercial considerations" is not legally relevant.

6.3.7 Paragraphs 7.26 and 7.28 (paragraphs 7.26 and 7.28 of the Final Report)

6.65. India requests the Panel to clarify the language in paragraphs 7.26 and 7.28, because while the former appears to present a possibility, the latter suggests a more definitive conclusion.[93]

6.66. The United States disagrees with India's request, because the United States considers the language used by the Panel in the paragraphs at issue appropriate, in light of the text of Article 14(d) of the SCM Agreement.[94]

6.67. We have decided to accommodate India's request. Thus, we have amended paragraph 7.28 to more closely reflect the language in Article 14(d) of the SCM Agreement.

6.3.8 Section 7.2.5.2: comparative advantage

6.68. India requests the Panel to evaluate the specific ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.[95]

6.69. The United States disagrees with India's request, because the Panel is not required to include a recitation and separate discussion of every argument put forward by the parties. In any event, the United States submits that the Panel has already both fully considered and rejected

[89] India's requests to review precise aspects of the Interim Report, paras. 21-23.
[90] United States' comments on India's requests to review precise aspects of the Interim Report, para. 32.
[91] India's requests to review precise aspects of the Interim Report, para. 27.
[92] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 34-35.
[93] India's requests to review precise aspects of the Interim Report, para. 31.
[94] United States' comments on India's requests to review precise aspects of the Interim Report, para. 38.
[95] India's requests to review precise aspects of the Interim Report, para. 32.

India's arguments with respect to an alleged "comparative advantage". If the Panel decides to accommodate India's request, the United States requests the Panel to similarly record the United States' submissions in respect of comparative advantage.[96]

6.70. We have decided to partly accommodate India's request. Thus, we have included a footnote at the end of paragraph 7.51 (paragraph 7.51 of the Final Report) with a cross-reference to the Panel's treatment of India's comparative advantage argument at paragraph 7.63 (paragraph 7.62 of the Final Report).

6.3.9 Paragraph 7.47 (paragraph 7.47 of the Final Report)

6.71. India requests that paragraph 7.47 be modified to accurately reflect India's position. India also requests the Panel to revise its findings in paragraph 7.50 (paragraph 7.50 of the Final Report) accordingly.[97]

6.72. The United States disagrees with India's request, because the Panel has accurately captured India's primary argument, and the Panel need not include a separate discussion of every argument put forward by the parties. Moreover, the United States also contends that India's argument at issue lacks factual or legal basis.[98]

6.73. We have decided not to accommodate India's request, as we see no need to amend our description of the "main arguments" made by India. India's argument regarding the use of out-of-country benchmarks "every time there is lack of information relating to in-country benchmark" is clearly linked to this main argument, in the sense that India suggests that the United States' uses lack of information "as an excuse to desecrate the … very narrow exception that has been tailored by the Appellate Body for extreme cases".[99] Once it is established by the Panel that the exception identified by the Appellate Body is not as narrow as India suggests, India's concern about that exception allegedly being "desecrate[d]" becomes moot.

6.74. Regarding the so-called "exhaustion" of Tier I benchmarks, we note that India is referring to an argument, at paragraph 29 of its second written submission, made in response to an argument by the United States regarding the object and purpose of the SCM Agreement. Since the Panel did not consider it necessary to evaluate this US argument in its findings, there is similarly no need for the Panel to evaluate India's response to this argument.

6.3.10 Paragraph 7.49 (paragraph 7.49 of the Final Report)

6.75. India submits that the Appellate Body in *US – Softwood Lumber IV* referred to the use of out of country benchmarks in "very limited" circumstances. India request the Panel to replace the phrase "appropriate circumstances" with the phrase "very limited circumstances".[100]

6.76. The United States disagrees with India's request, because the use of the phrase "appropriate circumstances" is fully consistent with the Appellate Body Report in *US – Softwood Lumber IV*. In addition, the United States contends that India repeats arguments which the Panel has considered and properly rejected in the Interim Report.[101]

6.77. We see no need to make the change proposed by India. Out-of-country benchmarks may be used in appropriate circumstances, irrespective of how limited those circumstances may be.

[96] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 40-41.
[97] India's requests to review precise aspects of the Interim Report, paras. 37-39.
[98] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 47-48.
[99] India's first written submission, para. 79, last sentence.
[100] India's requests to review precise aspects of the Interim Report, paras. 34-35.
[101] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 44-45.

6.3.11 Paragraph 7.60 (paragraph 7.60 of the Final Report)

6.78. India submits that the Panel has taken India's arguments out of context, and requests the Panel to (i) review its findings in paragraph 7.60 and Section 7.2.6.3 accordingly, and (ii) delete paragraph 7.61 (paragraph 7.61 of the Final Report).[102]

6.79. The United States disagrees with India's requests, because contrary to India's assertions the Panel has accurately captured India's arguments.[103]

6.80. We have decided not to accommodate India's requests. We do not agree with India that the Panel has considered an extract from India's oral statement at the first substantive meeting out of context. Paragraph 15 of India's first oral statement expresses the concern that the delivered price will be applied "even if the government price in question does not include such delivery charges". India then refers to the application of this mandatory requirement in cases "where the price under challenge" is *ex works*. At paragraph 16 of its oral statement, India asserts that the delivered price adjustment is made "[e]ven where the prevailing 'conditions of sale' for the **transaction** of the goods **in question** do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis" (bold emphasis added). India then explains that "this method allows the United States to consider something more than the actual *remuneration* received **by the provider of the goods**, which disregards the plain words of Article 14(d)" (bold emphasis added). These subsequent references to the "transaction in question" and the "remuneration received by the provider of the goods" confirm the Panel's understanding of India's argument, and make it clear that the reference in paragraph 15 of India's oral statement was not an isolated case taken out of context by the Panel. The argument is also made at paragraph 8 of India's first written submission, where India indicates that "[e]ven if the *government price* is at ex-factory level, ocean freight, delivery charges and import duties are included in the benchmark price to arrive at delivered prices".

6.81. Finally, the above-mentioned reference to the remuneration of the provider of the goods (which, in the context of Article 14(d) of the SCM Agreement, would indicate the remuneration to the *government* provider) is also included in paragraph 89 of India's first written submission, where India asserts that "transportation and other delivery charges can never be considered as 'remuneration' to the provider of goods" in cases where "terms of sale of the goods in question in the country of provision may be on an ex-works or ex-mines, or CIF or FOB, or anything other than 'delivered'".

6.3.12 Section 7.2.6.3: foreclosure of examination of prevailing market conditions

6.82. India contends that the Interim Report contains no finding on why mandatory foreclosure should or should not be considered an "as such" violation of Article 14(d) of the SCM Agreement, despite India's arguments on this matter. India requests the Panel to evaluate the relevant submissions of India, and review its findings accordingly.[104]

6.83. The United States disagrees with India's request, because contrary to India's assertions the Panel has considered and rejected India's arguments.[105]

6.84. We have decided not to accommodate India's request. India's request is based on an understanding of its argument that would not equate "prevailing market conditions" to the specific conditions of sale by the government provider at issue. As noted above, this does not reflect a proper understanding of India's argument.

[102] India's requests to review precise aspects of the Interim Report, paras. 41-44.
[103] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 49-52.
[104] India's requests to review precise aspects of the Interim Report, paras. 45-46.
[105] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 53-55.

6.3.13 Paragraph 7.62 (deleted from the Final Report)

6.85. India queries the relevance of the Panel's evaluation set forth in paragraph 7.62. India notes that the Panel refers to issues pertaining to India's "as applied" claims, whereas the relevant Section of the Report addresses India's "as such" claim.[106]

6.86. The United States disagrees with India's request, and considers that India's critiques are misplaced.[107]

6.87. We have decided to delete paragraph 7.62 from our Report. We have amended the introduction to paragraph 7.63 (paragraph 7.62 of the Final Report) accordingly.

6.3.14 Section 7.3.1.4

6.88. India requests the Panel to evaluate the implications of the United States' admission before the panel in *US – Anti-Dumping and Countervailing Duties (China)*. India submits that the Panel has neither recorded nor evaluated such matter in the Interim Report.[108]

6.89. The United States disagrees with India's request, because the investigations at issue in the present dispute are wholly distinct from the investigations at issue in *US – Anti-Dumping and Countervailing Duties (China)*, and those statements are simply not relevant to the present dispute.[109]

6.90. We have decided not to accommodate India's request. Our findings should not be based on any alleged admission by the United States in other WTO dispute settlement proceedings. Rather, our findings should be based on the evidence placed on the record by the parties. As this issue was raised in a footnote to India's first written submission, we consider there is no need to include this matter in the summary of India's "main" arguments.

6.3.15 Footnote 131 (footnote 245 of the Final Report)

6.91. India requests the Panel to record that the term "governed by" was never explained by the United States in the determination at issue, and that this term was first explained by the United States before this Panel.[110]

6.92. The United States disagrees with India's request, because India is incorrect in stating that the explanations provided by the USDOC were not contained in the determinations themselves.[111]

6.93. We have decided not to accommodate India's request, because there is no need to provide the requested clarification. As to whether or not the term "governed by" was explained in the USDOC's determinations at issue, we consider that those determinations speak for themselves.

6.3.16 Paragraph 7.82 and footnote 130 (paragraph 7.81 and footnote 244 of the Final Report)

6.94. India requests the Panel to review its findings after properly evaluating the implication of certain USDOC's statements in the 2007 administrative review.[112]

[106] India's requests to review precise aspects of the Interim Report, paras. 47-48.
[107] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 57-58.
[108] India's requests to review precise aspects of the Interim Report, paras. 56-57.
[109] United States' comments on India's requests to review precise aspects of the Interim Report, para. 68.
[110] India's requests to review precise aspects of the Interim Report, para. 58.
[111] United States' comments on India's requests to review precise aspects of the Interim Report, para. 71.
[112] India's requests to review precise aspects of the Interim Report, paras. 59-63.

6.95. The United States disagrees with India's request, because there is no inconsistency between the Panel's acknowledgment of the USDOC's statements and the Panel's findings.[113]

6.96. We have decided not to accommodate India's request. Footnote 130 of the Interim Report explains that, notwithstanding the USDOC's assertion in the relevant issues and decision memorandum, the USDOC had already referred to a factor other than majority government share ownership in a prior determination. There is no contradiction between this statement and the findings of the Panel in paragraphs 7.82-7.84 (paragraphs 7.81-7.83 of the Final Report). Furthermore, the Panel is correct to resolve India's claim on the basis of the totality of the evidence before it.

6.3.17 Paragraph 7.83 (paragraph 7.82 of the Final Report)

6.97. India requests the Panel to (i) consider that the reference to evidence in the 2007 administrative review is irrelevant to the 2004 and 2006 administrative reviews, as the latter pre-dated the former; and (ii) record that the United States has specifically admitted before the Panel that "administrative control" was not used in its determinations.[114]

6.98. The United States disagrees with India's requests. The United States recalls that the Panel has referred to several facts considered by the USDOC in the 2004, 2006 and 2007 administrative reviews. The Interim Report also does not indicate that the evidence referred to in the 2004 administrative review was insufficient to support the USDOC's public body finding. Finally, the United States made no such statements as India contends.[115]

6.99. We have decided not to accommodate India's requests. First, we do not consider that there is any inaccuracy regarding the last sentence of paragraph 7.83 (paragraph 7.82 of the Final Report). While that sentence refers to evidence of government appointment of directors addressed by the USDOC in the 2007 administrative review, paragraph 7.84 (paragraph 7.83 of the Final Report) also discusses similar evidence of government appointment of directors on USDOC's record of the 2004 administrative review. In addition, paragraph 7.83 cites a statement in USDOC's 2007 Issues and Decision Memorandum to the effect that the 2007 evidence "bolsters" the 2004 evidence. Thus, the fact that the 2007 evidence post-dates the 2004 review does not mean that there was no evidence of government appointment of directors in respect of that earlier review.

6.100. Second, we do not consider that the United States should be understood to have admitted that USDOC did not rely on "administrative control" in its determinations. The fact that this phrase may not have been used by the USDOC does not mean that the United States is precluded from relying on evidence – on USDOC's record – of "administrative control" in this Panel proceeding.

6.3.18 Paragraphs 7.85-7.87 (paragraphs 7.84-7.86 of the Final Report)

6.101. India requests the Panel to record the distinction highlighted in the underlying investigation, as well as before the Panel, between GOI *nomination* and GOI *appointment* of directors. India also requests the Panel to examine whether NMDC would be a public body considering that the GOI is involved only in the nomination of a majority of NMDC's board as opposed to appointing a very small minority of NMDC's board.[116]

6.102. The United States does not object to India's request that this argument be recorded by the Panel in its Final Report. The United States submits that this argument does not warrant any changes to the Panel's findings.[117]

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[113] United States' comments on India's requests to review precise aspects of the Interim Report, para. 73.

[114] India's requests to review precise aspects of the Interim Report, paras. 65-66.

[115] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 76-77.

[116] India's requests to review precise aspects of the Interim Report, paras. 65-66.

[117] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 78-79.

6.103. We have decided to accommodate India's request, and have modified paragraph 7.86 to record India's appointment versus nomination argument. However, we do not consider that this argument alters the Panel's findings. We have also amended the first line of paragraph 7.87.

6.3.19 Paragraph 7.87: content of websites (paragraph 7.86 of the Final Report)

6.104. India requests the Panel to record India's rebuttal to this issue, including the fact that annual reports are indeed part of the static portion of the website and such published annual reports are not changed.[118]

6.105. The United States does not object to India's request, and suggests that it could be addressed in existing footnote 140 (footnote 254 of the Final Report). The United States submits that this argument does not warrant any changes to the Panel's findings.[119]

6.106. We have decided to accommodate India's request, and have included a new footnote 255 in the Final Report and modified paragraph 7.87 accordingly. However, our finding remains unchanged, since it is based on the fact that websites are generally not static. Investigating authorities should not be required to trawl through websites, and ascertain what parts of such websites may or not remain unchanged, particularly given the risk that changes may be made at any time by the host, and websites may even disappear.

6.3.20 Paragraph 7.87: consideration of the record (paragraph 7.86 of the Final Report)

6.107. India refers to the Panel's finding that the listing agreement has been submitted only before this Panel and is not part of the records of the USDOC. India requests the Panel to fully consider the records of this case, record India's submissions, and review the relevant Panel's findings.[120]

6.108. The United States disagrees with India's requests. The United States submits that India has no basis for its argument, particularly because India does not point to any record evidence in which the listing agreement was contained or even mentioned.[121]

6.109. We have decided not to accommodate India's request. At paragraph 210 of its first written submission, India asserted that "Essar submitted that NMDC is not a government authority or a public body since the GOI was not involved in the daily operations of NMDC and that NMDC's operations are managed by an independent board consisting of 13 members". There is nothing in India's first written submission to suggest that, in making its argument, Essar was specifically referring to Clause 49 of the Listing Agreement.

6.3.21 Paragraph 7.87: government involvement (paragraph 7.86 of the Final Report)

6.110. India requests the Panel to clarify whether it is the Panel's view that any degree of government involvement in the appointment of NMDC's directors will suffice in concluding that NMDC is a public body. Alternatively, India requests that the relevant statement by the Panel be struck from the Report.[122]

6.111. The United States disagrees with India's clarification request, because this paragraph should not be modified on the basis of the relevance of Clause 49 of the Listing Agreement. While the Interim Report contains an interpretation of Article 1.1(a)(1) of the SCM Agreement, the statement regarding the Listing Agreement does not amount to a general articulation of this

[118] India's requests to review precise aspects of the Interim Report, para. 71.
[119] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 80-81.
[120] India's requests to review precise aspects of the Interim Report, paras. 72-73.
[121] United States' comments on India's requests to review precise aspects of the Interim Report, para. 82.
[122] India's requests to review precise aspects of the Interim Report, paras. 74-75.

provision. However, the United States also requests that the relevant part in paragraph 7.87 identified by India be struck from the Report.[123]

6.112. As both parties agree on the deletion of the relevant part of the Interim Report, we have amended this paragraph accordingly.

6.3.22 Paragraphs 7.87-7.89 (paragraphs 7.86-7.88 of the Final Report)

6.113. India requests the Panel to (i) accurately reflect India's arguments; (ii) record that the United States admitted before the Panel that the alleged "administrative control" was never a factor used by the United States in its determinations; and (iii) delete certain findings in paragraphs 7.87-7.89 because they are not aligned with the proper standard of review of the Panel.[124]

6.114. The United States disagrees with India's requests. The United States fails to see how India's arguments were misrepresented by the Panel. In addition, the United States has never made the admission indicated by India. Finally, the United States submits that India has no basis for arguing that the Panel should delete paragraphs 7.87-7.89 in their entirety.[125]

6.115. We have decided not to accommodate India's requests. The Panel simply addressed Clause 49 and the issue of Navatna/Miniratna status in its findings in response to arguments presented by India. The fact that such evidence was not on the USDOC's record does not mean that India's arguments should simply have been disregarded by the Panel. Furthermore, India has provided no basis for concluding that the relevant evidence should have been on the USDOC's record. Regarding the issue of whether the United States admitted that "administrative control" was never a factor relied on by the USDOC, the United States' response to Panel question No. 42 speaks for itself.

6.3.23 Paragraph 7.88 (paragraph 7.87 of the Final Report)

6.116. India requests the Panel to clarify the meaning of the expression "administrative control" as used by the Panel.[126]

6.117. The United States disagrees with India's clarification request, because this expression is used by NMDC on its own website. The United States submits that the Panel made use of this expression as used by the entity in question, and was not seeking to identify its own characterization of the entity.[127]

6.118. For the sake of clarity, we have amended the beginning of the second sentence of paragraph 7.88.

6.3.24 Paragraph 7.147 (paragraph 7.146 of the Final Report)

6.119. India asks the Panel to review its "as applied" findings in light of India's comments on the Panel's "as such" findings.[128]

6.120. The United States asks us to reject India's request, on the basis of the United States' objections to India's comments regarding the Panel's "as such" findings.[129]

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[123] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 83-84. See also United States' requests to review precise aspects of the Interim Report, para. 7.
[124] India's requests to review precise aspects of the Interim Report, paras. 77-79.
[125] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 86-89.
[126] India's requests to review precise aspects of the Interim Report, para. 76.
[127] United States' comments on India's requests to review precise aspects of the Interim Report, para. 85.
[128] India's requests to review precise aspects of the Interim Report, para. 81.
[129] United States' comments on India's requests to review precise aspects of the Interim Report, para. 90.

6.121. We have already explained that there is no need for us to amend our "as such" findings pursuant to India's comments. Accordingly, there is similarly no need for us to amend our "as applied" findings.

6.3.25 Paragraph 7.160-7.166 (paragraphs 7.159-7.165 of the Final Report)

6.122. India contends that the Panel has committed an error by ruling on matters (in the form of *ex post* rationalizations) that are not before it.[130]

6.123. The United States considers that the Panel is cautious with respect to its finding of *ex post* rationalization. According to the United States, it is therefore appropriate for the Panel to opine on the justification offered by the United States.[131]

6.124. We do not believe it is necessary to amend our findings. Paragraph 7.160 provides ample explanation of the reasons why we consider it appropriate to include the relevant considerations in our Report.

6.3.26 Paragraph 7.183 (paragraph 7.182 of the Final Report)

6.125. India asserts that the Panel has failed to provide any referencing for the relevant statements of the NMDC officials.[132] India also asserts that those statements relate to the setting of export/international prices, rather than domestic prices.[133]

6.126. The United States notes that referencing has been provided by the Panel in footnote 248 (footnote 366 of the Final Report). The United States also asserts that the relevant statements also relate to prices in the domestic market.[134]

6.127. We observe that the references to the relevant statements are already included in footnote 248 of the Interim Report (footnote 366 of the Final Report). Furthermore, the relevant statements make it clear that domestic prices are set in light of "the negotiated international price".

6.3.27 Section 7.4.1.3

6.128. India asks the Panel to include certain factual evidence in its findings.[135]

6.129. The United States asserts that India provides no rationale or explanation for why this information should be included.[136]

6.130. We decline India's request. It is not evident to us, and India has not explained, why the evidence referred to by India is relevant to the Panel's findings.

6.3.28 Section 7.4.3.4

6.131. India asked the Panel to include the fact that the royalty paid for the grant accounts for only a certain percentage of the costs borne by the miner. India also asks the Panel to delete its observation in footnote 310 (footnote 429 of the Final Report) regarding an apparent contradiction in India's position. India denies that there is any contradiction in its position. India also asks the

[130] India's requests to review precise aspects of the Interim Report, paras. 82-86.
[131] United States' comments on India's requests to review precise aspects of the Interim Report, para. 92.
[132] India's requests to review precise aspects of the Interim Report, para. 88.
[133] Ibid. para. 89.
[134] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 96-98.
[135] India's requests to review precise aspects of the Interim Report, para. 90.
[136] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 99-101.

Panel to record India's submission that GOI has no control over how much and in what manner the iron ore is mined.[137]

6.132. The United States asserts that India provides no rationale or explanation for why the proportion of royalty payable should be included in the Panel's findings. The United States asserts that the Panel's evaluation makes it clear that the amount of royalty is irrelevant. Regarding footnote 310 (footnote 429 of the Final Report), the United States contends that the Panel's reference to an inconsistency in India's position is fully supported by the record. The United States also contends that India provides no basis or justification for the Panel to include any reference to India's lack of control over the amount and manner of iron ore mined. The United States asserts that the Panel already rejected India's argument regarding uncertainty, risk and control at paragraphs 7.237-7.238 (paragraphs 7.236-7.237 of the Final Report.[138]

6.133. We decline India's requests. Concerning the amount of royalty and GOI's lack of control over the extraction, India has not explained – and it is not evident to us – why these issues are necessary for, or relevant to, the Panel's findings. Regarding footnote 310 (footnote 429 of the Final Report), we consider that the inconsistency referred to therein is plain. India's assertion to the contrary is unpersuasive.

6.3.29 Paragraph 7.247 (paragraph 7.246 of the Final Report)

6.134. India asks the Panel to exclude certain information which, in its view, is confidential.[139]

6.135. The United States denies that the relevant information is confidential. The United States observes that the relevant information was included in non-confidential submissions to the USDOC, and treated as non-confidential by the USDOC, during the underlying proceedings.[140]

6.136. We have deleted the quotation containing the information referred to by India. The information was included in a quote which, in light of changes reflecting the scope of the Coal Mining Nationalization Act, need no longer be included in the Panel's findings.

6.3.30 Paragraph 7.261 (paragraph 7.260 of the Final Report)

6.137. India asks the Panel to amend its findings to reflect India's argument[141] that remuneration received by a government can only be actual, rather than notional.[142]

6.138. The United States asserts that the Panel already considered and rejected India's argument that government prices be actual as opposed to notional. According to the United States, the question of whether the remuneration received by the government is actual or notional is equivalent to whether remuneration is assessed from the perspective of the government-provider in the first place.[143]

6.139. We decline to make the change proposed by India. India's argument that the government's remuneration can only be actual, rather than notional, is necessarily premised on its view that the adequacy of remuneration is first assessed from the perspective of the government provider. We have already rejected this view in our findings.

[137] India's requests to review precise aspects of the Interim Report, paras. 91-93.
[138] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 102-113.
[139] India's requests to review precise aspects of the Interim Report, para. 94.
[140] United States' comments on India's requests to review precise aspects of the Interim Report, para. 114.
[141] India refers to para. 389 of its first written submission and para. 231 of its second written submission.
[142] India's requests to review precise aspects of the Interim Report, para. 95.
[143] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 115-118.

6.3.31 Paragraph 7.262 (paragraph 7.261 of the Final Report)

6.140. India asks the Panel to review its finding that India's "good faith" claim is outside the Panel's terms of reference. India notes that its request for consultation and request for establishment refer to the nullification or impairment of benefits. India also observes that Article 27 of the *Vienna Convention* indicates that parties to a treaty are required to interpret and apply treaty obligations in good faith. India also refers to various findings of the Appellate Body in support.[144]

6.141. The United States asks the Panel to reject India's request. The United States observes that India's request for establishment contains no "good faith" claim. The United States asserts that an allegation of nullification or impairment is not a reference to "good faith".[145]

6.142. We reject India's request. India has not established that the Panel should address a claim that is not within the Panel's terms of reference, as determined by India's request for establishment. Furthermore, an allegation of nullification or impairment does not amount to an allegation of violation of the principle of "good faith".

6.3.32 Paragraph 7.264 (paragraph 7.263 of the Final Report)

6.143. India asks the Panel to correct an error regarding the scope of its findings in respect of the USDOC's rejection of certain domestic price information submitted by GOI and Tata.[146]

6.144. The United States contends that India's comment fails to address the Panel's explanation for its finding, or the connection between the relevant claims. The United States suggests that the scope of the Panel's findings is explained by the scope of India's claims.[147]

6.145. We acknowledge the inconsistency in our findings, and have amended them accordingly. We have also amended the relevant parts of paragraph 7.266 (paragraph 7.265 of the Final Report), and the Section 8.1 on Conclusions.

6.3.33 Paragraphs 7.404-7.407 (paragraphs 7.403-7.406 of the Final Report)

6.146. India requests the Panel to clarify a number of legal questions relating to the Panel's assessment of whether certain economic factors were evaluated by the USITC in its injury determination. Recalling certain points listed in the Panel's reasoning, India contends that the only relevant point is the evaluation of factors which are closely related to "growth", "return on investment" and "ability to raise capital". Thus, India requests the Panel to "clarify whether it is of the view that as a matter of law, the USITC complies with Article 15.4 [of the SCM Agreement] simply because it evaluates other factors 'closely related' to 'growth', 'return on investment' and 'ability to raise capital', without actually evaluating these factors themselves."[148]

6.147. Second, India contends that "return on investment" requires an analysis of profitability in relation to the capital employed during the relevant period. Thus, India requests the Panel to "clarify whether as matter of law, investigating authorities are entitled to skip separate evaluation of 'return on investment', merely because they have separately analyzed capital expenses, without correlating the same with profitability."[149]

6.148. Finally, India contends that the evaluation of "ability to raise capital" requires a much broader analysis than mere profitability, as it depends on the creditworthiness of a firm and its promoters, other products dealt with by the firm, future outlook of the firm and market, and overall state of affairs of the firm over a certain period of time. Thus, India requests the Panel to

[144] India's requests to review precise aspects of the Interim Report, paras. 96-100.
[145] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 119-120.
[146] India's requests to review precise aspects of the Interim Report, paras. 101-102.
[147] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 121-122.
[148] India's requests to review precise aspects of the Interim Report, paras. 104-105.
[149] Ibid. para. 106.

"clarify whether as matter of law, investigating authorities are entitled to skip separate evaluation of 'ability to raise capital' by merely analyzing 'profitability'."[150]

6.149. The United States submits that India's comments on the Interim Report do not identify any specific issues that require clarification, but rather amount to repetition of India's arguments, which the Panel has already rejected.[151]

6.150. We have decided not to accommodate India's requests. The Appellate Body in *EC – Tube or Pipe Fittings* stated that the *particular facts of each case* will determine whether a panel is able to find in the record "sufficient and credible evidence" that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made.[152] After examining the particular facts of this case, the Panel identified in the record sufficient and credible evidence that the factors at issue were evaluated.[153] On this basis, we refrain from addressing India's queries "as a matter of law".

6.3.34 Paragraph 7.407 (paragraph 7.406 of the Final Report)

6.151. India notes that the USITC has not provided indexed figures or its analysis with regard to information included in Appendix E, and requests that this be recorded in the Panel's Report.[154]

6.152. The United States recalls that the information contained in Appendix E was a compilation of the confidential responses of certain domestic producers, and notes that the redacted individual firm data was provided in aggregate form in the USITC's determination at Table VI-8, among other places.[155]

6.153. We have decided to partly accommodate India's requests. As explained by the United States, Table VI-8 provides in aggregate form the data redacted from Appendix E. For the sake of clarity, however, we have modified footnote 551 (footnote 676 of the Final Report) to address India's request.

6.3.35 Paragraph 7.440 (paragraph 7.439 of the Final Report) and Section 7.5.5.2.1

6.154. India requests the Panel to correct certain alleged errors and re-evaluate independently all three distinct arguments raised by India. First, India contends that the correct reference to India's argument relating to the punitive application of "facts available" should refer to paragraphs 173-174, and 188 of its first written submission. Second, India contends that the Panel incorrectly stated that India's arguments relating to the punitive application of "facts available", and the "evaluative, comparative approach" are "inter-dependent". Third, India asks the Panel to examine its argument relating to the United States' consistent application of the challenged provision within the context of India's alternative argument.[156] Finally, on the basis of the above, India requests the Panel to review its findings regarding India's "as applied" claims.[157]

6.155. According to the United States, India's requests fundamentally relate to whether the Panel has separately and independently recorded and examined India's punitive application argument. The United States submits that the Panel has fully recorded and addressed this argument. In addition, the United States recalls that India challenged the US laws themselves, and not the USDOC's "practice" with respect to the application of "facts available". Thus, the United States

[150] India's requests to review precise aspects of the Interim Report, para. 107.
[151] United States' comments on India's requests to review precise aspects of the Interim Report, para. 123.
[152] See paragraph 7.401 of the interim report, citing the Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[153] See paragraphs 7.402-7.409 of the Interim Report (paragraphs 7.401-7.408 of the Final Report).
[154] India's requests to review precise aspects of the Interim Report, para. 108.
[155] United States' comments on India's requests to review precise aspects of the Interim Report, para. 124.
[156] India's requests to review precise aspects of the Interim Report, paras. 109-115.
[157] Ibid. para. 116.

asks the Panel to reject India's requests relating to both India's "as such" and "as applied" claims.[158]

6.156. We have decided not to accommodate India's requests. First, paragraphs 173-174 of India's first written submission do not refer to India's argument, but rather to India's description of the United States' Statement of Administrative Action, and the understanding of the United States' Court of Appeals for the Federal Circuit. Moreover, paragraph 188 of India's first written submission refers to India's alternative argument relating to the WTO compatibility of discretionary provisions. However, paragraph 7.440 of the Interim Report does not refer to India's alternative argument, and thus should not include a reference to this part of India's first written submission.

6.157. Second, the Panel has not stated that the arguments at issue are "inter-dependent" in paragraph 7.440. India's punitive application argument is summarized at paragraph 7.416 (paragraph 7.415 of the Final Report) as a separate argument, and we specifically addressed it under Section 7.7.5.1.2, which is entitled "adverse conclusions". However, for the sake of clarity, we have modified footnote 608 (footnote 733 of the Final Report), and added a quote from India's first written submission.

6.158. Third, India's alternative argument at issue relates to whether discretionary measures may be found WTO inconsistent. We have explained at footnote 597 (footnote 722 of the Final Report) that our examination is limited to the US provisions "as such", and not the USDOC's "approach" as a "measure", because India's claims related to the US law "as such". In addition, we have found that the measure at issue is not inconsistent with Article 12.7 of the SCM Agreement. Consequently, as explained at footnote 617 (footnote 742 of the Final Report), we need not address whether the United States' measure at issue is not mandatory and thus cannot breach the United States' obligations under the WTO covered agreements.

6.159. Finally, having decided not to accommodate India's requests discussed above, we also decide not to accommodate India's corresponding requests relating to its "as applied" claims.

6.3.36 Paragraph 7.465 (paragraph 7.464 of the Final Report)

6.160. India requests the Panel to explain how the determination in the 2008 administrative review is not contrary to the "facts available" from the 2006 administrative review, taking into account the uncontested definition of "new industrial unit" and that Tata could not fall within this definition.[159] In addition, India requests the Panel to explain whether the determination of 6.06% subsidy margin against Tata for the alleged benefit under certain subsidy programmes was justified under Article 12.7 of the SCM Agreement, when the maximum benefit under the pollution control equipment subsidy and the feasibility study and project report cost reimbursement programme was respectively INR 2 million and INR 0.05 million.[160]

6.161. The United States asks the Panel to reject India's requests because information from a prior administrative review cannot be used as facts available for a later review when interested parties have not provided, as requested, any relevant information pertaining to the later period.[161]

6.162. We have decided not to accommodate India's requests. With respect to the subsidy programmes on exemption of electricity duty, capital power generating subsidy, interest subsidy, and stamp duty and registration, and the pollution control equipment subsidy, we have found at paragraph 7.465 that there was a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information in the record of the 2008 administrative review. We recall the United States' arguments, summarized at paragraph 7.463 (paragraph 7.462 of the Final Report), that the USDOC could not have automatically relied on the information submitted in the 2006 administrative review, without any relevant information being provided by interested parties in the 2008 administrative review. In

[158] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 125-131.
[159] India's requests to review precise aspects of the Interim Report, paras. 117-120.
[160] Ibid. paras. 121-124.
[161] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 132-137.

addition, with regard to the 6.06% subsidy rate for the pollution control equipment subsidy, the United States submitted that the USDOC "applied the benefit rate of a cooperating company for a similar program."[162] Finally, at paragraph 7.466 (paragraph 7.465 of the Final Report), we have already upheld India's claim under Article 12.7 of the SCM Agreement regarding the programme on feasibility study and project report cost reimbursement, and thus need not address India's additional argument.

6.3.37 Section 7.7.5.2.9

6.163. India requests the Panel to consider that the 2013 sunset review determinations are also inconsistent with Article 12.7 of the SCM Agreement to the extent they repeat those instances held inconsistent with this provision in the 2006, 2007 and 2008 administrative reviews.[163]

6.164. The United States submits that the interim review stage is not an appropriate time to raise new arguments, and that the Panel has already addressed the relevant arguments and evidence submitted by India.[164]

6.165. We have decided not to accommodate India's request, because it does not change the reasons that led us to conclude, at paragraph 7.480 (paragraph 7.479), that we are unable to evaluate India's claims.

6.3.38 Paragraphs 7.501-7.509 (paragraphs 7.500-7.508 of the Final Report)

6.166. India requests the Panel to clarify whether the Panel intended to exercise judicial economy with regard to India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement. India also requests that the Panel make a specific finding on whether the United States has complied with these provisions. India argues that its claims under these provisions were entirely independent from India's other claims relating to new subsidy allegations.[165]

6.167. The United States submits that the Panel has correctly addressed India's claims, and asks the Panel to reject India's requests.[166]

6.168. We have decided not to accommodate India's request. The Panel has not exercised judicial economy with regard to India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement. Rather, at paragraphs 7.502-7.508, we explained that as the USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to examine new subsidy allegations in the administrative reviews at issue, there was no need to examine the provisions at issue regulating investigations.

7 FINDINGS

7.1. This case concerns the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India challenges certain provisions of the United States Tariff Act, 1930 "as such" and "as applied" in the context of the relevant countervailing duties investigations. India's claims pertain to various procedural and substantive provisions of the SCM Agreement and, consequently, to Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. The United States denies India's claims.

7.2. We shall begin by examining India's substantive claims. Thereafter, we shall turn to India's procedural claims. Before reviewing India's claims, though, we recall a number of general principles regarding treaty interpretation, standard of review and burden of proof in WTO dispute settlement proceedings.

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[162] United States' response to India's question No. 10(d)(ii), para. 23.
[163] India's requests to review precise aspects of the Interim Report, para. 128.
[164] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 138-140.
[165] India's requests to review precise aspects of the Interim Report, paras. 129-133.
[166] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 141-142.

7.1 General principles regarding treaty interpretation, the applicable standard of review and burden of proof

7.1.1 Treaty Interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.

7.1.2 Standard of Review

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

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

7.5. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency 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 supported the overall determination.[167]

7.6. The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[168] At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[169]

7.1.3 Burden of Proof

7.7. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[170] Therefore, as the complaining party, India bears the burden of demonstrating that the measures at issue from the United States are inconsistent with the WTO agreements invoked by India. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[171] Finally, it is generally for each party asserting a fact to provide proof thereof.[172]

7.2 The United States' benchmarking mechanism

7.8. India challenges US Regulation Section 351.511(a)(2)(i) to (iv) "as such". Section 351.511(a)(2)(i) to (iii) contains the price benchmarking mechanism to be applied by the USDOC when determining whether or not the provision of goods by a government or public body confers a benefit on the recipient. Section 351.511(a)(2)(iv) provides that price comparisons shall be made at the delivered level.

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[167] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[168] Ibid. para. 187.
[169] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93.
[170] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[171] Appellate Body Report, *EC – Hormones*, para. 104.
[172] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.9. India makes a number of claims regarding the consistency of Section 351.511(a)(2)(i)-(iii) with Article 14(d) of the SCM Agreement. First, India claims that the hierarchical preference provided for in the US benchmarking mechanism conflates two separate issues, namely (i) the adequacy of remuneration paid for the good and (ii) benefit. India claims that, by focusing on the issue of benefit to the recipient, the United States fails to determine the threshold issue of whether or not the remuneration is adequate for the government provider of the good. India contends that there can be no benefit to the recipient of the good if the remuneration is adequate for the government provider, even if the price paid by the recipient is lower than a market benchmark. Second, India claims that prices set by the government provider of goods should be included as part of the "prevailing market conditions" referred to in the second sentence of Article 14(d). Third, India claims that the use of world market prices under Tier II of the benchmarking mechanism is inconsistent with Article 14(d).

7.10. India submits that Section 351.511(a)(2)(iv) is inconsistent with Article 14(d) and, consequently with Articles 19.3 and 19.4, because the requirement to use delivered prices means that the price benchmark will not relate to prevailing market conditions in the country of provision in all cases.

7.11. The United States asks the Panel to reject India's claims.

7.2.1 Relevant WTO provision

7.12. Article 14(d) of the SCM Agreement provides that:

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

7.13. Article 19.3 of the SCM Agreement provides in relevant part:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non–discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

7.14. Article 19.4 of the SCM Agreement provides that:

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. (footnote omitted)

7.2.2 Relevant US provision

7.15. The text of Section 351.511(a)(2)(i) to (iv) is reproduced below:

> § 351.511 Provision of goods or services.
>
> (a) Benefit—(1) In general. In the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration. See section 771(5)(E)(iv) of the Act.
>
> (2) ''Adequate Remuneration'' defined—
>
> (i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for

the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

(ii) Actual market-determined price unavailable. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) World market price unavailable. If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

(iv) Use of delivered prices. In measuring the adequacy of remuneration under Paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

7.16. We begin by assessing India's claim regarding the hierarchical preference provided for in Section 351.511(a)(2)(i) to (iii).

7.2.3 Whether Section 351.511(a)(2)(i) to (iii) is inconsistent with Article 14(d) because it fails to assess the adequacy of remuneration from the perspective of the government provider, before assessing whether there is benefit to the recipient

7.2.3.1 Main arguments of the parties

7.2.3.1.1 India

7.17. India considers that (i) adequacy of remuneration for the government provider of a good and (ii) benefit to the recipient are distinct issues. For India, the adequacy of remuneration for the government provider of goods is a "threshold condition to be answered prior to going into the question of benefit".[173] India submits that "unless the remuneration is less than adequate, the question of calculating benefit does not arise within the meaning of Article 14(d)".[174] India submits that the United States' benchmarking mechanism fails to address the adequacy of remuneration prior to an examination of benefit[175], since it contains a preference for determining benefit using Tier I and Tier II price benchmarks, and only provides for a Tier III analysis of the adequacy of remuneration for the government provider when Tier I and II price benchmarks are not available. India submits that, to the extent that adequacy of 'remuneration' to the provider of the goods is not evaluated in every case, the relevant US provisions are inconsistent with the two-pronged approach provided for in the first sentence of Article 14(d).[176]

7.18. India submits that the fact that Article 14(d) distinguishes between the terms "remuneration" and "benefit" indicates that the concepts are different. India suggests that to argue otherwise would result in a circular provision. According to India, measuring the adequacy of "remuneration" seems to be the pre-requisite for calculating the "benefit" to the recipient. India contends that the verb "remunerate" means "pay (someone) for services rendered or work

[173] India's second written submission, para. 10.
[174] India's response to Panel question No. 4.
[175] India's second written submission, para. 14.
[176] India's first written submission, para. 32.

done"[177] and the noun "remuneration" refers to the "money paid for work or a service".[178] India suggests that this ordinary meaning implies that there is someone who is being remunerated for the work done or services rendered. India notes that, in the case of provision of goods or services, the structure of Article 1.1(b) and Article 14(d) refers to only two entities – the *receiver of the goods* and the *provider of the goods.* India asserts that since "benefit" is anyway being assessed from the perspective of the *receiver of the goods*, the term "remuneration" is to be seen from the perspective of the *provider of the goods*. In making this argument, India submits that it is not seeking to redefine the term "benefit" using a cost-to-government standard. Indeed, India does not dispute that, once the question of benefit arises, it is "to be measured from the perspective of the recipient of the goods".[179] According to India, though, the adequacy of remuneration for the government provider of the good must be examined before considering whether there is any benefit to the recipient.

7.19. India considers that its position is supported by differences in the structure of the various sub-paragraphs to Article 14.[180] According to India, sub-paragraphs (b) and (c) clearly state that the method to calculate benefit is by reference to a "comparable", such that benefit is calculated using a comparative benchmark. India submits that sub-paragraph (d), by contrast, uses a different structure, providing that no benefit may be found unless – and therefore as a threshold issue - remuneration for the government provider is inadequate. India contends that, unlike the structure of sub-paragraphs (b) and (c), Article 14(d) does not specify that benefit shall be established using a comparative benchmark. In particular, Article 14(d) does not state that the provision of goods would confer a benefit as soon as there is a difference in the amount paid by the recipient for the goods provided by the government and the amount the recipient would have to pay to obtain the same goods on the market.

7.20. India submits that remuneration may be adequate for the government provider of goods even though the price paid by the recipient may be less than a market benchmark.[181] According to India, remuneration paid by the recipient will be adequate for government providers of goods if it is based on commercial considerations, irrespective of the results of comparisons with the price that the recipient would have to pay on the market. India asserts that a price based on commercial considerations will necessarily relate to "prevailing market conditions", as required by the second sentence of Article 14(d). India notes in this regard that Article XVII:1(b) of the GATT 1994 requires state trading enterprises to make any purchases or sales solely in accordance with "commercial considerations", and states that such considerations include "price, quality, availability, marketability, transportation and other conditions of purchase or sale". India contends that the fact that the "commercial considerations" enumerated in Article XVII:1(b) of the GATT 1994 are the same as the "prevailing market conditions" set forth in Article 14(d) of the SCM Agreement must be given meaning. India also refers to WTO case law regarding the interpretation and application of Article XVII:1(b) of the GATT 1994.[182]

7.2.3.1.2 United States

7.21. The United States asserts that its benchmarking mechanism properly assesses the adequacy of remuneration. The United States submits that Article 14(d) defines "benefit" by reference to the concept "adequacy of remuneration".[183] The United States contends that the essence of the benefit determination under the SCM Agreement is to determine whether the recipient is better off in light of the government financial contribution than if the recipient had relied on the market, a determination which involves assessing whether the recipient obtained something "on terms more favorable than those available in the market."[184] The United States submits that, to do this, an investigating authority must compare the difference between the government price and a private, arm's-length benchmark price. To the extent that the government price is less than the market benchmark price, the remuneration for the government is not adequate, and a benefit is conferred

[177] *The Oxford Dictionary of English*, 3rd ed., A. Stevenson (ed.) (Oxford University Press, 2010), p. 1503.
[178] Ibid.
[179] India's second written submission, paras. 12 and 13.
[180] India's first written submission, paras. 49 and 50.
[181] Ibid. para. 50.
[182] Ibid. paras. 34-47.
[183] United States' first written submission, para. 44.
[184] United States' second written submission, para. 7, citing to *Canada – Aircraft (Panel)*, para. 9.112.

on the recipient. The United States submits that the analysis under Article 14(d) is therefore not the two-step process suggested by India, but rather a (single) comparative exercise.[185]

7.22. The United States argues that the structure of Article 14(d) is no different from that of Article 14(b) or (c). The United States asserts that a consistent structure is employed throughout these provisions, since each provision identifies a condition that must be satisfied in order to establish that a benefit has been conferred.[186] The United States contends that each sub-paragraph of Article 14 provides for a determination of the existence of a benefit based on some deviation between what a recipient has actually paid and what they would otherwise have paid according to a benchmark price. For loans, subparagraph (b) prescribes that a benefit exists if there is a "difference" in the price of a governmental loan versus a "comparable commercial loan." For loan guarantees, subparagraph (c) similarly identifies a benefit if there is a "difference" between the amounts a firm pays for a loan with a government guarantee compared with what a "firm would pay on a comparable commercial loan absent the government guarantee." For the provision of goods and services, subparagraph (d) states that a benefit exists if the government provides the goods or services in exchange for "less than adequate remuneration" or if the government purchases such goods or services for "more than adequate remuneration." The United States contends that terms such as "less than" or "more than" are comparative in nature, just like the term "difference" in Article 14(b) and (c).

7.23. The United States rejects India's argument that remuneration will necessarily be adequate in relation to the prevailing market conditions if it is based on commercial considerations. The United States contends that nothing in the text of Article 14(d) states or implies that "prevailing market conditions" means "in accordance with commercial considerations."

7.2.3.2 Main arguments of the third parties

7.2.3.2.1 European Union

7.24. The European Union asserts that India's claims appear to be based on flawed interpretations of Article 14(d) of the SCM Agreement. The European Union contends that the perspective of the provider of the goods or services, in the sense of whether the government makes a reasonable return when providing the goods or services in question, is not dispositive in determining the existence of "benefit" under Article 1.1(b) or its amount in accordance with Article 14(d) of the SCM Agreement. The perspective of the provider advocated by India is similar to the "cost to the government" approach that has already been rejected to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement. According to the European Union, the Appellate Body Report in *Canada – Aircraft* stands for the proposition that a "benefit" is to be determined, not by reference to whether the transaction imposes a net cost on the government, but rather by reference to whether the terms of the financial contribution are more favourable to what is available to the recipient on the market.

7.2.3.2.2 Saudi Arabia

7.25. Saudi Arabia submits that, in determining whether the government provision of a good confers a benefit, an investigating authority may use a benchmark other than private, in-country prices in "very limited" circumstances. Article 14(d) of the SCM Agreement establishes domestic market prices as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should be the first reference point used by an investigating authority to determine benefit. Saudi Arabia asserts that in order to reject private, in-country benchmarks when determining whether a government-provided good confers a benefit, an investigating authority must establish that domestic prices of that good are "distorted". The government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion. Saudi Arabia contends that although external benchmarks may be used in very limited situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions, and because they negate comparative advantages. Saudi Arabia contends that

[185] United States' second written submission, para. 8.
[186] Ibid. para. 11.

where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks.

7.2.3.3 Evaluation

7.26. The first sentence of Article 14(d) provides that the government provision of a good "shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration". In our view, the word "unless" in the first sentence of Article 14(d) establishes a clear textual connection between the existence of benefit on the one hand, and the adequacy of remuneration on the other. If remuneration is found to be inadequate, the subsidy may be considered to confer a benefit. If the remuneration is found to be adequate, the subsidy may not be considered to confer a benefit. There is nothing in the text of Article 14(d) to suggest that the question of the adequacy of remuneration is a separate threshold issue, such that the question of benefit only arises – as a separate and subsequent matter – after the question of adequacy of remuneration has been resolved.

7.27. India asserts that "in explaining how … 'benefit' is to be calculated, Article 14(d) refers to a second term 'remuneration'".[187] India's statement is consistent with our view that the first sentence of Article 14(d) establishes a clear textual connection between the issues of benefit and adequacy of remuneration. Indeed, it is precisely for this reason that, as acknowledged by India, Article 14(d) refers to the term "remuneration" in explaining how "benefit" is to be calculated.

7.28. India goes on to argue that the use of different terms - "benefit" and "remuneration" - "suggests that the word 'remuneration' is not intended to be the same as 'benefit' and to argue otherwise, would only result in a circular provision".[188] In our view, the circularity alluded to by India would only arise if the issues of adequacy of remuneration and benefit were assessed separately, but on the basis of the same standard. As explained above, though, we do not consider that Article 14(d) envisages the issues of adequacy of remuneration and benefit being assessed separately. Rather, assessing the adequacy of remuneration is part of the process of determining whether a benefit exists. Our understanding is not affected by the use of the distinct terms "remuneration" and "benefit" in Article 14(d). The term "remuneration" relates to the sum that is paid for the good provided by the government. The term "benefit", by contrast, relates to the notion that the recipient received the good on terms more favourable than it could have obtained that good from the market. These terms are necessarily different, since they relate to different notions, and thereby allow for the possibility that the level of remuneration will not confer a benefit in all cases. However, although the terms "remuneration" and "benefit" are different, they are nevertheless connected by the concept of adequacy, establishing that a given amount of "remuneration" may be considered to confer a "benefit" if it is not adequate.

7.29. As for the perspective from which the adequacy of remuneration should be assessed, we note India's argument that since "benefit" is determined from the perspective of the receiver of the goods, "remuneration" should be assessed from the perspective of the provider of the goods.[189] India's argument that the adequacy of remuneration and benefit may be assessed in respect of different entities is based on its argument that the adequacy of remuneration and benefit should be assessed separately. Since we have rejected this argument, and find that determining the adequacy of remuneration is part of the process of determining whether benefit exists, we also exclude the possibility of assessing the adequacy of remuneration and existence of benefit in respect of different entities.

7.30. We note that India does not dispute the United States' argument that "benefit" should be assessed by reference to the recipient.[190] It is well established in WTO dispute settlement that this is the case, and that a benefit is conferred when a financial contribution makes the recipient better off than it would have been relative to what is available through the market. Since benefit is established from the perspective of the recipient, and since the adequacy of remuneration forms part of the assessment of benefit, the adequacy of remuneration must also, in our view, be

[187] India's first written submission, para. 23.
[188] Ibid. para. 23.
[189] Ibid. paras. 24 and 25.
[190] India's second written submission, paras. 12 and 13.

established from the perspective of the recipient. Furthermore, since benefit is assessed by reference to the market, so too must be the adequacy of remuneration.[191]

7.31. India suggests that an assessment of the adequacy of remuneration from the perspective of the recipient, by reference to the market, ignores relevant context concerning the alleged decision by the drafters of Article 14 to adopt a different structure for sub-paragraph (d) than for sub-paragraphs (a), (b) and (c). India notes in this regard that Article 14(a) provides that no benefit shall be conferred unless the provision of equity capital is "inconsistent" with usual investment practice. India also notes that sub-paragraphs (b) and (c) provide that no benefit shall be conferred unless there is a "difference" between the amount paid by the recipient (for the loan and loan guarantee, respectively) and the amount that the recipient would have to pay on the market. India contends that sub-paragraph (d) of Article 14, by contrast, provides for a "more comprehensive framework". India notes that the drafters of Article 14(d) did not specify that benefit would be conferred once there is a difference between the amount paid by the recipient to the government and the amount that the recipient would have paid on the market. According to India, this means that the adequacy of remuneration is not determined by simply comparing the government price to a market benchmark.

7.32. We are not persuaded by India's reliance on alleged structural differences in Article 14. We agree with the United States[192] that the first sentence of Article 14(d) provides for a comparative analysis in the same way that sub-paragraphs (b) and (c) of Article 14 do. In the context of the provision of goods, the comparative analysis envisaged by Article 14(d) concerns the question of whether the remuneration is "less than" adequate. The phrase "less than" is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market, as determined in relation to the prevailing market conditions. The fact that Article 14(d) does not use the term "difference" does not detract from the comparative nature of the analysis inherent in the first sentence of Article 14(d).[193]

7.33. Furthermore, the second sentence of Article 14(d) provides that the adequacy of remuneration shall be assessed in relation to the prevailing market conditions. This textual consideration prompted the Appellate Body to state in *US – Softwood Lumber IV* that "private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods".[194] Thus, the Appellate Body has also accepted that the structure of Article 14(d) allows Members to assess the adequacy of remuneration, and therefore existence of benefit, by comparing the government price to a market benchmark. Once it is established that the price paid to the government provider is less than the price that would be required by the market, assessed in relation to prevailing market conditions, the remuneration afforded by the government price is inadequate, and a benefit is conferred.[195]

7.34. Finally, we observe that India's claims are brought under Article 14(d) of the SCM Agreement. The title of Article 14 explains that Article 14 is concerned with the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient". Even India acknowledges that "all the guidelines present in Article 14 have been provided in the context of determining the

[191] This approach is consistent with the finding by the Appellate Body in *US – Softwood Lumber IV* (para. 90) that "private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods". In our view, this finding confirms that the adequacy of remuneration is established by reference to the market.

[192] See, for example, United States' second written submission, paras. 10-15.

[193] The comparative analysis required by Article 14(d) is similar to that required by Article 14(a) which, while not using the term "difference", nevertheless requires a comparison of the "investment decision" with "usual investment practice".

[194] Appellate Body Report, *US – Softwood Lumber IV*, para. 90. The issue before the Appellate Body was not whether or not Article 14(d) could be applied on the basis of benchmarking *per se*. The issue before the Appellate Body was rather whether or not external benchmarks could be used instead of domestic benchmarks (i.e. those prevailing in the country of provision). In concluding that external benchmarks could be used in certain circumstances, the Appellate Body necessarily accepted the use of benchmarking mechanisms in the application of Article 14(d).

[195] The fact that the government price may have been set according to "commercial considerations" is then irrelevant, for the adequacy of remuneration is not assessed from the perspective of the government provider. For this reason, it is not necessary for us to examine India's "commercial considerations" argument – including in particular its reliance on case law concerning the interpretation of Article XVII:1(b) of the GATT 1994 - in any detail.

benefit conferred on the recipient".[196] In this context, it would be incongruous to find that the United States has violated a provision of Article 14 by doing precisely what Article 14 is concerned with, namely calculating benefit in terms of benefit to the recipient, simply because it did not first, as a separate matter, determine the adequacy of remuneration to the government provider of the good.

7.35. For the above reasons, we reject India's claim that Section 351.511(a)(2)(i) to (iii) "as such" is inconsistent with Article 14(d) of the SCM Agreement because it fails to require that the adequacy of remuneration be assessed from the perspective of the government provider before assessing benefit to the recipient.

7.2.4 The exclusion of government prices from Tier I and II benchmarks

7.2.4.1 Main arguments of the parties

7.36. India claims that the United States' benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because the mechanism excludes the use of government prices as Tier I or II benchmarks. India submits that this is contrary to the requirement in Article 14(d) that benchmarks for the government provision of goods should be determined in relation to "prevailing market conditions" in the country of provision. According to India, government prices form part of the "prevailing market conditions".

7.37. The United States contends that its benchmarking mechanism does not, in fact, exclude government prices in all cases.[197] The United States asserts that Section 351.511(a)(2)(i) allows for the inclusion of prices from government sales where those prices are market-determined, such as through competitively run government auctions. Where this is not the case, the United States submits that government prices for the provision of goods must be excluded from the Article 14(d) benchmarks because, according to established WTO case law, the term "benefit" requires a comparison of the financial contribution received by the recipient to what it would otherwise receive on the market.

7.2.4.2 Evaluation

7.38. As a factual matter, we observe that India does not dispute the United States' assertion that government prices are not excluded from the benchmarking mechanism in all cases. The factual premise for India's claim is therefore undermined.

7.39. Furthermore, we consider that it would be circular, and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit. In addition, as noted above, benefit is assessed in relation to the market. Since governments may set prices in order to pursue public policy objectives, rather than market-based profit maximization, we see no basis for requiring investigating authorities to include government prices when determining market benchmarks in the context of Article 14(d). In particular, we do not consider that investigating authorities should be required to treat government prices as being representative of "prevailing market conditions" within the meaning of the second sentence of that provision.

7.40. Our approach to this issue is consistent with the following findings by the Appellate Body in *US – Softwood Lumber IV*:

> Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar

[196] India's first written submission, para. 49.
[197] United States' first written submission, para. 67.

> goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.[198]

7.41. We consider it noteworthy that the Appellate Body consistently refers to *private* prices in the above extract. It is *private* prices in the country of provision that are the "primary benchmark" for assessing the adequacy of remuneration.

7.42. According to India, the above findings by the Appellate Body mean that the government price may only be rejected as a price benchmark in situations where the government is the sole or dominant provider of the goods.[199] We disagree. Because governments are generally not profit-maximizers, but instead often pursue public policy objectives when providing goods to recipients in their territory, government prices need not be presumed to reflect market principles. When the government is not dominant in a market, the non-market aspect of government pricing will generally not distort private prices in that market. In such cases, those domestic private prices may serve as a benchmark for the purpose of Article 14(d). When the government is dominant in a market, as was the case in *US – Softwood Lumber IV*, the non-market aspect of government prices may distort private prices in the domestic market, such that those domestic prices may not then be used as an Article 14(d) benchmark. In such cases, private prices in other markets may be used as benchmarks, provided they are properly adjusted to reflect the prevailing market conditions in the country of provision. Thus, the fact that a government is not dominant in its domestic market does not mean (as argued by India) that the government's prices are likely to reflect market principles, and therefore be indicative of prevailing market conditions. It simply means that those government prices, which in any event need not be presumed to reflect market principles (because the government's pricing may be determined by policy objectives other than profit-maximization), would likely not have distorted *private* prices in that market, such that those *private* prices may serve as benchmarks for the purpose of Article 14(d).

7.43. India also relies[200] on the following findings by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*:

> Although the Panel did not explicitly rule on the issue, it stated that one possible interpretation of "commercial" could be that any loan made by the government would *ipso facto* not be "commercial". In our view, it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be "commercial". We see nothing to suggest that the notion of "commercial" is *per se* incompatible with the supply of financial services by a government. Therefore, the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not "commercial" and thus incapable of being used as benchmarks under Article 14(b) of the *SCM Agreement*. An investigating authority would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks.[201]

7.44. India refers in particular to the Appellate Body's statement that "it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be 'commercial'". We do not understand this statement to mean that government prices should necessarily be used as market benchmarks for the purpose of Article 14(d). Noting in particular the last sentence in the above extract, which refers to potential distortions caused by government presence or influence in the market, we understand the Appellate Body to be repeating, for the purpose of Article 14(b), the approach that it took in *US –*

[198] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[199] India's response to Panel question No. 10, and fn. 255 to India's second written submission.
[200] India's second written submission, para. 192.
[201] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 479.

Softwood Lumber IV in respect of Article 14(d), as outlined above. Indeed, we observe that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body subsequently referred expressly to the issue of distortion caused by government intervention:

> notwithstanding the differences between Article 14(b) and (d) … [r]eading Article 14(b) as always requiring a comparison with loans denominated in the same currency as the investigated loans, even in circumstances where all loans in the same currency are distorted by government intervention, would lead to a comparison with government distorted loans, thus frustrating the purpose of Article 14(b). If loans in a given market and in a given currency are distorted by government intervention, an investigating authority should be permitted, in certain circumstances also under Article 14(b), to use a benchmark other than "a comparable commercial loan which the firm could actually obtain on the market".[202]

7.45. We are therefore not persuaded by India's reliance on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

7.46. For the above reasons, we reject India's claim that the United States' benchmarking mechanism is "as such" inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices as Tier I and II price benchmarks.

7.2.5 The use of world market prices as Tier II price benchmarks

7.2.5.1 Main arguments of the parties

7.47. India claims that the United States' benchmarking mechanism violates Article 14(d) because it provides for the use of world market (Tier II) price benchmarks whenever Tier I in-country benchmarks are not available. There are three components to India's claim. First, India submits that the text of Article 14(d) *per se* excludes the use of out-of-country benchmarks.[203] Second, India submits that out-of-country benchmarks may in any event only be used in situations where the market of the country of provision is distorted because of the predominant role of the government provider.[204] Third, India submits that the United States' benchmarking mechanism fails to require that the conditions prevailing in the country from which the Tier II benchmark is taken relate to the market conditions prevailing in the country of provision.[205]

7.48. The United States[206] rejects India's assertion that the text of Article 14(d) precludes out-of-country benchmarks. The United States asserts that the Appellate Body has confirmed that out-of-country prices may be used. The United States contends that a contrary interpretation would mean that where in-country prices do not exist or are not useable, the rights and obligations contained in the SCM Agreement would cease to apply.

7.2.5.2 Evaluation

7.49. We are not persuaded by India's assertion that Article 14(d) *per se* excludes the use of out-of-country benchmarks. The fact that out-of-country benchmarks may be applied in the context of Article 14(d) was clarified by the Appellate Body in *US – Softwood Lumber IV*. We are guided by the findings of that case, and therefore conclude that the use of out-of-country benchmarks in appropriate circumstances is not inconsistent with Article 14(d).

7.50. Nor are we persuaded by India's assertion that out-of-country benchmarks may only be used in the context of Article 14(d) of the SCM Agreement in situations where the market in the country of provision is distorted because of the predominant role of the government provider. There is nothing in the text of that provision to support India's assertion. Furthermore, while India relies on the findings of the Appellate Body in *US – Softwood Lumber IV*, we note that the Appellate Body's findings in that case were necessarily circumscribed by the facts of that case.

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[202] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 484.
[203] India's first written submission, para. 77.
[204] Ibid. para. 79.
[205] Ibid. para. 82.
[206] United States' first written submission, paras. 68-70.

Since that case concerned a situation in which the government provider of goods did, in fact, play a predominant role in the market, the Appellate Body only addressed the application of out-of-country benchmarks in that situation. Indeed, the Appellate Body expressly stated that "[c]onsidering that the situation of government predominance in the market, as a provider of certain goods, is the only one raised on appeal by the United States, we will limit our examination to whether an investigating authority may use a benchmark other than private prices in the country of provision in that particular situation".[207] However, this does not mean that the reasoning underlying the Appellate Body's findings in that case can not apply, with equal force, in other situations, in which the government is not a predominant provider.

7.51. We next consider India's assertion that the United States' benchmarking mechanism fails to require that Tier II benchmarks must relate to the prevailing market conditions in the country of provision. In this regard, we note that the benchmarking mechanism implements 19 U.S.C. § 1677(5)(E), which provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review".[208] Since the overarching statutory provision requires that the adequacy of remuneration must in all cases be assessed in relation to the prevailing market conditions in the country of provision, in law Tier II benchmarks applied pursuant to the implementing regulation (i.e. Section 351.511(a)(2)(ii)) must also relate to the prevailing market conditions in the country of provision. Accordingly, there is no basis for India's claim that the United States' benchmarking mechanism "as such" provides for the use of Tier II benchmarks that do not reflect prevailing market conditions in the country of provision.[209]

7.52. For these reasons, we reject India's claim that the use of world market prices as Tier II benchmarks provided for in Section 351.511(a)(2)(ii) "as such" is inconsistent with Article 14(d) of the SCM Agreement.

7.2.6 Whether Section 351.511(a)(2)(iv) is inconsistent with Article 14(d) because it requires the use of delivered prices for benchmarking

7.53. India submits that Section 351.511(a)(2)(iv) "as such" is inconsistent with Article 14(d), and consequently also Articles 19.3 and 19.4[210], of the SCM Agreement because it mandates that the government provider price and the benchmark price be compared on a delivered basis.

7.2.6.1 Main arguments of the parties

7.2.6.1.1 India

7.54. India contends that the mandatory use of delivered prices in the benchmarking mechanism ignores the Article 14(d) requirement that the adequacy of remuneration is to be determined in "relation to the prevailing market conditions", including conditions of sale, in the country of provision. India submits that the second sentence of Article 14(d) requires that consideration of the prevailing market conditions for the goods in question in the country of provision includes an assessment of the "conditions of … sale" prevailing in the country of provision, for the goods in question. India contends that the use of delivered prices is a legal fiction contrary to Article 14(d) in cases where the conditions of sale prevailing in the country of provision do not include delivery.[211] India contends that, in such cases, the mandatory inclusion of delivery charges (including import duties where relevant) eliminates the possibility of adjustments for the terms and conditions of sale prevailing in the country of provision[212]. India submits that Section 351.511(a)(2)(iv) is inconsistent with Articles 19.3 and 19.4 for "substantially the same reasons".[213]

[207] Appellate Body Report, *US – Softwood Lumber IV*, para. 99.
[208] 19 U.S.C. § 1677(5), Exhibit USA-4, internal page 344.
[209] We also note that we reject India's comparative advantage argument at para. 7.62 below.
[210] India contends that Section 351.511(a)(2)(iv) is inconsistent with Articles 19.3 and 19.4 "to the extent that" there is an inconsistency with Article 14(d) (India's first written submission, para. 99).
[211] India's first written submission, paras. 88-89.
[212] India's second written submission, para. 36.
[213] India's first written submission, para. 104.

7.2.6.1.2 United States

7.55. The United States submits that India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. The United States contends that the adequacy of remuneration should rather be assessed with respect to the recipient. The United States also contends that the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation.

7.56. The United States asserts that an ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the purchaser's factory in establishing the market negotiated price. The United States asserts that India's interpretation would artificially isolate delivery costs from the price of a good and therefore shield it from the actual prevailing market conditions. According to the United States, such an interpretation would not fulfil the purpose of the Article 14(d) benchmark comparison – which is to assess whether the recipient is better off than it would have been absent that financial contribution.

7.57. The United States submits that as India has not demonstrated that Section 351.511(a)(2)(iv) is inconsistent with Article 14(d), it also has not demonstrated any inconsistency with Articles 19.3 and 19.4.

7.2.6.2 Main arguments of the third parties

7.2.6.2.1 European Union

7.58. The European Union submits that the determination of the adequacy of the remuneration under Article 14(d) of the SCM Agreement requires the identification of a proper comparator in the marketplace of the country of provision, i.e., the prices at which the same or similar goods are sold or bought by private suppliers in arm's length transactions in the country of provision. If such prices are distorted in that market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular, it may be necessary to have recourse to an external proxy benchmark or to a constructed proxy duly adjusted that somehow relates or refers to, or is connected with, the conditions prevailing in the market of the country of purchase. The European Union contends that, in the absence of an actual price that is available on the market for the same product (e.g., because all prices are distorted because of the government intervention or, simply because the government controls prices or is the only provider), the comparison envisaged in the benefit analysis can be made by using a proxy for what *would* have been paid on a comparable purchase of goods that could have been obtained on the market in the absence of the distortion (i.e., by reference to market principles) and, if needed, by making appropriate adjustments in order to avoid in particular the countervailing of genuine comparative advantages. The European Union submits that once the proper benchmark price has been identified, either in-country, outside-country or constructed proxy, the comparison required to determine the existence and amount of benefit has to be made at the same level of trade.

7.2.6.3 Evaluation

7.59. We begin by evaluating India's Article 14(d) claim. India contends that the mandatory use of delivered prices means that price benchmarks will not relate to prevailing market conditions in the country of provision "even if the government price in question does not include such delivery charges"[214], such as in situations where the government provider sells the relevant good ex-works or, in the case of minerals, ex-mine.[215]

[214] India's opening statement at the first meeting of the Panel, para. 15.

[215] We observe that India's claim is not based on any difference in the levels of trade at which the government price and the Tier I or II benchmarks are set. In response to a question from the Panel, India

7.60. We consider that India's argument is flawed, for it conflates the "prevailing market conditions" referred to in the second sentence of Article 14(d) with the contractual terms and conditions of the government provision under investigation. As explained above, investigating authorities are entitled to assess the adequacy of remuneration from the perspective of the recipient, using market benchmarks that relate to the "prevailing market conditions" in the country of provision.[216] We do not consider that such market benchmarks need mirror the contractual terms on which the government provider sells its good, since government prices are not an indicator of the prevailing market conditions.[217] In this regard, we agree with the United States that the terms "prevailing market conditions" and "conditions of sale" in the second sentence of Article 14(d) do not relate to the specific contractual terms on which the government provides goods. Instead, these terms relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions. It is for this reason that Article 14(d) includes such factors as "availability" and "marketability", even though these factors could not properly be considered as contractual terms.

7.61. Furthermore, we recall that we have rejected India's claim that the United States' benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices as Tier I and II price benchmarks. Consistent with this finding, we also reject the notion that the contractual terms on which a government provides goods must necessarily be considered to establish or reflect prevailing "market" conditions in the country of provision. Because of the propensity for governments to pursue public policy objectives in providing goods to recipients in their territory, it is possible that contractual terms set by governments are not set in accordance with "market" principles, and therefore do not reflect prevailing "market" conditions.

7.62. We also reject India's argument that the use of delivered price benchmarks "nullifies the comparative advantage of the country of provision in terms of being able to provide the goods in question locally".[218] To the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have. In this regard, we note the following finding by the Appellate Body in *US – Softwood Lumber IV*:

> It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.[219]

As discussed above, import transactions occur even in situations where minerals may be sourced locally, and such import transactions necessarily relate to prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions.

7.63. For the above reasons, we reject India's claim that Section 351.511(a)(2)(iv) "as such" is inconsistent with Article 14(d) of the SCM Agreement. For the same reasons, we also reject India's consequent claims under Articles 19.3 and 19.4 of the SCM Agreement.

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expressly accepted the United States' contention that the delivered price adjustment is made to both the government price and the Tier I or II benchmark.

[216] India also submits that, in cases where the government sells ex works, transportation and other delivery charges can never be considered as "remuneration" to the government provider of the goods (India's first written submission, para. 89). This argument is premised on the adequacy of remuneration being assessed from the perspective of the government provider, rather than the recipient. We dealt extensively with this issue above.

[217] If the price benchmark had to match all the terms applied by the government provider, including presumably price, the resultant comparison with the government price would be meaningless.

[218] India's first written submission, para. 97.

[219] Appellate Body Report, *US – Softwood Lumber IV*, para. 109.

7.2.7 Conclusion

7.64. In light of the foregoing, we reject India's claim that Section 351.511(a)(2)(i)-(iv) "as such" is inconsistent with Article 14(d) of the SCM Agreement. We also reject India's claim that Section 351.511(a)(2)(iv) "as such" is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement.

7.3 Claims regarding the imposition of countervailing duties in respect of iron ore supplied by NMDC

7.65. India raises a number of claims regarding the USDOC's determinations, in the 2004, 2006, 2007 and 2008 administrative reviews, that NMDC provided specific subsidies to Essar, ISPAT, JSW and Tata in the form of iron ore sold for less than adequate remuneration. India's claims concern: USDOC's treatment of NMDC as a public body; USDOC's finding of *de facto* specificity; and USDOC's determination of the existence and quantum of benefit.

7.3.1 The treatment of NMDC as a public body: Article 1.1(a)(1)

7.3.1.1 Relevant WTO provision

7.66. Article 1.1(a)(1) of the SCM Agreement provides:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> > (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> >
> > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
> >
> > (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> >
> > (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

7.3.1.2 Main arguments of the parties

7.3.1.2.1 India

7.67. India claims that the USDOC improperly focused on the GOI's 98% shareholding in NMDC, contrary to Article 1.1(a)(1) of the SCM Agreement. According to India, the USDOC failed to consider whether NMDC fulfilled two essential public body criteria: (i) the carrying out of governmental functions, and (ii) the exercise of governmental power or authority.

7.68. India's arguments concerning the alleged deficiencies in the USDOC's determination that NMDC is a public body rely heavily on findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. India begins by noting the finding by the Appellate Body that the essence of 'government' is that it enjoys the effective power to "regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[220] According to India, the Appellate Body reiterated that this finding was derived, in part, from the

[220] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

functions performed by a government and, in part, from the government having the powers and authority to perform those functions. According to India, therefore, an entity only constitutes a public body if it performs a governmental function, and has the powers and authority to perform that function.[221]

7.69. India contends that the USDOC failed to conduct the analysis described by the Appellate Body.[222] India states that the USDOC focused instead on the fact that GOI held a 98% shareholding in NMDC.[223] According to India, such an approach was condemned by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* in the following terms:

> the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.[224]

7.70. India claims that, in focusing on the GOI shareholding in NMDC, the USDOC failed to examine whether NMDC has been vested with the power and authority to perform governmental functions; whether NMDC has the power and authority to direct or entrust a private body; and whether NMDC is, in fact, exercising governmental functions, i.e. regulate, control, or supervise individuals, or otherwise restrain conduct.[225] India also contends that the USDOC made no attempt to cite any evidence or undertake any analysis as to whether the "indicia of government control" was manifold, over and above the mere majority holding of the government, as well as whether this control was exercised in any meaningful way. India submits that, as a result, the USDOC's determination that NMDC constitutes a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.3.1.2.2 United States

7.71. The United States' disputes the interpretation of the term "public body" adopted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, on which India's claim is based. The United States contends that neither India nor the Appellate Body explain why the interpretation of the term public body should be based on the issue of whether an entity performs governmental functions, or is vested with, and exercises, the authority to perform such functions. The United States submits that, when interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU[226], the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. The United States contends that the USDOC's treatment of NMDC as a public body is consistent with this approach.

7.72. In the alternative, the United States contends that the USDOC's treatment of the NMDC as a public body is in any event consistent with the interpretation by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The United States rejects India's argument that the USDOC's determination that the NMDC is a public body was based solely on a determination that India owned over 98% of the NMDC.[227] According to the United States, record evidence also indicates that NMDC has the authority to perform Indian government functions. The United States notes in this regard that the USDOC also found that the NMDC, as a state-owned mining company, was governed by the GOI's Ministry of Steel.[228] The United States points in this regard to record

[221] India's first written submission, para. 222.
[222] Ibid. para. 222.
[223] Ibid. paras. 232 and 234.
[224] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[225] India's first written submission, para. 234.
[226] The United States is referring to Articles 31 and 32 of the *Vienna Convention*.
[227] India's first written submission, para. 232.
[228] Notice of preliminary results of countervailing duty administrative review, 10 January 2006, 71 Fed. Reg. 1512 ("2004 Preliminary Results"), Exhibit IND-17, p. 8, internal page 1516; Notice of preliminary results of countervailing duty administrative review, 9 January 2008, 73 Fed. Reg. 1578 ("2006 Preliminary Results"), Exhibit IND-32, pp. 9-10, internal pages 1586-1587; Issues and decision

evidence of NMDC's own website, which declared that the "NMDC was established as a fully owned Government of India Corporation in 1958 with the objective of developing all minerals other than coal, petroleum oil and atomic minerals. NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel, Government of India."[229] The United States also asserts that during the 2004 review verification, Indian and NMDC officials explained that the GOI was heavily involved in the selection of the directors of the NMDC, a few of whom were directly appointed by the Ministry of Steel.[230] Furthermore, during the 2007 review, GOI further explained that it appoints 2 directors and had approval power over an additional 7 directors out of a total of 13 directors. According to the United States, the USDOC explicitly found that this evidence supported its determinations that the NMDC was "part of the GOI".[231]

7.73. In addition, the United States notes that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* stated that "the legal order of the relevant Member may be a relevant consideration whether or not a specific entity is a public body."[232] The United States submits that, in the legal order of India, the NMDC performs a government function. The United States maintains that record evidence in the relevant reviews shows that the Indian government, i.e., the state and federal governments, owns all the mineral resources on behalf of the Indian public[233], and that the Indian federal government has the final approval of the granting of mining leases for iron ore.[234] According to the United States, therefore, it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore. The United States asserts that the GOI specifically established the NMDC to perform part of this function, i.e., "developing all minerals other than coal, petroleum oil and atomic minerals."[235] The United States also asserts that, during the USDOC's verification in the 2004 administrative review, an official from the Indian Ministry of Steel identified the NMDC as a strategic company which was monitored and reviewed by the government because it provided a specific service to the Indian public. The United States submits that, because the NMDC is exploiting public resources on behalf of the Indian government, the owner of the resources, the NMDC is performing a government function in India.

7.3.1.3 Main arguments of the third parties

7.3.1.3.1 Australia

7.74. Australia asserts that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* concluded that a public body is an entity that possesses, exercises or is vested with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts, which may point in different directions. Australia considers that the Appellate Body's conclusion suggests that a public body must meet one of three descriptions – an entity that possesses governmental authority, an entity that exercises governmental authority, or an entity that is vested with governmental authority. In Australia's view, these descriptions are alternatives to one another and are not cumulative. Australia further submits that one relevant criterion for examining a "public body" under Article 1.1(a)(1) of the SCM Agreement should be to what extent the government controls the entity.

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memorandum: final results and partial recession of administrative review, 29 April 2009 ("2007 Issues and Decision Memorandum"), Exhibit IND-38, pp. 43-45, comment 10; and Notice of preliminary results of countervailing duty administrative review, 11 January 2010, 75 Fed. Reg. 1496 ("2008 Preliminary Results"), Exhibit IND-40), p. 8, internal page 1503.

[229] New subsidy allegations, 2 May 2005 ("2004 New Subsidy Allegations"), Exhibit USA-69, p. 8, internal exhibit 6, page 2.

[230] Verification of the questionnaire responses submitted by the Government of India, 3 January 2006 ("2004 Verification India"), Exhibit USA-66, pp. 5-6.

[231] 2007 Issues and Decision Memorandum, Exhibit IND-38, pp. 43-45, comment 10.

[232] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297.

[233] The report of the "expert group" on preferential grant of mining leases for iron ore, manganese ore and chrome ore, attached to the New subsidy allegations (JSW), 23 May 2007 ("DANG Report attached to 2006 New Subsidy Allegations (JSW)"), Exhibit USA-50, internal page 79. (Under Indian law, the state governments owns the minerals in the land, however, for iron ore, which is listed a Schedule 1 mineral, the federal Indian government must approve all mining leases.)

[234] DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal page 79.

[235] 2004 New Subsidy Allegations, Exhibit USA-69, internal exhibit 6, p. 2.

7.3.1.3.2 Canada

7.75. Canada contends that the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. According to Canada, such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement.

7.3.1.3.3 China

7.76. China submits that the legal interpretation regarding public body developed by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* should be followed by the Panel in this case and should serve as the foundation for any findings regarding the public body determination at issue.

7.3.1.3.4 European Union

7.77. The European Union submits that the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* had to be unconditionally accepted by the parties to that dispute and is now part of the *acquis* of the WTO dispute settlement system, implying that, absent cogent reasons, the same legal question will be resolved in the same way in a subsequent case. The European Union asserts that, in that case, the Appellate Body sought a balance between the US approach, with its emphasis on ownership and control in general terms and China's approach, with its emphasis on governmental authority and function.

7.3.1.3.5 Saudi Arabia

7.78. Saudi Arabia submits that, for the purposes of finding the existence of a financial contribution under Article 1.1(a)(l) of the SCM Agreement, a public body must possess, exercise or be vested with "governmental authority", which is the power of an entity to command or compel a private body. The unique "defining elements" of the term "government" – "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" – also define the term "public body". Saudi Arabia contends that possessing or exercising governmental authority is distinct from being owned or controlled by the government, and the two concepts are not interchangeable. Saudi Arabia asserts that a government-owned or controlled entity might be a public body, but only where the government has delegated to the entity the ability to "control or govern the actions of a private body". According to Saudi Arabia, the government's delegation of authority, not its ownership or control, thus dictates the entity's status as a public body.

7.3.1.4 Evaluation

7.79. India's claim is brought under Article 1.1(a)(1) of the SCM Agreement. That provision refers to financial contributions that are provided by any government or "public body". India's claim challenges the determination by the USDOC that the NMDC constitutes a "public body". The term "public body" was interpreted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body issued its report in that case in March 2011, after the relevant USDOC determinations that the NMDC is a public body. India's arguments rely heavily on the findings of the Appellate Body in that case, to the point that India asserts that the USDOC's analysis "falls short of the test specified by the Appellate Body"[236] in that case. While we are required by Article 11 of the DSU to make our own objective assessment of the matter before us, the Appellate Body has affirmed that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same".[237] We therefore begin by reviewing what we consider to be the most relevant findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, in order to consider the extent to which they may offer relevant guidance for our objective assessment of India's claim challenging the USDOC's determination that the NMDC is a "public body" in this case. In this regard, we observe the following findings made by the Appellate Body:

[236] India's first written submission, para. 237.
[237] Appellate Body Report, *US – Continued Zeroing,* para. 362.

288. As we see it, the juxtaposition of the collective term "government" on the one side and "private body" on the other side, as well as the joining under the collective term "government" of both a "government" in the narrow sense and "any public body" in Article 1.1(a)(1) of the *SCM Agreement*, suggests certain commonalities in the meaning of the term "government" in the narrow sense and the term "public body" and a nexus between these two concepts. When Article 1.1(a)(1) stipulates that "a government" and "any public body" are referred to in the *SCM Agreement* as "government", the collective term "government" is used as a superordinate, including, *inter alia*, "any public body" as one hyponym. Joining together the two terms under the collective term "government" thus implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a "financial contribution" for purposes of the *SCM Agreement*.

...

290. ... As we see it, the[] defining elements of the word "government" inform the meaning of the term "public body". This suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.

...

317. Having completed our analysis of the interpretative elements prescribed by Article 31 of the *Vienna Convention*, we reach the following conclusions. We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body within the meaning of Article 1.1.(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.

318. In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body. We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises

> meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.
>
> 319. In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.[238]

7.80. We understand the Appellate Body to have found that the critical consideration in identifying a public body is the question of governmental authority, i.e. the authority to perform governmental functions. In the Appellate Body's own words, "being vested with governmental authority is the key feature of a public body".[239] The relevant entity must be shown to have been vested with such authority, or to have actually exercised such authority through the performance of governmental functions. To determine whether an entity has governmental authority, an investigating authority must evaluate the core features of the entity and its relationship to government. Governmental control of the entity is relevant if that control is "meaningful". Indeed, the Appellate Body explicitly stated that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[240]

7.81. India contends that the USDOC's determination that NMDC constitutes a public body is based solely on the fact that GOI holds 98%[241] of the shares in NMDC and asserts that to be inadequate, referring to the Appellate Body's statement that "the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity".[242] We do not agree with India's understanding of the USDOC's determination. In reviewing the USDOC's 2004 administrative review determination, we observe that the USDOC found that "the NMDC is a mining company governed by the GOI's Ministry of Steel and that the GOI holds 98 percent of its shares".[243] This language in the USDOC's determination indicates that the USDOC's public body determination is not based solely on the GOI's shareholding in NMDC[244], for it makes clear that the USDOC's determination is also based on NMDC being "governed by" GOI. To us, this indicates that the USDOC looked to the question of control of NMDC, and thus we consider that the USDOC's determination that the NMDC constitutes a public body was based on considerations of government control as well as government ownership. In this regard, we agree with the Appellate Body that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by governmental, and therefore public, authorities. We also agree with the Appellate Body

[238] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 288, 290 and 317-319. (footnotes omitted)

[239] Ibid. para. 310.

[240] Ibid. para. 318.

[241] India does not contest the USDOC's determination that the GOI held just over 98% of the shares in the NMDC.

[242] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[243] 2004 Preliminary Results, Exhibit IND-17, p. 5.

[244] We acknowledge that, during the 2007 administrative review, the USDOC stated in its issues and decision memorandum that "majority ownership of an input supplier qualifies [NMDC] as a government authority within the meaning of [Section 1677(5)(D)(i))]," and that "[a]nalyzing additional factors is not necessary absent information that calls into question whether government ownership does not mean government control" (2007 Issues and Decision Memorandum, Exhibit IND-38, p. 45). That statement was made, though, in light of an earlier assertion that "[t]he NMDC is governed by the Ministry of Steel and the GOI holds the vast majority of its shares" (2007 Issues and Decision Memorandum, Exhibit IND-38, p. 14).

that "meaningful control" may not be established on the basis of government shareholding alone, but a combination of government shareholding plus other factors indicative of control may suffice. We shall therefore examine whether the USDOC's determination amounts to a proper finding that the NMDC is subject to "meaningful control" by the GOI.

7.82. The United States submits that[245], in addition to GOI's shareholding in NMDC, the USDOC's determination that NMDC is "governed by" the GOI[246] is based on record evidence demonstrating that: (i) the GOI was heavily involved in the selection of directors of the NMDC, some of whom were directly appointed by the Ministry of Steel; and (ii) the NMDC's own website stated that NMDC is under the "administrative control" of GOI. The United States also refers to evidence in the 2007 administrative review that the GOI had reported in a questionnaire response that it appointed two directors and had approval power over an additional seven out of 13 total directors.

7.83. In respect of GOI involvement in the appointment of NMDC's directors, we note that there was evidence on the USDOC's record indicating that GOI officials informed USDOC at verification for the 2004[247] administrative review that the NMDC's chairman, or managing director, and four functional directors are full-time directors selected by a Board that is part of the GOI. GOI officials also informed the USDOC that there are two part-time directors from, and appointed by, the Ministry of Steel.[248] In addition, the USDOC stated in its Issues and Decision Memorandum for the 2007 administrative review:

> The information on the record of the instant review only further bolsters the Department's prior determinations that the NMDC is a GOI authority capable of providing a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For example, with regard to the NMDC's 13 board members, information from the GOI indicates that it directly appoints two members and approves the appointments of an additional seven members.[249]

7.84. India contends that the fact that GOI approves the nomination of NMDC directors "is irrelevant to the determination of whether NMDC is a public body or not".[250] According to India, "shareholding and appointment of directors are merely two sides of the same coin". India suggests that just as an entity is not a public body simply because of government shareholding, an entity is also not a public body simply because of government involvement in the appointment of its directors.

7.85. We disagree with India. In our view, government involvement in the appointment of an entity's directors (involving both nomination and direct appointment) is extremely relevant to the issue of whether that entity is meaningfully controlled by the government, because government involvement in the appointment of an entity's directors suggests that the relationship between the

[245] United States' second written submission, paras. 104 and 105. India contends that the United States' explanation of the USDOC's determination constitutes *ex post* rationalization (India's second written submission, paras. 128-138). We disagree. The USDOC's "rationalization" for its public body determination, namely government ownership and the NMDC being "governed by" the GOI, is expressly set forth in the USDOC's determinations. The United States merely refers to evidence on the USDOC's record to explain that rationalization. India also contends that there is no evidence that the "government directions or policies have influenced the transactions or pricing of the products sold by NMDC" (India's second written submission, para. 138). We do not consider that evidence of such influence is required in order for an investigating authority to determine that the status of an entity is public rather than private. While such evidence may be relevant in instances of alleged entrustment or direction of a private body by a government or public body, such considerations did not form the basis of the USDOC's finding of financial contribution.

[246] 2004 Preliminary Results, Exhibit IND-17, p. 8, internal page 1516; 2006 Preliminary Results, Exhibit IND-32, pp. 9-10, internal pages 1586-1587; and Notice of preliminary results and partial recession of countervailing duty administrative review, 20 December 2008, 73 Fed. Reg. 79791 ("2007 Preliminary Results"), Exhibit IND-37, p. 6, internal page 79796.

[247] We note India's argument that the USDOC referred to government involvement in the composition of NMDC's board for the first time in the 2007 administrative review (India's opening statement at the second meeting of the Panel, para. 26). On the basis of record evidence regarding the USDOC's reference to this issue in the 2004 administrative review (2004 Verification India, Exhibit USA-66, pp. 5-6), we reject India's argument.

[248] 2004 Verification India, Exhibit USA-66, pp. 5-6.

[249] 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 45.

[250] India's second written submission, para. 137.

government and that entity is closer than it would be if the government simply held a shareholding in that entity. While a government shareholding indicates that there are formal links between the government and the relevant entity, government involvement in the appointment of individuals – including serving government officials – to the governing board of an entity suggests that the links between the government and the entity are more substantive, or "meaningful", in nature. Indeed, we observe that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body implicitly accepted that an investigating authority's determination that certain entities constitute public bodies could be based on evidence indicating that the chief executives of those entities were "government appointed", and "the party retain[ed] significant influence in their choice".[251]

7.86. India also argues[252] that the relevance of certain directors being appointed or nominated by the GOI is reduced by the fact that in India the independence of non-governmental directors is guaranteed by Clause 49 of the Listing Agreement with Stock Exchanges. The United States contends that the Listing Agreement had not been submitted to the USDOC, and should therefore not be considered by the Panel. We note that the Listing Agreement is contained in an Annexure to NMDC's Annual Report.[253] While GOI informed the USDOC that all financial details of the NMDC are available at its website, and provided USDOC with NMDC's website address, GOI did not provide the USDOC with hard copies or screen-prints of any financial documentation posted on that website, including the NMDC's Annual Report or any Annexures thereto.[254] Since websites are not static, it is not reasonable to expect investigating authorities to base their determinations on the contents of a website on any given day.[255] In our view, investigating authorities are entitled to require interested parties wishing to refer to website material to submit hard copies thereof. Furthermore, although GOI did refer to NMDC's financial details being available on NMDC's website in response to a request for NMDC's financial report[256], GOI made no specific reference to NMDC's Annual Report generally, or Clause 49 of the Listing Agreement in particular, when responding to USDOC's questions regarding the role of GOI in NMDC's operations.[257] For these reasons, we are not persuaded that the USDOC should have taken account of Clause 49 when considering GOI involvement in the appointment of directors.

7.87. Regarding the issue of the "administrative control" of the NMDC, we note that petitioners submitted hard copies of material taken from the NMDC's own website stating that "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India."[258] Although the NMDC website does not specify what precisely is meant by "administrative control", the fact that an entity is under the "administrative control" of the government suggests that the relationship between that entity and the government is very different from the relationship that would normally prevail between a private body and the government. Accordingly, in the context of government ownership and government involvement in the appointment of directors, such evidence provides additional support for a finding that an entity is under the "meaningful control" of the government.

7.88. India contends that NMDC in fact enjoyed a "significant amount of autonomy" from GOI, as a result of having been granted either "Miniratna" or "Navratna" status during the relevant review periods.[259] India refers in this regard to certain notifications set forth in Exhibits IND-72 1(2) and 72 2(1). We note that the first paragraph of the GOI document set forth in Exhibit IND-72 1(2) refers to the GOI "[t]urning selected public sector enterprises into global

[251] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.
[252] India's second written submission, para. 137.
[253] Ibid. fn. 189.
[254] Ibid.
[255] We observe India's argument that the relevant annual reports are part of the static portion of the website, and such published annual reports are not changed. We are not persuaded by this argument, since investigating authorities should not have to trawl through websites in order to ascertain what parts may or may not be subject to change. Websites, or documents linked thereto, may generally be changed at any time, and may even disappear.
[256] Administrative review for the period 01/01/2006 to 31/12/2006, supplemental questionnaire response from the Government of India, 2 September 2007 ("2007 Supplemental Questionnaire Response from the GOI for 2006 AR"), Exhibit IND-58, p. 6, concerning GOI's response to Question 2e of USDOC's questionnaire.
[257] 2007 Supplemental Questionnaire Response from the GOI for 2006 AR, Exhibit IND-58, p. 4, concerning GOI's response to Question 2a of USDOC's questionnaire.
[258] 2004 New Subsidy Allegations, Exhibit USA-69, Exhibit 6, p. 2.
[259] India's second written submission, para. 138.

giants". We also note that the first paragraph of the GOI document set forth in Exhibit IND-72 2(1) explains that the greater autonomy referred to by India is granted "to make the public sector more efficient and competitive". So long as public sector enterprises are involved, we are not persuaded that the grant of a greater degree of autonomy is necessarily at odds with a determination that such public sector enterprises constitute public bodies. India has not suggested that "Miniratna" or "Navratna" companies are effectively private in nature.

7.89. We recall our assessment that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by the government. We further recall that government shareholding, when combined with other factors, may well be indicative of the government's "meaningful control" of an entity. We consider that the USDOC's determination, when viewed in light of the above-mentioned record evidence, effectively amounted to a determination that the NMDC was under the "meaningful control"[260] of GOI.[261] Accordingly, we reject India's claim that the USDOC's determination that NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.3.2 USDOC's finding of *de facto* specificity

7.90. By virtue of Article 1.2 of the SCM Agreement, the Agreement only applies to subsidies that are specific. Accordingly, countervailing duties may only be levied on imports that benefit from specific subsidies. According to Article 2 of the SCM Agreement, subsidies may be *de jure* (Article 2.1(a) & (b)) or *de facto* (Article 2.1(c)) specific.

7.91. The USDOC determined in the 2004 administrative review that the NMDC's provision of high-grade iron ore is *de facto* specific "because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number".[262] India challenges the USDOC's determination of *de facto* specificity. The United States asks the Panel to reject India's claim.

7.3.2.1 Relevant WTO provision

7.92. Article 2 provides in relevant part:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately

[260] To avoid any uncertainty, we affirm that this conclusion is not based on the United States' proposal to define a "public body" as an entity that is controlled by the government such that the government can use that entity's resources as its own. (United States' first written submission, para. 286)

[261] Taking this view, we need not and do not address the United States' arguments relating to the relevance of India's legal order (and the performance of government function) to this matter. See para. 7.73 above.

[262] 2004 Preliminary Results, Exhibit IND-17, internal page 1516.

large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

...

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

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

7.3.2.2 Main arguments of the parties

7.3.2.2.1 India

7.93. India claims that the USDOC's determination of *de facto* specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement because: the USDOC failed to show that the subsidy discriminated in favour of "certain enterprises" over a comparative set of other, similarly-situated enterprises; the USDOC based its determination of specificity on limitations inherent in the nature of the product; the USDOC failed to establish that the subsidy was used by a limited number of certain enterprises; the USDOC failed to examine all the mandatory factors listed in Article 2.1(c); and the USDOC failed to determine *de facto* specificity on the basis of positive evidence.

7.3.2.2.1.1 Discrimination in favour of certain enterprises

7.94. Noting the reference to "certain enterprises" in the chapeau of Article 2.1, India submits that, in order to demonstrate specificity under any of the three paragraphs of Article 2.1, it is necessary to show that the subsidy is available to certain known and particularized enterprises, as opposed to all entities in general.[263] India submits in particular that an investigating authority must demonstrate that the subsidy favours certain enterprises over a comparative set of other entities that are similarly-situated with regard to their potential/capability to receive the subsidy in question.[264] According to India, there must be a showing of discrimination against a comparative set of other entities that would, but for the governmental instrument or conduct, also have had access to the subsidy in question.[265]

7.95. India claims that the USDOC failed to identify any comparative set of entities that had been discriminated against in terms of eligibility for the alleged subsidy provided by NMDC.[266] India contends that the USDOC's finding of specificity was not based on any action on the part of NMDC or GOI to restrict the sale of iron ore to a limited set of industries.[267] India contends that no such restrictions were in place, and that the sale of iron ore from NMDC is open to any person willing to pay the market price sought by NMDC.[268] India denies that NMDC or GOI directly or indirectly influences the nature and type of enterprises that may purchase iron ore from NMDC.[269]

7.96. India also submits that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before proceeding to apply Article 2.1(c).[270]

7.3.2.2.1.2 Limitations inherent in the nature of the product

7.97. India submits that, rather than establishing that a comparative set of entities had been discriminated against, the USDOC simply relied on the inherent characteristics/attributes of the

[263] India's first written submission, para. 243.
[264] Ibid. para. 246.
[265] Ibid. para. 248.
[266] Ibid. para. 263.
[267] Ibid. para. 262.
[268] Ibid. para. 264.
[269] Ibid. para. 264.
[270] India's opening statement at the second meeting of the Panel, para. 34.

product at issue.[271] India asserts that as a matter of basic common sense, because of the nature of the product, a given raw material may be capable of being used only by certain types of industries, depending on the nature and use of the raw material involved.[272] India contends that such inherent limitations concerning the nature of the product cannot directly be changed or influenced by government actions.

7.3.2.2.1.3 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.98. India notes that, according to Article 2.1(c) of the SCM Agreement, a subsidy may in fact be specific notwithstanding any appearance of (*de jure*) non-specificity when, *inter alia*, there is "use of a subsidy programme by a limited number of certain enterprises". India contends that the USDOC should have shown that the "limited number" of entities benefiting from the subsidy was part of a broader set of "certain enterprises".[273] According to India, because the term "certain enterprises" is shorthand for the beneficiaries in question, what the United States needs to prove is that the programme in question was being used by only a limited number of users within the set of beneficiaries. India contends that it is not relevant whether the entire set of beneficiaries was limited in number.[274]

7.99. India submits that the USDOC's determination was unclear as to the subsidy being obtained by a "limited number" of entities within a broader set of "certain enterprises".[275] In particular, India contends that it is unclear whether the USDOC considered: (i) that the users of iron ore were the "certain enterprises", and that the subsidy was only made available to a "limited number" of users within that set; or (ii) that (all) the users of iron ore constitute the "limited number" of entities within some broader, but undefined, category of "certain enterprises".[276] India submits that, as a result of such uncertainty, the USDOC's determination is inconsistent with Article 2.1(c).

7.3.2.2.1.4 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.100. India notes that, according to Article 2.1(c) of the SCM Agreement, a finding of *de facto* specificity must take into account "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation".[277] India contends that the USDOC failed to take account of these two mandatory factors, contrary to Articles 1.2 and 2.1(c).

7.3.2.2.1.5 USDOC's alleged failure to base its finding of specificity on positive evidence

7.101. India notes that, pursuant to Article 2.4 of the SCM Agreement, "[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence".

7.102. India submits that, although the USDOC determined that the sale of iron ore by NMDC was *de facto* specific since the actual receipt of the subsidy would only be "limited to industries that use iron ore, including the steel industry, and is thus limited in number", there is no evidence on record indicating that NMDC only made iron ore available to users of iron ore, or that only users of iron ore purchased from NMDC.[278] India asserts that the USDOC rather assumed that iron ore was being purchased from NMDC only by users of iron ore. India submits that the USDOC's determination was devoid of positive evidence, contrary to Article 2.4.

[271] India's first written submission, para. 262.
[272] Ibid. para. 264.
[273] Ibid. para. 272.
[274] India's second written submission, para. 182.
[275] India's first written submission, paras. 271-272.
[276] Ibid. paras. 272-273.
[277] Ibid. paras. 274-276.
[278] Ibid. para. 278.

7.3.2.2.2 United States

7.103. As an initial matter, the United States submits that India errs in requesting the Panel to find a U.S. measure inconsistent with Article 2.1.[279] According to the United States, Articles 2.1(a) and 2.1(c) of the SCM Agreement are definitional provisions that do not contain obligations.

7.3.2.2.2.1 Discrimination in favour of certain enterprises

7.104. The United States rejects India's argument that a determination of specificity can only be made with reference to a "comparative set" of "similarly-situated" entities[280], with consideration of whether the actual use of the subsidy is limited to certain enterprises, i.e., a subset of that group.[281] The United States submits that Article 2.1(c) of the SCM Agreement does not state that specificity can only be found if a subset of similarly situated entities receives the subsidy. Rather, the United States submits that Article 2.1(c) provides that *de facto* specificity may be found in light of the "use of a subsidy programme by a limited number of certain enterprises."[282] The United States asserts that if a limited number of enterprises use the programme, this fact supports a finding of specificity. For the United States, the question a panel or investigating authority must answer when considering whether a subsidy programme is used by "a limited number of certain enterprises" is whether the "certain enterprises" constitute a discrete segment of the economy.[283] According to the United States, this assessment is made with respect to the economy of the Member concerned (rather than with respect to a broader category of similarly-situated enterprises, as alleged by India). In addition, the United States rejects India's argument that specificity should be examined under Articles 2.1(a) and (b) of the SCM Agreement before proceeding to apply Article 2.1(c).[284]

7.3.2.2.2.2 Limitations inherent in the nature of the good

7.105. The United States also disagrees with India's argument that if the inherent characteristics of a good, rather than the government programme, limits the uses of that good to certain enterprises, the programme cannot be found to be specific.[285] The United States submits that a similar argument was rejected by the panel in *US – Softwood Lumber IV*, when Canada argued that the provision of standing timber was not specific because it was the inherent characteristics of the standing timber, rather than the Government of Canada, that limited the number of enterprises that uses standing timber.[286] According to the United States, the panel found that Article 2 permits a specificity finding precisely because the use of the good is limited to certain enterprises.

7.3.2.2.2.3 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.106. The United States contends that the positive evidence supporting the USDOC's determination that the iron ore programme was used by a limited number of certain enterprises consists of a list of 43 NMDC customers identified on the NMDC website, most of which were iron and steel companies.[287] The United States also contends that the Dang Report demonstrates that the total Indian domestic consumption of iron ore was accounted for by steel producers and pig and sponge iron producers[288], with the overwhelming majority, approximately 76%, being used by steel producers.[289]

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[279] India's first written submission, para. 641(f)(ii), (g)(iii), and (h)(ii).
[280] Ibid. para. 245-261.
[281] Ibid. para. 261.
[282] SCM Agreement, Art. 2.1(c).
[283] United States' first written submission, para. 402.
[284] United States' response to Panel question No. 70, paras. 109-111; and opening statement at the second meeting of the Panel, para. 30.
[285] India's first written submission, paras. 239-279.
[286] The United States refers in this regard to the Panel Report in *US – Softwood Lumber IV*, para. 7.116.
[287] 2004 New Subsidy Allegations, Exhibit USA-69, p. 4, Exhibit 7.
[288] DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31.
[289] Ibid.

7.3.2.2.2.4 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.107. The United States submits that USDOC did account for India's economic diversification and the length of time during which the subsidy programme operated. According to the United States, the USDOC considered that the facts and circumstances of the challenged specificity determination demonstrated that neither of these factors would affect the conclusion that the provision of iron ore was specific.[290] The United States denies that the USDOC was required to address these factors explicitly.

7.108. The United States contends that the USDOC accounted for the fact that India's economy is highly diverse by specifically recognizing a variety of Indian industries such as polyethylene terephthalate film and resin in the challenged investigation.[291] The United States asserts that the USDOC also determined that only a limited number of enterprises use iron ore, in contrast to the large number of industries in the Indian economy.

7.109. The United States submits that the evidence underlying USDOC's specificity findings with respect to high-grade iron ore led to the conclusion that the issue of the duration of that programme's operation was not relevant to the subsidy programme at issue. The United States contends that because the USDOC found that "the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number"[292], no additional analysis of the duration of the subsidy was necessary. This is because the only industries that could receive the subsidy over time would still be defined as part of the original, limited group of beneficiaries – those that use iron ore.

7.110. According to the United States, when record evidence and the circumstances of an investigation demonstrate that the issues of diversification and duration of the subsidy would not affect the specificity analysis, and no party argues to the contrary, USDOC is not required to make explicit determinations as to those aspects of the *de facto* analysis. The United States relies in this regard on the finding by the panel in *EC – Countervailing Measures on DRAM Chips* that an investigating authority need not make explicit findings regarding these considerations when other parties fail to raise the issue: "[t]he record does not indicate that the parties ever raised the issue that the disproportionate use of the Programme's funds ... was somehow to be explained by the lack of diversification of the Korean economy or the length of time the programme had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters."[293] The United States contends that no party challenged USDOC's specificity findings with respect to the sale of high-grade iron ore, and no party suggested that either limited economic diversification or the duration of the subsidy programme was relevant to the limited number of industries benefiting from that programme.[294]

7.3.2.2.2.5 USDOC's alleged failure to base its finding of specificity on positive evidence

7.111. The United States submits that the USDOC's determination of specificity was based on positive evidence. The United States refers in this regard to the above-mentioned evidence (taken from the NMDC website and Dang Report) regarding the use of domestic iron ore by iron and steel producers.

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[290] *See*, Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.975 ("[T]he relevance of the[] two factors to understanding whether there has been 'predominant use {of a subsidy programme} by certain enterprises' will depend on the particular facts" at issue.)

[291] See, *e.g.*, 2004 Preliminary Results, Exhibit IND-17 (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34950 (16 May 2002) and *Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13460 (21 March 2005)).

[292] 2004 Preliminary Results, Exhibit IND-17, internal page 1516, unchanged in the final results of countervailing duty administrative review, 17 May 2006, 71 Fed. Reg. 28665 ("2004 Review Final Results"), Exhibit IND-19, internal page 28667.

[293] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229.

[294] 2004 Review Final Results, Exhibit IND-19, 28667; and issues and decision memorandum: final results of administrative review, 10 May 2006 ("2004 Issues and Decision Memorandum"), Exhibit IND-18, II. Analysis of Programs, 4. Sale of High-Grade Iron Ore for Less than Adequate Remuneration and IV. Analysis of Comments.

7.3.2.3 Main arguments of the third parties

7.3.2.3.1 Canada

7.112. Canada disagrees with the interpretation of Article 2.1 of the SCM Agreement suggested by India. Canada submits that the ordinary meaning of the text of Article 2.1 does not require the use of "comparative sets" of "similarly-situated entities" in order to determine specificity. According to Canada, Article 2.1 is not a non-discrimination obligation, as India seems to suggest.

7.3.2.3.2 China

7.113. China submits that Article 2.1 contemplates an analysis in a manner that the assessment of *de facto* specificity under Article 2.1(c) must follow the initial appearance of non-specificity concluded as a result of the analysis under Article 2.1 subparagraphs (a) and (b). According to China, an investigating authority is therefore obliged first to consider the principles set out in subparagraphs (a) and (b), and may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity. China also considers that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c).

7.3.2.3.3 European Union

7.114. The European Union disagrees with India's argument that Article 2.1(c) pre-supposes an appropriate "comparative set" of "similarly situated" firms. Contrary to what India asserts, Article 2.1 is not addressed towards an issue of *discrimination*: rather, it addresses the issue of *specificity*.

7.3.2.3.4 Saudi Arabia

7.115. Saudi Arabia submits that, when determining *de facto* specificity under Article 2.1(c) of the SCM Agreement, investigating authorities must take into account the level of diversification of economic activities in the exporting country. The explicit diversification requirement of Article 2.1(c) obligates investigating authorities to consider the broader economic context in which a subsidy programme operates. Saudi Arabia asserts that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner. That is exactly what the diversification requirement of Article 2.1(c) was designed to prevent. Saudi Arabia further submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, there is nothing in the text of the SCM Agreement that permits a finding of specificity on this basis. Second, investigating authorities have an affirmative obligation under the SCM Agreement to "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence relating to the four factors found in Article 2.1(c). Authorities may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, this expansive interpretation could also render the specificity determination under Article 2 redundant – the investigating authority need only determine (under Article 1) the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity. Finally, any decision on whether *de facto* specificity may be based solely on a good's inherent characteristics may not penalize less diversified economies in express violation of Article 2.1(c).

7.3.2.4 Evaluation

7.116. Before examining India's claims, we consider the United States' argument that Articles 2.1(a) and 2.1(c) are merely definitional provisions, devoid of any legal obligations.[295] We

[295] United States' first written submission, para. 389.

also consider India's argument that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before applying Article 2.1(c).[296]

7.3.2.4.1 Are Articles 2.1(a) and (c) merely definitional?

7.117. The United States submits that Article 2.1 is definitional, and does not contain obligations. The United States submits, therefore, that there can be no finding of inconsistency with that provision.

7.118. We acknowledge that Article 2 defines the scope of subsidies that are subject to the disciplines of the SCM Agreement. We also acknowledge that the Appellate Body emphasised that Article 2.1 imposes "principles" rather than "rules".[297] That being said, we note that Article 2.4 refers to a "determination" of specificity being made under the provisions of Article 2. Except in situations envisaged by Article 2.3, such determination is made – explicitly or implicitly – every time that a Member finds that a subsidy falls within the scope of the SCM Agreement. In our view, a panel may reasonably find that such "determination" is either consistent, or inconsistent, with the principles set forth in Article 2.1(a)-(c). We note that, consistent with this approach, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*[298] upheld the panel's finding that the United States had not acted inconsistently with its obligations under Article 2.1(a). Implicit in the Appellate Body's finding is a determination that Article 2.1(c) does contain legal obligations that a Member may be found not to have complied with.

7.3.2.4.2 Sequential application of sub-paragraphs (a), (b) and (c) of Article 2.1

7.119. Regarding India's argument that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before applying Article 2.1(c), we observe that, the Appellate Body has stated that the sub-paragraphs of Article 2.1 need not be applied sequentially in all cases. The Appellate Body explicitly "recognize[s] that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary".[299] We note that there is no suggestion in the USDOC's determinations that the provision of iron ore by the NMDC was restricted by law. Nor has India suggested that this would have been a relevant consideration. Accordingly, we consider that the USDOC was entitled to proceed directly to consider, in the context of Article 2.1(c), whether the provision of the NMDC's iron ore was restricted in fact.

7.3.2.4.3 Discrimination in favour of certain enterprises

7.120. India submits that a subsidy can only be specific if it discriminates, in terms of access or eligibility, between similarly-situated entities. India's discrimination argument is based on a statement by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that the principles set forth in Articles 2.1(a) and (b) concern the issue of whether the "conduct or instruments of the granting authority discriminate or not".[300] India contends that there cannot be discrimination "unless there are entities other than the 'certain enterprises' that would have, but for the governmental instrument or conduct, had access to the subsidy in question".[301] India contends that "a conclusion that a program is specific to 'certain enterprises' under Articles 2.1(a) and (b) can only be reached in the context of a 'comparative set', whereby an investigating authority can determine that the subsidy only benefits 'certain enterprises' over this 'comparative set'". According to India, this "comparative set" "must consist of 'similarly-situated' entities, i.e. entities that share a mutual or common relation/degree of similarity as the 'certain enterprises' in question, such that entities covered thereby would have otherwise been capable of receiving the subsidy in question".[302] India contends that the same approach must also apply to *de facto*

[296] India's opening statement at the second meeting of the Panel, para. 34.
[297] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.
[298] Ibid. para. 401.
[299] Ibid. para. 371.
[300] Ibid. para. 367.
[301] India's first written submission, para. 248.
[302] Ibid. para. 250.

specificity under Article 2.1(c), since all three sub-paragraphs of Article 2.1 are all concerned with the same issue, namely specificity.[303]

7.121. We are not persuaded by India's argument. Article 2.1(a), which deals with *de jure* specificity, provides that a subsidy shall be specific when the granting authority or relevant legal instrument "explicitly limits access to a subsidy to certain enterprises". Article 2.1(c), in respect of *de facto* specificity, similarly provides that a subsidy shall be specific *inter alia* when a subsidy programme is "use[d] … by a limited number of certain enterprises". These two provisions complement one another. Article 2.1(a) concerns limitations on access to subsidies that exist in law. Article 2.1(c) concerns limitations on access that are not expressly provided for in legal instruments, but whose existence may nevertheless be determined by reference to facts. In both cases, what matters is the existence of a restriction on access to the subsidy, in the sense that the subsidy is available to certain enterprises, industries, or groups of enterprises or industries, but not to others. The entities with access to the subsidy are referred to in the chapeau to Article 2.1 as "certain enterprises". Once access to the subsidy is shown to be limited to those "certain enterprises" (either *de jure* or *de facto*), the subsidy is specific. There is no requirement to show that the subsidy is at the same time *not* available to other, *undefined* – but similarly situated – entities. Article 2.1 simply makes no provision for such requirement. The focus of Article 2.1 is on the "certain enterprises", and their limited access to the subsidy. Article 2.1 is not concerned with other enterprises, and whether or not such other enterprises have been discriminated against.

7.122. By limiting access to a subsidy to certain enterprises, a Member will necessarily prevent other enterprises from also accessing that subsidy. This goes without saying, since any restriction on access to a subsidy implies that access will be denied to other enterprises. If other enterprises were not deprived access to the subsidy, that subsidy would be generally available, and therefore not "specific" within the meaning of Article 2.1 of the SCM Agreement. The point, though, is that Article 2 is not concerned with the identity or nature of the excluded entities. Thus, if a law limits access to a subsidy to steel producers, specificity may be established pursuant to Article 2.1. Article 2.1 is not concerned with the entities that are implicitly excluded from access to that subsidy. In particular, Article 2.1 is not concerned with whether the excluded entities are aluminium producers, refrigerator producers or farmers. Nor is Article 2.1 concerned with the issue of whether the excluded entities are like, or similarly situated, to the steel producers who do have access.

7.123. Although India states that "a finding of specificity cannot arise simply because a subsidy is made available to certain enterprises rather than the entire economy", this is precisely what the text of Article 2.1 provides. Let us recall in this regard that Article 2.1(a) applies when a legal instrument "explicitly limits access to a subsidy to certain enterprises". Thus, once the subsidy is made available to certain enterprises only, the text of Article 2.1(a) requires that such a subsidy shall be found to be specific.[304] There is no requirement in Article 2.1(a) to conduct any further analysis regarding the nature of the entities to which the subsidy is not made available. As explained above, the same applies in respect of specificity established pursuant to Article 2.1(c).

7.124. Furthermore, we observe that Article 2 contains no reference to the notion of "discrimination". The basis for India's argument regarding discrimination reposes rather on a statement made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* to the effect that the principles set forth in Articles 2.1(a) and (b) concern the issue of whether the "conduct or instruments of the granting authority discriminate or not".[305] Given our review of the text of Article 2.1, we are not persuaded that the Appellate Body's solitary[306] use of the term "discriminate" suggests that Article 2.1 should be interpreted in the manner suggested by India. This is because there is no suggestion in the Appellate Body's analysis or findings that, having determined that access to a subsidy is limited to certain enterprises, an investigating authority must also determine that access is denied to other, similarly situated entities. Thus, when

[303] India's first written submission, para. 258.

[304] We observe that India itself states that the question addressed by all sub-paragraphs of Article 2.1 is "whether a given subsidy is specific to certain enterprises" (India's second written submission, para. 172). Thus, even India acknowledges that specificity is determined in relation to "certain enterprises", rather than some sub-category thereof.

[305] Appellate Body Report, para. 367.

[306] Having made the above-mentioned statement, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* makes no further reference to the concept of discrimination.

interpreting Article 2.1(a), the Appellate Body found that "a subsidy is specific under Article 2.1(a) of the *SCM Agreement* when the explicit limitation reserves access to that subsidy to 'certain enterprises'".[307] The Appellate Body did not state that a subsidy is specific when access is reserved to "certain enterprises", *and access is denied to other similarly situated entities*. Furthermore, when reviewing the panel's evaluation of the investigating authority's determination of specificity, the Appellate Body concluded that the panel's acknowledgment that the investigating authority's determination "that the alleged subsidy was explicitly limited" by certain documents was "a proper and a sufficient basis for the Panel to conclude that the USDOC had not acted inconsistently with Article 2.1(a) of the *SCM Agreement* in determining [that the relevant programme] was *de jure* specific".[308] Again, there is no suggestion by the Appellate Body that, in addition to determining that access to the subsidy was limited to "certain enterprises", the investigating authority should also have determined that access was denied to other, similarly situated entities. Thus, there is no meaningful support for India's discrimination argument in the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

7.125. Further, in cases where the "certain enterprises" represent the totality of an industry, a requirement that the recipient of a financial contribution must be compared to a "comparative set" of "similarly situated entities" would make little, if any, sense. Assuming the industry is defined by the products it produces, there will generally be no "similarly-situated" entities that the relevant industry could be part of. In such cases, the "similarly-situated" entities and the "certain enterprises" would be the same, such that it would not be possible to establish that similarly situated entities were excluded from the subsidy. While India's approach to specificity would suggest that specificity could not be established in such circumstances, such approach is clearly at odds with the plain language of Article 2.1 as discussed above.

7.126. For all of the above reasons, we reject India's argument that specificity under Article 2 must be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities.

7.3.2.4.4 Limitations inherent in the nature of the product

7.127. India contends that the USDOC's determination of *de facto* specificity, based on entities that use iron ore being limited in number, can only be justified if the 'comparative set' of excluded entities comprises the entire economy of India. According to India, "considering the entire economy as the 'comparative set', including industries and enterprises that are inherently incapable of using iron ore, results in the automatic and mechanistic application of the specificity requirement, thereby robbing it of its value and purpose", since it "will result in an affirmative finding of *de facto* specificity in all cases where the government is involved in providing raw materials".[309] India submits that specificity should not be established on the basis of limited use under Article 2.1(c) in cases where, because of the nature of the subsidized product, the use of that product is necessarily restricted to a limited number of entities.

7.128. In accordance with Article 32 of the Vienna Convention, supplementary material may be used to assist in interpretation of the terms of a treaty "to confirm the meaning resulting from the application of Article 31" or to determine the meaning if the interpretation according to Article 31 "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result with is manifestly absurd or unreasonable." In this context, India refers to the Second Cartland Draft circulated in the Negotiating Group on Subsidies and Countervailing Measures in September 1990, in which the concept of *de facto* specificity was enunciated in draft Articles 4.1(c) and (d):

> (c) Where discretion is exercised in the course of the administration of a subsidy, specificity shall not be deemed to exist if there is a clear indication, substantiated on the basis of positive evidence, that discretion has not been exercised so as to limit access to the subsidy to certain enterprises or to award amounts of subsidy so as to direct the subsidy to certain enterprises. In this regard, information on the frequency with which applications for the subsidy are refused and the reasons for such refusal shall, in particular, be considered.

[307] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.
[308] Ibid. para. 393.
[309] India's first written submission, para. 264.

> (d) A subsidy may be specific in fact if it can be demonstrated, on the basis of facts which were known - or should have been known - to the granting authority at the time of establishment of the subsidy programme, that the subsidy would be limited to certain enterprises.***
>
> ****It remains for* signatories *to address the issue of limited access as a result of the inherent characteristics of goods, services or extraction or harvesting rights provided by a government*.[310]

7.129. According to India, the absence of the asterisked footnote in the final text of the SCM Agreement shows that "there was no consensus among the negotiating members on the issue of determining specificity based solely on the inherent characteristics of the goods". According to India, Article 2.1(c) of the SCM Agreement cannot be interpreted in a manner that would indirectly incorporate into the treaty what the negotiators could not originally agree on.

7.130. We are not persuaded by India's arguments. Regarding India's reliance on the above-mentioned negotiating history, we first note that such negotiating history would only become relevant if the Panel were to conclude that the interpretation set out in the preceding sub-section "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." This is not the case here. As explained above, our interpretation of Article 2.1(c), based on the text, in its context and in view of the object and purpose of the provision, is clear and is contrary to India's position. Second, the fact that negotiators reserved the right to consider "the issue of limited access as a result of the inherent characteristics of goods", but ultimately did not include any provisions regarding this issue in the final version of the SCM Agreement, does not, as India argues, require the conclusion that negotiators could not agree to include a provision concerning specificity based on the inherent characteristics of goods. It, in our view, may suggest that negotiators addressed the issue, and concluded that no such provision was necessary. What is clear, is that the SCM Agreement, as agreed by Members, does not provide for any special regime in cases where access to a subsidy is limited by the inherent characteristics of goods.

7.131. In terms of India's broader argument, we recall our earlier findings to the effect that once it is established that access to the subsidy is limited, that subsidy is specific within the meaning of Article 2. Thus, if access is limited by virtue of the fact that only certain enterprises may use the subsidized product, the subsidy is specific. As explained above, there is no need for a further consideration regarding the nature of the excluded entities. Similarly, there is no need, in such cases, to establish that the excluded entities would also have been able to use the subsidized product. We note that a similar issue was addressed by the panel in *US – Softwood Lumber IV*, reaching essentially the same conclusion:

> We first address Canada's argument that a subsidy is specific only when the authority deliberately limits access of this subsidy to certain enterprises within the group of enterprises eligible or naturally apt to use the subsidy. In our view, Article 2 SCM Agreement is concerned with the distortion that is created by a subsidy which either in law or in fact is not broadly available. While deliberate action by a government to restrict access to a subsidy that is in principle broadly available, through the use of discretion, could well be the basis for a finding of *de facto* specificity, we see no basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products. Article 2 speaks of the use by a limited number of certain enterprises or the predominant use by certain enterprises, not of the use by a limited number of certain *eligible* enterprises. **In the case of a *good* that is provided by the government** - and not just money, which is fungible – and **that has utility only for certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only**. We

[310] Document MTN/GNG/NG10/W/38/Rev.1, 4 September 1990. (emphasis added)

> do not consider that this would imply that any provision of a good in the form of a natural resource automatically would be specific, precisely because in some cases, the goods provided (such as for example oil, gas, water, etc.) may be used by an indefinite number of industries. This is not the situation before us. As Canada acknowledges, the inherent characteristics of the good provided, standing timber, limit its possible use to "certain enterprises" only.[311]

7.132. We agree with this reasoning, which we consider to be consistent with our approach outlined above.

7.133. For the above reasons, we reject India's argument that if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a sub-set of this industry.

7.3.2.4.5 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.134. India submits that because the term "certain enterprises" is shorthand for the beneficiaries in question, the USDOC needed to prove that the programme was being used by only a limited number of users within this set of beneficiaries.[312] India submits that it is not relevant whether the entire set of "certain enterprises" was limited in number.

7.135. India's argument is based on a proposed distinction between "users" and "beneficiaries" that is not provided for in Article 2.1(c) of the SCM Agreement. As we explain above, Article 2.1 refers to "certain enterprises". Article 2.1 does not refer to other "users" of the relevant subsidy programme. Nor does it refer to "certain enterprises" as "beneficiaries". Furthermore, as explained above, Articles 2.1(a) and (c) are concerned with situations where access to a subsidy is limited to the same category of "certain enterprises". An authority may determine that a subsidy is specific – in the sense that access to that subsidy is limited *to* "certain enterprises" – pursuant to Article 2.1(c) by relying on the fact that the number of "certain enterprises" using the subsidy is limited. It is the category of "certain enterprises" that is relevant for this numerical exercise, just as it is the category of "certain enterprises" that is relevant for the purpose of Article 2.1(a). Accordingly, there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the programme.

7.3.2.4.6 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.136. The text of Article 2.1(c) expressly requires that, in the context of a determination of *de facto* specificity, "account shall be taken" of the extent of diversification of the relevant economy and the length of time that the relevant programme has been in operation. Our evaluation of the USDOC's compliance with that requirement must be based on the USDOC's determinations, and other contemporaneous USDOC documents. In reviewing USDOC's determinations, we see nothing to indicate that the USDOC did actually take account of the two factors identified by India. Nor has the United States pointed us to any other contemporaneous document in which the USDOC did so. Accordingly, we find that the USDOC failed to comply with the Article 2.1(c) requirement to take those factors into account when determining whether the provision of goods by NMDC is *de facto* specific.

7.137. We note the United States' argument that the USDOC accounted for the fact that India's economy is highly diverse by specifically recognizing a variety of Indian industries such as polyethylene terephthalate film and resin in the challenged investigation.[313] However, this argument merely alludes to a number of references made by the USDOC to prior proceedings in which the United States imposed trade remedies on imports from India. The USDOC referred to

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[311] Panel Report, *US – Softwood Lumber IV*, para. 7.116. (bold emphasis added)

[312] India's second written submission, para. 182.

[313] See, *e.g.*, 2004 Preliminary Results, Exhibit IND-17, internal pages 1513-14 (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34950 (16 May 2002) and *Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13460 (21 March 2005)).

these proceedings in order to address issues totally unrelated to its determination of *de facto* specificity.[314] Furthermore, we do not consider that isolated references to a limited number of prior trade remedy proceedings involving imports from a Member is necessarily sufficient to establish the economic diversity of that Member. Accordingly, we are unable to accept that such references suffice to demonstrate that the USDOC took into account the economic diversification of India for the purpose of Article 2.1(c).

7.138. We also note the United States' argument that the evidence underlying USDOC's specificity findings with respect to high-grade iron ore led to the conclusion that the issue of the duration of that programme's operation was not relevant to the subsidy programme at issue. The United States contends that because the USDOC found that "the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number"[315], no additional analysis of the duration of the subsidy was necessary. Since there is no statement to this effect in the USDOC's determinations, nor in any contemporaneous documentation, we are unable to take this argument into account when considering whether or not the USDOC complied with the requirements of Article 2.1(c).

7.3.2.4.7 USDOC's reliance on positive evidence

7.139. We recall that the USDOC determined that the provision of iron ore by the NMDC is specific because provision is "limited to industries that use iron ore, including the steel industry".[316] India claims that there was no evidentiary basis for the USDOC's finding that NMDC only made iron ore available to users of iron ore, or that only users of iron ore purchased from NMDC.

7.140. In response to India's argument, the United States refers to evidence on the USDOC's record regarding NMDC's customer base. This evidence is set forth in Exhibit USA-69, and concerns a list of 43 customers enumerated in a document posted on the NMDC's website.[317] The United States contends that most of these customers are iron and steel companies. India does not dispute this. Our own review of the evidence referred to by the United States indicates, on the basis of the relevant companies' names, that many of the companies enumerated in the above-mentioned list are indeed concerned with the iron and steel business. Accordingly, and particularly in light of India's failure to dispute the United States' categorization of the NMDC's customers, we find that there is no factual basis for India's Article 2.4 claim that the USDOC's determination of *de facto* specificity was not based on positive evidence.

7.3.3 USDOC's determination of the existence and quantum of benefit: Article 14

7.141. India's claims relate to the USDOC's determinations that, by providing iron ore for less than adequate remuneration, the NMDC conferred a benefit on its customers. India submits that, in assessing the existence and quantum of benefit in the 2006, 2007 and 2008 administrative reviews, the USDOC violated Articles 1.1(b) and 14(d) of the SCM Agreement because: the USDOC used price benchmarks to assess benefit to the recipient, without first considering the adequacy of the remuneration for NMDC; the USDOC failed to apply certain Tier I benchmarks; the USDOC used benchmark prices adjusted for delivery charges; and the USDOC excluded NMDC export prices from the world benchmark price. The United States asks the Panel to reject India's claims.

7.3.3.1 Relevant WTO provision

7.142. Article 14(d) of the SCM Agreement is set forth above.[318] Article 1.1(b) of the SCM Agreement provides that a subsidy may only be deemed to exist if "a benefit is … conferred" by the relevant financial contribution.

7.143. Our evaluation of India's claims also requires us to consider Article 12.4 of the SCM, which provides:

[314] 2004 Preliminary Results, Exhibit IND-17, internal pages 1513-14.
[315] Ibid. internal pages 1516, unchanged in 2004 Review Final Results; and Exhibit IND-19, internal page 28667.
[316] 2004 Preliminary Results, Exhibit IND-17, internal page 1516.
[317] 2004 New Subsidy Allegations, Exhibit USA-69, p. 4, internal exhibit 7.
[318] See para. 7.12 above.

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

7.3.3.2 USDOC's use of benchmark price comparisons to assess benefit to the recipient, without first considering the adequacy of the remuneration for NMDC

7.3.3.2.1 Main arguments of the parties

7.144. India submits that, because of the hierarchical preference for using Tier I and II benchmark comparisons set forth in Section 351.511(a)(2)(i)-(iii), the USDOC acted inconsistently with Article 14(d) by failing to determine whether the price charged by NMDC was adequate for NMDC itself, prior to applying the Tier I and II benchmarks to determine benefit to the recipient. India submits that USDOC ignored record evidence indicating that NMDC's prices were based on commercial considerations, such that the revenue received by NMDC was adequate.

7.145. The United States asks[319] the Panel to reject India's claim, for the same reasons that it asks the Panel to reject India's "as such" claim discussed above.

7.3.3.2.2 Evaluation

7.146. We recall that we have already rejected India's claim of inconsistency of Section 351.511(a)(2)(i)-(iii) "as such". India's present claim concerns Section 351.511(a)(2)(i)-(iii) "as applied". India's present claim is dependent on its "as such" claim.[320] For the same reasons that we rejected India's "as such" claim, we also reject India's claim against Section 351.511(a)(2)(i)-(iii) "as applied".

7.3.3.3 USDOC's treatment of Tier I benchmarks

7.147. India claims that the USDOC acted inconsistently with Article 14(d) by failing to apply certain Tier I, i.e. in-country, benchmarks to assess sales by the NMDC of high grade iron ore lumps and fines, despite a preference for in-country benchmarks being set forth in Article 14(d). There are two elements to India's claim. First, India claims that the USDOC failed, in the 2006, 2007 and 2008 administrative reviews, to consider the use of domestic price information submitted by Tata and GOI during the 2006 administrative review. Second, India challenges the USDOC's refusal to apply the in-country benchmark it determined for ISPAT to other Indian steel producers.

7.3.3.3.1 USDOC's alleged failure to consider domestic price information submitted by Tata and GOI

7.3.3.3.1.1 Main arguments of the parties

7.148. India's claim concerns (i) price charts submitted by GOI and Tata, that were compiled by the Mine Owners/Goa Mineral Ore Exporters Association, and (ii) a letter submitted by Tata in which a private iron ore supplier quotes existing and revised prices for sales of high grade iron ore to Tata.[321]

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[319] United States' first written submission, para. 438.

[320] India's first written submission, para. 283.

[321] Ibid. para. 287. The price charts submitted by GOI and Tata are set forth in Administrative review for the period 01/01/2006 to 31/12/2006, Government of India's questionnaire response to supplemental questionnaire, 8 February 2008 ("2008 Supplemental Questionnaire Response from the GOI for 2006 AR"), Exhibit IND-61; Tata's responses for questionnaires issued on 11 January 2008 and 18 January 2008 ("2008 Questionnaire Responses from Tata"), Exhibit IND-67; and Certification of service of verification exhibits and

7.149. India claims that the USDOC improperly failed to use the above-mentioned price charts and price quote as Tier I benchmarks, and opted to use Tier II (out-of-country) benchmarks instead. India submits that the USDOC simply failed to consider the use of the relevant domestic price information as potential Tier I benchmarks, and failed to provide the reasons for doing so.[322] India contends that the United States' attempts to justify USDOC's rejection of this data during the Panel proceedings constitute *ex post* rationalizations that should be rejected *in limine*.

7.150. The United States rejects India's assertion that the USDOC should have used the price data submitted by GOI and Tata as Tier I benchmarks. With respect to the price charts, the United States contends that, because the parties involved in the transactions are generally not identified in the charts, there was no way to determine if the prices were in fact private or governmental. The United States asserts that, of the three parties that are identified in the charts, two are state-owned companies (MML and Orissa). The United States also contends that there was no record evidence or explanation provided in or accompanying the charts to demonstrate that the prices represented actual private market transactions, as required by US law. Further, the United States contends that the specific percentage of iron ore content is not identified in the data. The United States asserts that this is an important factor in assessing the value of iron ore.

7.151. With respect to the price quote provided by Tata, the United States submits that this could not be used as a Tier I benchmark because it is a proprietary document containing confidential information. The United States asserts that the price quote provided by Tata was "easily susceptible to disclosure"[323], since the data were so limited in scope that if USDOC used it as a benchmark, the proprietary numbers provided in the quote could be reverse calculated by the companies to which that benchmark was subsequently applied.

7.152. The United States denies that it is relying on *ex post* rationalizations to defend the USDOC's rejection of relevant domestic price information. The United States contends that the USDOC was not required to make any determination regarding the potential use of the price data as Tier I benchmarks as "none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks".[324] The United States further contends that the arguments now characterized by India as *ex post* rationalizations were merely made by the United States in response to arguments raised by India in its first written submission.

7.3.3.3.1.2 Evaluation

7.153. Before addressing the parties' substantive arguments, we first address India's argument that the rationalization provided by the United States for the USDOC not using the price information proffered should be rejected by the Panel because it was provided *ex post*.

Whether the United States' arguments constitute *ex post* rationalization

7.154. It is well established that a Member may not offer during dispute settlement proceedings a new rationale for its investigating authority's determinations. For example, the Appellate Body noted in *US – Tyres (China)* that it "has previously clarified that a panel's examination of the conclusions of an investigating authority 'must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report.' The Appellate Body has also clarified that during panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination".[325] An investigating authority's determinations must be evaluated in light of the rationale provided contemporaneously by that investigating authority. We note, in this regard, that there is no reference to the domestic price data at issue in the USDOC's preliminary or final determinations, or in any other contemporaneous USDOC document, even though (as acknowledged by the

minor corrections, 17 March 2008 ("Tata Verification Exhibits"), Exhibit IND-70, p. 24. The price quote submitted by Tata is set forth in Tata Verification, Exhibit IND-70, p. 23.

[322] India's first written submission, paras. 288 and 289.

[323] United States' first written submission, para. 445.

[324] United States' second written submission, para. 53.

[325] Appellate Body Report, *US – Tyres (China)*, para. 329. (footnotes omitted)

United States[326]) domestic prices "are the primary benchmark"[327] for assessing the adequacy of remuneration. Nor is there any explanation by the USDOC of why it applied Tier II instead of Tier I benchmarks. Indeed, there is nothing contemporaneous with the determinations to suggest that the USDOC actually rejected the domestic price data for the reasons presented by the United States during these proceedings.

7.155. The United States contends that the USDOC was not required to make any determination regarding the potential use of the price data as Tier I benchmarks as "none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks".[328] In considering this argument, we note that the United States acknowledges that domestic price information was requested by the USDOC for benchmarking purposes.[329] Given the context in which the information was requested, and supplied by interested Indian parties, we consider that those parties submitting that information could reasonably have expected that it would be used, or at least considered, for the purpose of establishing Tier I benchmarks. In this context, the United States' argument that interested parties did not expressly assert that the relevant information should be used for benchmarking purposes is unpersuasive.

7.156. For these reasons, we find that the United States' explanation of the USDOC's rejection of certain domestic price information for Tier I benchmarking purposes constitutes *ex post* rationalization, which we are bound not to consider when evaluating India's claim.

Whether India has established a *prima facie* case in support of its claim

7.157. Our finding that the United States has advanced *ex post* rationalizations in support of USDOC's actions does not, however, resolve the matter before us. In order for India's claim to prevail, India must first establish a *prima facie* case in support of that claim, before we turn to substantive consideration of the United States' defence of USDOC's actions.

7.158. We recall that private domestic prices are the "primary benchmark" for assessing benefit under Article 14(d) of the SCM Agreement.[330] According to India, the domestic price information submitted by GOI and Tata "contained the market prices of iron ore in India".[331] Our review of the information in question shows that it does relate to domestic prices in India. In our view, therefore, it should have been considered for potential use as price benchmarks by the United States. Accordingly, we find that India has established a *prima facie* case in support of its claim. Since India's *prima facie* case is not rebutted by any contemporaneous rationale or justification in the USDOC's determinations, we uphold India's claim that the USDOC's failure to consider the relevant domestic price information for use as Tier I benchmarks is inconsistent with Article 14(d), and therefore Article 1.1(b), of the SCM Agreement.

7.159. Notwithstanding the above finding, we believe that the United States' implementation of a DSB recommendation to bring its measures into conformity in this regard may be facilitated if we consider the rationale provided by the United States to justify the USDOC's rejection of the domestic sales information as Tier I benchmarks. Such consideration may also be relevant in the event that the Appellate Body reverses our finding that the United States has advanced *ex post* rationalization, and wishes to complete the analysis of India's claim. For these reasons, we will go on to address the United States' arguments in this regard.

[326] United States' first written submission, para. 40.
[327] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[328] United States' second written submission, para. 53. We note that the United States does not invoke this argument in respect of the price quote submitted by Tata.
[329] United States' response to Panel question No. 80(b).
[330] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[331] India's first written submission, para. 287.

Consideration of the rationale provided by the United States

7.160. We begin with the United States' assertion that the USDOC was entitled to reject price information concerning sales identified as having been made by government-owned entities.[332] We recall that we have already found that Article 14(d) does not require an investigating authority to rely on a government's domestic prices when determining market benchmarks.[333] Accordingly, and for the same reasons, we consider that the USDOC would have been entitled to reject government price information when determining its price benchmarks.

7.161. Regarding the United States' argument that the USDOC had no means of knowing whether or not the relevant price information concerned government or private suppliers, we agree with the United States that an investigating authority is not required to determine price benchmarks on the basis of price information pertaining to unidentified entities.

7.162. We also agree with the United States that an investigating authority is not required to determine price benchmarks on the basis of information that is not shown to pertain to actual transactions. We consider that Article 14(d) allows sufficient discretion[334] to allow Members to require actual transaction data for purposes of determining a benchmark if they choose. That being said, we note India's contention that the USDOC's alleged insistence on actual transaction price data for Tier I benchmarks is inconsistent with the USDOC's use of price "negotiation" information as Tier II benchmarks.[335] Upon reviewing the price information used by the USDOC as Tier II benchmarks[336], we note that it is taken from charts entitled "Iron Ore Prices in the Japanese Market".[337] The United States has explained that the data in the charts concerns actual pricing. While this may indeed be the case, we are not persuaded that the price charts submitted by the GOI and Tata should be treated any differently, particularly since they are similarly entitled "Prices of Iron Ore".[338] In the absence of any compelling explanation to the contrary, we see no reason why information labelled "Prices of Iron Ore" should not be treated as actual transaction prices, in the absence of any factual basis for concluding that the information is not, in fact actual transaction price data.

7.163. Regarding the price quote submitted by Tata, we consider that the USDOC was entitled to reject that quote on the basis that it did not specify the exact percentage of iron ore content, but rather only indicated whether it was low grade or high grade. Although the designation of low or high grade would have indicated whether the iron content was above or below 64%, the precise percentage of iron content is important in determining prices, because iron ore is priced per unit of iron content, and the USDOC made adjustments to reflect this.[339] It would not have been appropriate for the USDOC to determine price benchmarks based on information that did not reflect the precise iron content of the iron ore involved.

7.164. India contends[340] that the USDOC should have sought additional clarification from the GOI and/or Tata before rejecting the domestic price information submitted by them. The United States submits that the USDOC was not required to seek additional clarification, since it had not made a facts available determination. According to the United States, the USDOC was not required to seek

[332] The relevant entities are MML and Orissa. The USDOC determined that both of these entities constitute public bodies. India has not challenged these determinations under Article 1.1(a)(1) of the SCM Agreement.

[333] See paras. 7.38 *et seq.* above.

[334] We observe the finding by the Appellate Body in *US – Softwood Lumber IV* (para. 92) that Article 14 does not determine "the precise detailed method of calculation" of benefit. India also accepts that investigating authorities enjoy discretion under Article 14 (India's second written submission, para. 11).

[335] India's second written submission, para. 193.

[336] Tex Reports of 2006 and 2007 iron ore prices from foreign suppliers paid by purchasers in Japan (respectively Response of Essar Steel Ltd. to supplemental questionnaire, 14 November 2007 ("2007 Supplemental Questionnaire Response from Essar for the 2006 AR"), Exhibit USA 118; and Response of Essar Steel Ltd. to supplemental questionnaire, 21 November 2008 ("2008 Supplemental Questionnaire Response from Essar for the 2007 AR"), Exhibit USA-119).

[337] 2007 Supplemental Questionnaire Response from Essar for the 2006 AR, Exhibit USA-118; and 2008 Supplemental Questionnaire Response from Essar for the 2007 AR, Exhibit USA-119.

[338] See, for example, 2008 Supplemental Questionnaire Response from the GOI for 2006 AR, Exhibit IND-61.

[339] 2006 Preliminary Results, Exhibit IND-32, internal page 1587.

[340] India's second written submission, para. 196.

further clarification relating to any deficiencies in order to employ other benchmark data found to be more suitable.[341] The United States notes that, in any event, the USDOC had informed GOI and Tata that their information was deficient, and yet neither interested party chose to remedy that deficiency.[342] India has also clarified that it "is not arguing that the United States must continuously seek the same information again and again".[343] Bearing in mind the USDOC did not apply Tier II benchmarks on the basis of facts available, and considering that India does not deny that the USDOC had already sought additional clarification from GOI and Tata, we are not persuaded by India's argument that the USDOC should have sought further clarification before rejecting the domestic price information submitted by them.

7.165. With respect to the price quote provided by Tata, the United States also submits that this information could not be used as a Tier I benchmark because it is a proprietary document containing confidential information that was easily susceptible to disclosure. In response to this argument, India contests the confidentiality of the relevant document.[344] However, India does not deny that Tata requested confidential treatment for that document.[345] While India might consider that the USDOC's treatment of the price quote as confidential is misplaced, this is not a matter that we are required to address in this dispute. Since India does not contest that the information was submitted and treated as confidential but is easily susceptible to disclosure (through reverse calculation), we see no basis to consider that the USDOC should have used the price quote as a Tier I benchmark to assess NMDC's sales to other purchasers.

7.3.3.3.2 USDOC's non-application of the ISPAT Tier I price benchmark to other producers

7.3.3.3.2.1 Main arguments of the parties

7.166. India claims that, during the 2006 administrative review, the USDOC improperly declined to use the in-country benchmark that it had established for ISPAT when considering whether NMDC had provided Essar and JSW with iron ore for less than adequate remuneration. India contends that the USDOC improperly relied on the fact that the ISPAT benchmark was based on confidential information regarding the price at which that steel producer had purchased iron ore from another supplier. India claims that the USDOC's improper reliance on the confidentiality of the information was inconsistent with Article 14(d) of the SCM Agreement, because of that provision's preference for the use of domestic price benchmarks.

7.167. India acknowledges that, by virtue of Article 12.4 of the SCM Agreement, confidential information submitted to an investigating authority "shall not be disclosed without specific permission of the party submitting it." Nevertheless, India denies that Article 12.4 justified the non-use of the ISPAT benchmark in respect of Essar and JSW.[346] India submits that, whereas Article 12.4 prohibits the disclosure of confidential information, that provision does not prohibit the use of such information by the investigating authority (in respect of other interested parties). In response to a question from the Panel, India contends that the USDOC could have used the information without disclosing "the nature and source of such information".[347]

7.168. The United States submits that the USDOC properly declined to use certain ISPAT price benchmark for Essar and JSW, because to do so would have resulted in the unauthorized disclosure of confidential information to those entities. The United States refers in this regard to the ability of those two entities to reverse calculate the underlying confidential information on the basis of their rate of subsidization. The United States submits that the fact that the USDOC could not ensure the data would not be used by other parties once disclosed reinforces that the USDOC could not disclose the data under Article 12.4.

[341] United States' response to Panel question No. 81, para. 13.
[342] Ibid. para. 11.
[343] India's comments on the United States' response to Panel question No. 81.
[344] See, for example, India's opening statement at the second meeting of the Panel, paras. 32 and 33.
[345] India's response to Panel question No. 88.
[346] India's first written submission, para. 292.
[347] India's response to Panel question No. 27.

7.3.3.3.2.2 Evaluation

7.169. We note that Article 12.4 of the SCM Agreement obliges an investigating authority not to "disclose" confidential information provided to it. India's claim hinges on the issue of whether or not the USDOC could have *used* the confidential domestic price information submitted by ISPAT (and used by the USDOC to determine a Tier I benchmark price for ISPAT) as a Tier I benchmark to assess sales of iron ore by NMDC to Essar and JSW, without *disclosing* that confidential information to those entities.

7.170. The confidential information in question concerns the price at which another domestic mine sold iron ore to ISPAT. India has not contested the confidentiality of this information. The United States has demonstrated to our satisfaction[348] that, if the USDOC had used that confidential information as a Tier I benchmark for Essar or JSW, those entities would have been able to reverse calculate – using the rate of subsidization determined by USDOC, and the price at which they purchased iron ore from NMDC – the price at which ISPAT had purchased iron ore from the other domestic supplier. In other words, the USDOC's use of the relevant confidential information to determine price benchmarks for Essar and JSW would necessarily have disclosed that information to those entities, contrary to the requirements of Article 12.4. While India contends that the USDOC could have used the relevant information without disclosing the "nature and source" thereof[349], India has failed to provide any details as to how this might have been achieved by the USDOC.

7.171. We decline to interpret Article 14(d) in a manner that would require an investigating authority to breach the confidentiality obligation provided for in Article 12.4 of the SCM Agreement. Accordingly, we reject India's claim that the USDOC violated Articles 1.1(b) and 14(d) by failing to apply the ISPAT Tier I benchmark price to assess sales of iron ore by NMDC to Essar and JSW in the 2006 administrative review.

7.3.3.4 Claims against the USDOC's use of "as delivered" price benchmarks

7.172. In the 2006, 2007 and 2008 administrative reviews, the USDOC compared the NMDC price for certain types of iron ore with the price charged by an Australian producer of iron, adjusted for import duties and ocean freight from Australia to India. The USDOC compared the NMDC price for other types of iron ore with the delivered price paid by an Indian producer for iron ore from Brazil (including ocean freight and import duties). India claims that the USDOC's use of such "as delivered" benchmark prices is inconsistent with Article 14(d) of the SCM Agreement.

7.3.3.4.1 Main arguments of the parties

7.173. India submits that the benchmarks should have been assessed at the ex-mine level, to reflect the prevailing market conditions in India which, according to India, included the ex-mine sales made by NMDC. India notes that, in requiring that the adequacy of remuneration be assessed in relation to the prevailing market conditions, Article 14(d) includes "price" as one such condition. According to India, the prices in the Indian market include both private and government/NMDC prices. India submits that the USDOC's use of delivered prices precluded any adjustment of the price benchmarks to the ex-mine level, even though NMDC prices were set at that level.

7.174. India submits that the USDOC failed to determine, in applying these benchmarks, whether the prevailing market conditions in Australia and Brazil reflected the market conditions prevailing in India. India submits that the USDOC merely presumed that this was so, without undertaking any comparison between the market conditions prevailing in Australia and Brazil, and those prevailing in India.[350]

7.175. India also submits that the inclusion of all delivery charges in the relevant benchmarks nullifies the comparative advantage that India has in being able to locally source iron ore for Indian steel producers. India argues that it is a comparative advantage for a country that users of

[348] United States' response to Panel question No. 87.
[349] India's response to Panel question No. 27.
[350] India's first written submission, para. 302.

the natural resources can procure it locally without having to suffer the costs and risks associated with their import from a different country.[351] India contends that the benchmarks used by the United States, which are under challenge, relate to iron ore sourced from outside India that were inflated to include delivery charges in all cases (including ocean freight). According to India, these benchmarks effectively represent the cost incurred by an Indian steel maker, in the event it is forced to procure iron ore by way of import. India argues that this method is built on the artificial premise that iron ore is otherwise not available in India forcing Indian steel makers to import iron and bear the costs and risks associated with international trade. India, therefore, argues that adopting benchmark prices that include all delivery charges on imported iron ore nullifies the comparative advantage that India has in being able to locally source iron ore for Indian steel makers.[352]

7.176. The United States rejects India's argument that the USDOC improperly presumed that the Australian and Brazilian market conditions were identical to the prevailing Indian market conditions. The United States asserts, as an initial matter, that the Brazilian price relied on by the USDOC represents the price at which an Indian steel company, Essar, actually purchased iron ore from Brazil and had it delivered to its facility in India. The United States contends that the Brazilian delivered price, therefore, is not an out-of-country price, but is rather an in-country price between private parties.[353] Concerning the USDOC's use of certain Australian prices, the United States submits that such prices do relate to the prevailing market conditions in India. The United States contends in this regard that iron ore is a highly traded commodity, and that Australian iron ore can be imported into India. The United States also recalls that the Article 14(d) guidelines require that the benchmark price be determined based upon "the prevailing market conditions ... in the country of provision." The United States submits that, unless the delivery charges are included in a world market benchmark, the world market benchmark does not satisfy the Article 14(d) guideline that the price be based on market conditions in the country of provision. According to the United States, the use of an ex-mine price in Australia would be a pure Australian price, and not the price of Australian iron in relation to the prevailing market conditions in the Indian market.

7.177. The United States also disagrees with India that the "prevailing market conditions" should be determined in light of NMDC sales at the ex-mine level. The United States denies that the phrase "prevailing market conditions" must be interpreted to refer to the specific terms of the government sales in question.[354] The United States asserts that the term "prevailing market conditions" should not be read so narrowly, since Article 14(d) does not direct that the benchmark must be limited to the specific terms of the government price being compared for benchmark purposes. According to the United States, to limit the comparison to the specific terms of the government sale would be to force a Member to ignore the actual more general prevailing market conditions, such as the fact that the true cost of an input to a producer includes all of the delivery charges to get the input to the producer's facility for use.[355] The United States notes in this regard that a producer cannot use an input which is not delivered to the factory. The United States also submits that the essence of the benefit analysis under Article 14 of the SCM Agreement is to determine whether the recipient is better off than it would have been absent the government action. The United States asserts that the only way to make that determination is to assess whether the recipient obtained something "on terms more favourable than those available in the market"[356], to the exclusion of government prices. The United States suggests that comparing the government price with a benchmark price that includes government prices (be they domestic or export prices), would result in a circular comparison.[357] The United States notes in this regard that the Appellate Body has stated that the "primary benchmark" for determining the benefit for goods sold at less than adequate remuneration is "prices of similar goods sold by private suppliers in the county of provision."[358] The United States submits that, by specifically using the term "private"

[351] India's first written submission, para. 305.
[352] Ibid. paras. 306-308.
[353] United States' first written submission, para. 455.
[354] Ibid. paras. 462 and 463.
[355] Ibid. para. 464.
[356] Panel Report, *Canada – Aircraft*, para. 9.112.
[357] United States' first written submission, para. 469.
[358] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

suppliers, which means the opposite of public[359], the Appellate Body recognized that the preferred benchmark prices are private prices rather than government prices.[360]

7.178. The United States submits that India has not provided any evidence of the existence of comparative advantage.[361] The United States notes India's reference to India having "certain raw materials" and the ability to extract and use those materials.[362] The United States contends that India does not explain why this gives India a comparative advantage over, for instance, Australia, which also has the same materials and the ability to extract and use (including export) them. The United States asserts that, because the Dang Report demonstrates that Australia has more iron ore reserves and exports more iron ore than India[363], any adjustment for comparative advantage would in fact not be in India's favour.[364] Moreover, the United States notes that India misuses the macroeconomic concept of "comparative advantage" in its arguments. The United States asserts that India offers no source to support the proposition that "the risk and expense of international transactions" has anything to do with comparative advantage. Rather, according to the United States, "comparative advantage" - as opposed to "competitive advantage" - is the advantage one country has over another in the production of a particular good relative to other goods if, as compared with the other country, it produces that good less inefficiently than it produces other goods. It is the United States' contention that India appears to confuse these terms.[365]

7.3.3.4.2 Evaluation

7.179. India makes three distinct arguments in support of its Article 14(d) claim against the world price benchmarks used by the USDOC. First, India challenges the USDOC's use of benchmark prices set at the delivered level, despite the fact that prices were set by the NMDC at the ex-mine level. Second, India asserts that the USDOC failed to make the adjustments necessary to ensure that the Australian and Brazilian delivered price benchmarks reflected prevailing market conditions in India. Third, India contends that the world benchmark price applied by the USDOC countervailed India's comparative advantage.

7.3.3.4.2.1 Whether the USDOC's price benchmarks should have been set at the ex-mine level

7.180. India's argument is based on its claim against Section 351.511(a)(2)(iv) "as such". In both cases, India contends that the use of delivered prices means that price benchmarks do not relate to prevailing market conditions in India which, according to India, should be determined by reference to the fact that the NMDC provided iron ore at the ex-mine level. For the same reasons that we rejected India's "as such" claim, we also reject the present argument.

7.3.3.4.2.2 Whether the Australian and Brazilian prices used by the USDOC reflect prevailing market conditions in India

7.181. We begin by considering the USDOC's Brazilian price benchmark in isolation. We observe that this benchmark was based on an actual transaction in which an Indian steel producer purchased iron ore from a Brazilian mine on a delivered (and therefore imported) basis. Since the transaction was made by an Indian steel producer established in India, the transaction necessarily related to the prevailing market conditions in India. It was in light of those prevailing market conditions that the Indian steel producer engaged in the transaction, notwithstanding the cost of transporting the iron ore from the Brazilian mine to its facility in India. As a result, the Brazilian transaction, including delivery charges, reflects and relates to the prevailing market conditions in India, consistent with the second sentence of Article 14(d).

[359] The New Shorter Oxford English Dictionary, 1993 ("Oxford Dictionary"), Exhibit USA-64, internal page 2359 (defines "private" as ""[o]f a service, business, etc.: provided or owned by an individual rather than the State or public body").
[360] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[361] United States' first written submission, para. 459.
[362] India's first written submission, para. 305.
[363] DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, internal pages 37-38, 39 and 41-43.
[364] United States' first written submission, para. 459.
[365] United States' second written submission, para. 44 and fn. 60.

7.182. Regarding the USDOC's use of Australian and Brazilian prices more generally, we note that, upon verification, NMDC officials explained that "international prices … end up becoming the international benchmark prices for their own contract negotiations". Those officials also explained that "India must compete with Australia, Brazil and other countries so it must follow the Tex Report's prices to remain competitive". NMDC officials further stated that, "[i]n setting the price in the domestic market, … NMDC reviews the negotiated international price when determining how much the purchaser would be willing to pay to import".[366] Since NMDC sets its domestic prices in light of competition from Australia and Brazil, and therefore in light of how much an Indian steel producer "would be willing to pay to import" iron ore from mines in those countries, we are not persuaded by India's assertion that Australian and Brazilian prices, adjusted for delivery to steel producers in India, do not relate to the prevailing market conditions in India. Since such prices indicate what an Indian steel producer would be "willing to pay", they necessarily relate to the prevailing market conditions in India.

7.183. Given the existence of record evidence establishing the relationship between the delivered Australian and Brazilian iron ore prices used by the USDOC and prevailing market conditions in India, we reject India's argument that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to adjust those delivered prices to reflect the market conditions prevailing in India.

7.3.3.4.2.3 Whether the USDOC's actions nullified India's comparative advantage

7.184. India's argument regarding comparative advantage is based on the existence of iron ore in India. According to India, "the comparative advantage for [a country with natural resources] lies in the fact that users of the natural resources can procure it without having to suffer the costs and risks associated with their import from a different country".[367]

7.185. Expressed in these terms, we consider that India's comparative advantage argument is essentially resolved by our findings regarding the USDOC's use of Australian and Brazilian price benchmarks, discussed above. In light of record evidence that Indian steel producers actually imported iron ore from overseas, and that NMDC set its domestic prices in light of import competition, there is no factual basis for the argument that India's comparative advantage was such that users of iron ore had no need to engage in import transactions. Accordingly, we reject India's argument that the price benchmarks applied by the USDOC nullified India's comparative advantage.

7.3.3.5 The inconsistent treatment of NMDC export prices

7.3.3.5.1 Main arguments of the parties

7.186. India asserts that NMDC's export prices to Japan were excluded from the world benchmark price in the 2006, 2007 and 2008 administrative reviews, even though they had been included in the world benchmark price in the 2004 administrative review (and in the preliminary determination for the 2006 review). India claims that, to avoid inconsistency, the USDOC should also have taken NMDC's export prices into account when determining the Tier II benchmark prices for the 2006, 2007 and 2008 reviews. India contends that there was no risk that NMDC's export prices would be subsidized, since NMDC would have no desire to confer any benefit on Japanese steel-makers. India also claims that the USDOC was in any event required by the chapeau of Article 14 to explain why, in those reviews, it departed from the approach it had adopted in the 2004 review.

7.187. The United States disagrees with India's argument that the USDOC should have included certain NMDC export prices in its world benchmark price. The United States suggests that comparing the government price with a benchmark price that includes government prices (be they domestic or export prices), would result in a circular comparison.[368] The United States notes in this regard that the Appellate Body has stated that the "primary benchmark" for determining the benefit for goods sold at less than adequate remuneration is "prices of similar goods sold by

[366] 2004 GOI Verification Report, Exhibit USA-114, pp. 6 and 7.
[367] India's first written submission, para. 305.
[368] United States' first written submission, para. 469.

private suppliers in the county of provision."[369] The United States submits that, by specifically using the term "private" suppliers, the Appellate Body recognized that the preferred benchmark prices are private prices rather than government prices.[370]

7.188. Regarding the use of the NMDC export price in calculating the world market price benchmark in the 2004 review and not in the 2006, 2007 and 2008 reviews, the United States contends that the exclusion of the export price from the world benchmark price in these subsequent reviews was merely correcting the mistaken inclusion of that price in the 2004 review.[371]

7.3.3.5.2 Evaluation

7.189. We recall that we have already found that Article 14(d) does not require an investigating authority to rely on a government's domestic prices when determining market benchmarks.[372] This is because a government may set prices on the basis of public policy considerations rather than market principles. We consider that the same risk arises in respect of a government's export pricing. For example, a government might provide goods to export customers for less than adequate remuneration in order to promote domestic production and employment. For this reason, we reject India's claim that the USDOC should have used NMDC's export prices to determine Tier II benchmark prices in the 2006, 2007 and 2008 administrative reviews.

7.190. India also claims that the USDOC failed to comply with the obligation in the chapeau of Article 14 to "adequately explain[]" why it did not apply the same approach in the later reviews as it did in the 2004 review. India contends that the USDOC was required "in the event the method employed or the benchmark used was modified during the course of the proceedings, [to] provide a sufficient/good enough reason or justification as to how and why such modification was made".[373]

7.191. The chapeau of Article 14 requires that the application of the "method used by the investigating authority to calculate the benefit to the recipient … to each particular case shall be transparent and adequately explained". The requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied.[374] We agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis.[375]

7.192. We observe that, in its preliminary determination for the 2006 administrative review, the USDOC continued to apply the Tex Report benchmarks that it had applied in previous reviews.[376] Thus, in its preliminary determination for the 2006 administrative review, the USDOC applied benchmarks based in part on NMDC's export prices (reported in the Tex Report), just as the USDOC had done in the 2004 administrative review. In its subsequent Issues and Decision Memorandum for the 2006 administrative review, though, the USDOC explained that it had revised the benchmark used in its preliminary determination by excluding the NMDC prices that had been reported in the Tex Report. The USDOC explained that it did so because the NMDC prices pertain to "the very government provider at issue".[377] In our view, the USDOC's explanation of its change in approach in respect of the NMDC export prices is clear and intelligible, and is easily understood

[369] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[370] Ibid.
[371] United States' first written submission, para. 471.
[372] See paras. 7.38 *et seq.* above.
[373] India's first written submission, para. 315.
[374] According to the Fifth Edition of the Shorter Oxford English Dictionary, the verb "explain" in relevant context means to "make clear or intelligible (a meaning, difficulty, etc.); … Give details of (a matter, *how*, etc.)" (emphasis original). The term "transparent", when used figuratively, means "easily seen through or understood; easily discerned; evident; obvious".
[375] United States' response to Panel question No. 104, para. 60.
[376] 2006 Preliminary Results, Exhibit IND-32, p. 10 of 22.
[377] Issues and decision memorandum: final results of administrative review, 7 July 2008 ("2006 Issues and Decision Memorandum"), Exhibit IND-33, p. 33 of 98.

and discerned. Accordingly, we reject India's claim that the USDOC's explanation of this matter is inconsistent with the requirements of the chapeau of Article 14 of the SCM Agreement.

7.3.4 Conclusion

7.193. For the reasons set forth above, we reject India's claims that the USDOC's treatment of the NMDC as a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement. We uphold India's claim that the USDOC's determination of *de facto* specificity is inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC failed to take account of all the mandatory factors set forth in that provision. However, we reject India's claim that the USDOC violated the Article 2.4 requirement to base its determination of specificity on positive evidence.

7.194. We reject most elements of India's claim that the USDOC's determination of the existence and quantum of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement and the chapeau of Article 14. However, we uphold that claim in respect of the USDOC's treatment of domestic price information submitted by GOI and Tata, in respect of which the United States sought to rely on *ex post* rationalization.

7.4 The USDOC's findings regarding the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme: Articles 1.1, 2, 12.5 and 14 of the SCM Agreement

7.195. In its 2006 administrative review, the USDOC investigated new subsidy allegations regarding captive mining rights for iron ore and coal. The USDOC found that GOI provided financial contributions to steel producers by providing them with iron ore and coal through the grant of captive mining rights (i.e. rights that allowed steel producers to mine iron ore and coal for their own internal use). The USDOC found that such captive mining rights were provided under the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme.[378] The USDOC found that the Captive Mining of Iron Ore Programme was *de facto* specific because "the provision of captive iron ore mining rights is limited to certain enterprises, such as steel producers".[379] The USDOC found that the Captive Mining of Coal Programme was *de jure* specific because "preference is given in the allocation of coal blocks to steel producers whose annual production capacity exceeds one millions tons".[380] The USDOC found that the captive mining programmes conferred a benefit on steel producers after (i) constructing a notional price for the extracted iron ore and coal and (ii) comparing that notional price to a Tier I/II benchmark price.

7.196. India makes a number of challenges against the USDOC's findings. India's claims concern: the existence of any Captive Mining of Iron Ore Programme (Article 12.5); the *de facto* specificity of any Captive Mining of Iron Ore Programme (Article 2.1(c)); the USDOC's determination that steel producers were provided with goods by GOI through the grant of mining rights (Article 1.1(a)(1)); the USDOC's finding that GOI granted Tata coal mining rights (Article 1.1(a)(1)); the USDOC's finding that the Captive Mining of Coal Programme is *de jure* specific (Articles 2.1(a) and (b)); and the USDOC's assessment of benefit using a notional price for the extracted iron ore and coal (Articles 1.1(b) and 14).

7.4.1 The existence of the Captive Mining of Iron Ore Programme (Article 12.5)

7.197. India claims that the USDOC violated Article 12.5 of the SCM Agreement by failing to satisfy itself as to the accuracy of information on the basis of which it determined the existence of the Captive Mining of Iron Ore Programme.[381] India submits that such programme does not exist.

[378] We note that the USDOC refers variously to a "Captive Mining Rights program" (2006 Preliminary Results, Exhibit IND-32, p. 14 of 22), a "captive mining rights of iron ore program" (2006 Issues and Decision Memorandum, Exhibit IND-33, p. 19 of 98), and a "Captive Mining of Iron Ore" programme (Final results of countervailing duty administrative review, 14 July 2008, 73 Fed. Reg. 40295 ("2006 Review Final Results"), Exhibit IND-34, p. 3 of 5). For coal, the USDOC refers to a "Captive Mining Rights program" (2006 Preliminary Results, Exhibit IND-32, p. 15 of 22). We shall refer to the relevant programmes as the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme.

[379] 2006 Preliminary Results, Exhibit IND-32, internal page 1591.

[380] Ibid.

[381] India's first written submission, paras. 353-357.

7.198. The United States asks the Panel to reject India's claims. The United States asserts that the USDOC satisfied itself as to the accuracy of information, consistent with Article 12.5, by finding that the information on which it relied was from official reports commissioned by the GOI, to which members of the Indian steel industry contributed, and newspaper articles by independent press sources.

7.4.1.1 Relevant WTO provision

7.199. Article 12.5 provides in relevant part:

> the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

7.4.1.2 Main arguments of the parties

7.200. India contends that, rather than satisfying itself of the accuracy of the information supplied by interested parties (as required by Article 12.5), the USDOC simply relied on bare assertions by the petitioner[382] that the GOI operated a Captive Mining of Iron Ore Programme. India asserts that, in doing so, the USDOC overlooked information on the record, including supporting documents relied upon by the US domestic industry, clearly showing that the GOI scheme granted mining rights *simpliciter*, and that there was no specific GOI programme allocating captive mining rights.

7.201. India submits that the USDOC's determination regarding the alleged Captive Mining of Iron Ore Programme is factually incorrect since record evidence shows that India granted mining rights for iron ore on a first-come-first-served basis, without regard to whether the applicants were engaged in captive mining (i.e. whether they were integrated steel producers or stand-alone miners). India contends that "the GOI scheme granted mining rights *simpliciter* and there was no specific GOI program allotting captive mining rights".[383] According to India, the GOI "only grants 'mining leases' for iron ore. Whereas some of the licensees may be using it for captive consumption, others may only be engaged in selling the extracted iron ore".[384] Furthermore, India contends that "all the lessees … are granted concessions on the same terms and conditions".[385] India also refers to statements made by Tata to the USDOC indicating "that GOI does not favour steel producers over independent miners of iron ore either in terms of allocation of rights or payment of royalty".[386] India further refers to expert evidence submitted to the USDOC indicating that "there is no provision in the Indian mining law that allows captive mines to pay a reduced or special rate".[387]

7.202. The United States submits that the USDOC properly determined that the GOI provided captive mining rights for iron ore based on information on the record. The United States contends that India's focus on its mining laws suggests that the USDOC determined that there is a *de jure* captive mining programme, whereas the USDOC actually determined that there is a *de facto* programme. The United States acknowledges that the alleged policy is not provided for in India's mining laws, but claims that the existence of such policy is nevertheless "widely known".[388] According to the United States, India's arguments regarding Indian mining law are inconsistent with evidence on the USDOC's record indicating that GOI "has a captive iron ore mining policy under which it has granted captive mining rights to four steel companies".[389] The United States refers in this regard to two reports commissioned by GOI, and a series of press clippings.

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[382] India relies in this regard on Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.368 and fn. 268.
[383] India's first written submission, para. 354.
[384] India's response to Panel question No. 29.
[385] India's second written submission, para. 226.
[386] India's first written submission, para. 342.
[387] Ibid. paras. 343 and 354.
[388] United States' second written submission, para. 482.
[389] United States' first written submission, para. 480.

7.203. The first report relied on by the United States is the "Dang Report". The United States observes that the Dang Report envisages that the "[p]olicy of captive mining leases should continue".[390] The second report relied on by the United States is the "Hoda Report". The United States observes that the Hoda Report contains a section entitled "Allocation of Captive Mines to Steel Makers"[391] which, according to the United States, "contains a discussion of whether the captive mining policy should be expanded".[392] The United States also observes that the Hoda Report identifies one of the interested groups in the discussion as "steel mill owners with captive mines".[393]

7.204. Regarding press clippings, the United States notes that an article from the *Times of India* suggests that if the recommendations of the Hoda Report are followed, captive mining may be eliminated. The United States also observes that other press clippings refer to four Indian steel producers as having captive mines.

7.4.1.3 Evaluation

7.205. This claim concerns the USDOC's determination of the existence of the Captive Mining of Iron Ore Programme. The United States does not claim that the Captive Mining of Iron Ore Programme is contained in any Indian law or regulation, or otherwise set forth in writing. Rather, the United States submits that the existence of the Captive Mining of Iron Ore Programme was properly ascertained by the USDOC by reference to record evidence.

7.206. We do not exclude the possibility that Members might opt to provide specific subsidies pursuant to programmes or policies that are not expressed in writing. If the existence of such programme or policy is properly established (and assuming the other requirements of the SCM Agreement are met), an investigating authority may impose countervailing duties on imports benefiting from such programme or policy. We emphasise, though, that the existence of such a subsidy programme or policy must be properly established by the relevant investigating authority. In this regard, we observe that Article 12.5 of the SCM Agreement requires that an investigating authority must satisfy itself as to the accuracy of the information on which its findings – including those concerning the existence of countervailed subsidy programmes – are based.

7.207. We shall review all of the record evidence cited by the United States as supporting the USDOC's determination of the existence of the Captive Mining of Iron Ore Programme. We shall also consider the probative value of that evidence viewed in its totality. In this way, we shall evaluate whether the USDOC properly established the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5.

7.208. The first piece of record evidence cited by the United States is the Dang Report. The United States notes that the Dang Report refers to the GOI's "[p]olicy of captive mining leases". We observe that the Dang Report was prepared by an Expert Group commissioned by GOI to "formulat[e] guidelines for preferential grant of mining leases" for *inter alia* iron ore "by state governments".[394] The GOI took this initiative because state governments had "shown inclination to accord preference to applicants who agree to put up mineral based downstream industry within the State boundaries", even though the MMDR Act "does not appear to provide any legitimacy for such stipulation".[395] The Dang Report explains that "[a]gainst this background, Ministry of Steel constituted a Group of Experts to undertake an in-depth examination and frame a set of uniform National Guidelines for a System of Preference to be followed in grant of leases for iron ore, manganese and chrome ore".[396]

[390] DANG Report attached to 2006 New Subsidy Allegations (JSW), p. 52, Exhibit USA-50.
[391] National Mineral Policy, Report of the High Level Committee (Hoda Report), attached to the New subsidy allegations (Tata), 23 May 2007 ("Hoda Report attached to 2006 New Subsidy Allegations (Tata)"), Exhibit USA-71, internal page 143.
[392] United States' second written submission, para. 70.
[393] Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 143.
[394] DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, p. 1.
[395] Ibid. p. 4.
[396] Ibid. p. 4.

7.209. The Dang Report confirms the existence of captive mining in the Indian industry. Thus, in describing the structure of the Indian iron ore industry, the Dang Report states that iron ore "[m]ining is undertaken both by steel companies, who operate captive mines, and exclusively mining companies".[397] However, the mere fact that captive iron ore mining exists does not mean *ipso facto* that there is a Captive Mining of Iron Ore Programme, or any other policy to favour captive miners. It simply means that mining licences have been provided to steel producers, which then engage in mining and consume the minerals they extract. Of greater significance, in our view, is that despite referring to the factual existence of captive mining, the Dang Report does not refer to captive mining leases being provided pursuant to any Captive Mining of Iron Ore Programme. Nor, indeed, is there reference to any such programme or policy in the very section of the Dang Report that purports to describe the "policy and regulatory frame work for the grant and operation of leases".[398]

7.210. As part of its Conclusion, the Dang Report states that it is necessary "to encourage and involve larger integrated steel plants … to safeguard their raw material security".[399] Such encouragement in the future could benefit captive mining. However, there is nothing in the Dang Report to suggest that such encouragement of captive iron ore mining already existed at the time it was drafted.

7.211. In light of the above observations, we are not persuaded that the single reference in the Dang Report to the "[p]olicy of captive mining leases"[400] provides support for determining the existence of a Captive Mining of Iron Ore Programme. We consider it highly relevant that, although the Dang Report describes the Indian iron ore industry, and the policies applicable to that industry, there is no reference to any programme or policy benefiting captive mining. Nor is there any suggestion that mining leases were provided to steel producers on terms any different than those provided to other miners. Indeed, it is entirely possible that the reference to a "[p]olicy of captive mining leases", on which the United States relies, was merely intended to refer back to the fact that mining leases are provided to steel companies, and to suggest that mining leases should continue to be provided to steel producers.

7.212. The next piece of evidence referred to by the United States is the Hoda Report. The United States refers in particular to a section of that Report entitled "Allocation of Captive Mines to Steel Makers"[401] which, according to the United States, "contains a discussion of whether the captive mining policy should be expanded".[402] We observe, though, that the United States does not identify any reference in the Hoda Report to any captive mining policy or programme. Although the Hoda Report again confirms the existence of captive mines, like the Dang Report, it does not identify any Captive Mining of Iron Ore Programme, or any GOI policy in favour of such mines. Moreover, the Hoda Report does not, in fact, refer to the possibility of "expanding" such policy, as alleged by the United States. While the Hoda Report does consider whether, as a matter of future policy, iron ore mining licences should be awarded "exclusively" to captive miners[403], the Hoda Report does not indicate that the exclusive award of iron ore mining licences to captive miners would constitute an "extension" of any existing policy in their favour.

7.213. The United States points to the statement in the Hoda Report that "[s]tand alone mining and captive mining should continue to exist".[404] The United States also emphasises that one of the groups interested in the Hoda process was "steel mill owners with captive mines".[405] We recall, though, that the factual existence of captive mining does not demonstrate *ipso facto* that a Captive Mining of Iron Ore Programme, or any policy in favour of captive mining, also exist. It simply means that mining licences have been awarded to steel producers that consume the minerals they extract.

[397] DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, p. 50.
[398] Ibid. p. 50.
[399] Ibid. p. 58.
[400] Ibid. p. 52.
[401] Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 143.
[402] United States' second written submission, para. 70.
[403] Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 149.
[404] Ibid. p. 159.
[405] Ibid. p. 143.

7.214. Given the absence of any reference in the Hoda Report to any Captive Mining of Iron Ore Programme, or any policy in favour of captive mining, we do not consider that the Hoda Report provides support for determining the existence of a Captive Mining of Iron Ore Programme. Indeed, the Hoda Report actually states that "under the current dispensation … all miners [are treated] alike".[406] On its face, this statement would seem to exclude the possibility that any policy or programme in favour of captive mining of iron ore might exist. This apparent inconsistency was not addressed by the USDOC.

7.215. Regarding the *Times of India* article relied on by the United States, we note that this is merely a report on the contents of the Hoda Report.[407] We therefore do not consider that the article provides any additional support for the alleged existence of the Captive Mining of Iron Ore Programme than the Hoda Report itself. The United States refers to other press articles identifying four Indian steel producers as having captive mines.[408] Again, however, the fact that steel producers hold mining leases does not mean *ipso facto* that there is a distinct programme for captive mining.

7.216. We acknowledge that, in principle, the existence of a subsidy programme that is not expressed in writing might be established on the basis of evidence which, although not particularly instructive when viewed individually, becomes more insightful and probative when viewed as a whole. We do not consider that this is one of those cases. We see nothing in the evidence reviewed above to suggest that, even when viewed together, they provide a sufficient basis to establish the existence of a Captive Mining of Iron Ore Programme. Nor has the United States explained how the existence of the Captive Mining of Iron Ore Programme might be established on the basis of the ensemble of the evidence.

7.217. For the above reasons, we find that the USDOC did not have sufficient basis to properly determine the existence of the Captive Mining of Iron Ore Programme. We therefore uphold India's claim that the USDOC failed to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5.

7.4.2 Specificity of the Captive Mining of Iron Ore Programme (Article 2.1)

7.218. India claims that the USDOC's determination that the Captive Mining of Iron Ore Programme is *de facto* specific is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement. The United States asks the Panel to reject India's claim. The United States submits that, because India has a Captive Mining of Iron Ore Programme which is limited to four steel companies, the programme is *de facto* specific within the meaning of Article 2.1(c) because the captive mining rights are provided to a limited group of enterprises.

7.219. In light of our finding that the evidence relied upon by the United States does not suffice to support USDOC's determination that a Captive Mining of Iron Ore Programme exists, which is therefore inconsistent with Article 12.5 of the SCM Agreement, there is little if any sense in our evaluating whether or not the USDOC properly found the purported programme to be *de facto* specific. We therefore exercise judicial economy in respect of India's Article 2.1 and 2.4 claims in respect of the Captive Mining of Iron Ore Programme.

7.4.3 The provision of goods through the grant of mining rights

7.220. The USDOC determined that the grant of mining licences under the Captive Mining of Iron Ore and Captive Mining of Coal Programmes constituted a financial contribution in the form of the provision of a good[409] (i.e. iron ore and coal). India claims that the USDOC's determination that the grant of the mining rights for iron ore and coal amounts to the provision of goods is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.[410] The United States asks the Panel to reject India's claim.

[406] Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 149.
[407] 2006 New Subsidy Allegations (Tata), Exhibit USA-71, internal exhibit 11, internal page 1.
[408] United States' first written submission, para. 482.
[409] 2006 Preliminary Results, Exhibit IND-32, p. 14 of 22.
[410] India's first written submission, paras. 358-371.

7.221. In light of our finding that the evidence relied upon by the United States does not suffice to support USDOC's determination that a Captive Mining of Iron Ore Programme exists, we considered exercising judicial economy in respect of the part of India's claim regarding the provision of iron ore. However, since we must in any event address India's claim regarding the provision of coal, we evaluate India's claim in full.

7.4.3.1 Relevant WTO provision

7.222. Article 1.1(a)(1)(iii) of the SCM Agreement is set forth above.[411]

7.4.3.2 Main arguments of the parties

7.223. India acknowledges that the panel and Appellate Body in *US – Softwood Lumber IV* accepted that the grant of stumpage rights, i.e. the right to fell standing trees, constitutes the provision of a good within the meaning of Article 1.1(a)(1)(iii). However, India contends that not every governmental action that may ultimately result in goods being made available would amount to a financial contribution. India submits that merely making goods available does not amount to "provid[ing]" goods within the meaning of Article 1.1(a)(1)(iii). India refers[412] to findings by the Appellate Body in *US – Softwood Lumber IV* to argue that, for the government to be providing a good, not only must the government have control over the availability of that specific good, but there must also be a "reasonably proximate relationship" between what has been "provided" by government on the one hand and the 'good' in question on the other.[413] According to India, it is the governmental action itself that should directly result in the provision of the goods, and not the intervening acts of non-governmental bodies.[414]

7.224. India submits that, unlike the grant of a right to fell trees, there is no "reasonably proximate relationship" between the grant of mining rights and the availability of the extracted iron ore or coal.[415] India asserts that in the case of the stumpage programmes covered in the *US – Softwood Lumber IV* case, the undisputed factual findings were that at the time of granting the right to harvest standing timber, the amount of standing timber actually available was already known, and the right to harvest granted through the stumpage contract also transferred ownership over the timber. According to India, therefore, there was an absolute and direct link between the rights granted by the government and the 'good' in question. India submits that a "reasonably proximate relationship" arose in that case because there was no intervening act between the right to harvest "standing timber" (governmental action) and the extracted "standing timber"' (the good in question). India contends that this is not the case in respect of the grant of mining rights.

7.225. India notes that the panel in *US – Softwood Lumber IV* recognized the difficulty of building a "reasonably proximate relationship" between the grant of mining rights and the provision of the extracted minerals in the following footnote to its Report. India refers in particular to the panel's statement that "there is a clear difference between tenure agreements concerning standing timber and the granting of extraction rights in the case of minerals or oil, or fishing rights where the owner of the right is not at all certain what and how much of it he will find, and what he pays for is the right to explore a particular site and the chance of finding something.[416]

7.226. According to India, the licence to mine does not lead to a guaranteed transfer of marketable minerals. India submits that the uncertainty inherent in mining activities (regarding what and how much will be found), as well as the need for significant intervention (between the grant of the mining licence and the extraction of minerals) through private conduct, make the link between the grant of mining rights by the government and the actual iron ore or coal extracted too remote to fulfil the "reasonably proximate relationship"[417] standard applied by the Appellate Body.

[411] See para. 7.66 above.
[412] India's first written submission, para. 362.
[413] India refers in this regard to Appellate Body Report, *Softwood Lumber IV*, para. 71.
[414] India's first written submission, para. 365.
[415] Ibid. para. 366.
[416] Panel Report, *Softwood Lumber IV*, para. 7.18 and fn. 99.
[417] India's first written submission, para. 369.

7.227. The United States submits that the USDOC properly determined that the provision of the right to mine iron ore constitutes the provision of goods as set out in Article 1.1(a)(1)(iii) of the SCM Agreement, and therefore is a financial contribution under Article 1.1(a)(1) of the SCM Agreement.

7.228. Regarding India's argument that the GOI did not "provide" iron ore and coal to steel producers, because there is no "reasonably proximate relationship" between the provision of mining rights and the provision of the minerals themselves[418], the United States contends that India's suggested interpretation is not supported by the text of the SCM Agreement. According to the United States, the ordinary meaning of "provides" is to "make available," in addition to "supply or furnish for use" and "to put at the disposal of."[419] The United States suggests that India does not appear to contest this interpretation[420], even though a mining lease makes available, supplies and furnishes for use, and puts at the disposal of the owner, the good that is covered by the lease.

7.229. The United States understands India to rather argue that the ordinary meaning of "provides" is somehow limited or circumscribed, in the sense that "there must … be a 'reasonably proximate relationship' between what has been provided by government on the one hand and the 'good' in question on the other."[421] The United States understands that the basis for India's "reasonably proximate relationship" test appears to be a phrase from the Appellate Body report in *US – Softwood Lumber IV.* According to the United States, India quotes a passage from that report in which the Appellate Body considered an argument by Canada that the provision of rights to a good by a government cannot be considered the provision of a good because, in that case, the term "would capture every property law in a jurisdiction."[422] The United States notes that, in rejecting that contention, the Appellate Body stated that it could not see "how … general governmental acts" of the type referred to by Canada would fall within the Appellate Body's interpretation of "provides a good," since such acts would be "too remote" from the act of provision.[423] Rather, the "government must have some control over the availability of a specific thing being 'made available.'"[424] The United States suggests that, viewed in its entire context, the Appellate Body's reference to "reasonably proximate relationship" is intended to distinguish "general acts" of government from those where the government controls the good in question and then makes those goods available to a recipient. The United States submits that the GOI act in question – the provision of mining rights for iron ore and coal – is not "general" (like a property law), but rather is a specific provision of rights to goods over which the government has control.

7.230. The United States notes India's suggestion that while the provision of rights to some goods, such as the right to harvest a stand of timber, may constitute the provision of a good under Article 1.1(a)(1)(iii), the right to *in situ* mineral deposits does not constitute the provision of goods because the provision of the minerals is "too remote" from the government action of providing a good. The United States submits that Article 1.1(a)(1)(iii) provides for no distinction on the basis that it takes more effort to find and mine minerals than it does to harvest a stand of trees.[425] The United States contends that India erroneously relies on a footnote from the panel report in *US - Softwood Lumber IV* in which the panel indicated that, in deciding that harvesting rights to timber constituted the provision of goods, it was not deciding whether the provision of rights to *in situ* minerals constituted the provision of goods.[426] The United States asserts that the panel explicitly stated that it was not expressing a view as to whether extraction rights did or did not constitute the provision of goods within the meaning of Article 1.1.(a)(1)(iii). Furthermore, the United States contends that the panel actually suggested that the distinction it might draw was not on the basis of the nature of the good to which rights were provided, but rather the nature of the right. Thus, the panel stated that if the right at issue in that dispute had consisted of "the right to explore a particular site and the chance of finding something," the panel might have viewed the provision of rights differently. The United States contends that the rights at issue in this case are

[418] India's first written submission, para. 366.
[419] Appellate Body Report, *US – Softwood Lumber IV*, para. 69.
[420] *See* India's first written submission, paras. 360-361.
[421] India's first written submission, para. 362.
[422] Appellate Body Report, *US – Softwood Lumber IV*, para. 70.
[423] Ibid. para. 71.
[424] Ibid. para. 70.
[425] India's first written submission, para. 371.
[426] Ibid. para. 368 (citing Panel Report, *US – Softwood Lumber IV*, fn. 99).

not mere rights of exploration, but rather rights to mine iron ore and coal that is known to exist, and for which the recipients only pay if they actually extract the good.

7.4.3.3 Main arguments of the third parties

7.4.3.3.1 European Union

7.231. The European Union agrees with the United States that, taking into account the facts and circumstances of this case, the grant of mining rights for iron ore and coal does amount to the "provision" of a good within the meaning of Article 1 of the SCM Agreement. In the opinion of the European Union, India has not established any meaningful distinction between the facts of *US – Softwood Lumber IV* and the facts of this case.

7.4.3.3.2 Saudi Arabia

7.232. Saudi Arabia submits that a government's granting of extraction rights is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. In particular, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii). Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. The Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question and (ii) there is a reasonably proximate relationship between the government action and the enjoyment of the tangible goods by the recipient. Saudi Arabia contends that neither of these requirements is met where the government grants intangible extraction rights. Saudi Arabia submits that the granting of a right to exploit a nation's *in situ* natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources.

7.4.3.4 Evaluation

7.233. Article 1.1(a)(1)(iii) of the SCM Agreement states that there is a financial contribution when a government or public body "provides" goods for less than adequate remuneration. India disputes the USDOC's determination that the GOI "provided" iron ore and coal through the grant of rights to mine those minerals.[427] India's claim is based on the alleged lack of proximity between the provision of the right to mine and the extracted iron ore and coal.

7.234. The concept of goods being "provided" through the grant of rights to those goods was addressed by the Appellate Body in *US – Softwood Lumber IV*. The Appellate Body found in relevant part:

> 68. Having considered the meaning of the term "goods", we now turn to consider what it means to "provide" goods, for purposes of Article 1.1(a)(1)(iii) of the *SCM Agreement*. Canada argues that stumpage arrangements do not "provide" standing timber. According to Canada, all that is provided by these arrangements is an intangible right to harvest. At best, this intangible right "makes available" standing timber. But, in Canada's submission, the connotation "makes available" is not an appropriate reading of the term "provides" in Article 1.1(a)(1)(iii). In contrast, the United States argues that the Panel's interpretation that stumpage arrangements "provide" standing timber is correct. The United States contends that, where a government transfers ownership in goods by giving enterprises a right to take them, the government "provides" those goods, within the meaning of Article 1.1(a)(1)(iii).
>
> 69. Again, we begin with the ordinary meaning of the term. Before the Panel, the United States pointed to a definition of the term "provides", which suggested that the term means, *inter alia*, to "supply or furnish for use; make available". This definition is the same as that relied upon by USDOC in making its determination that "regardless of whether the Provinces are supplying timber or making it available through a right of

[427] India does not dispute the USDOC's determination that iron ore and coal are "goods" within the meaning of Article 1.1(a)(1)(iii).

> access, they are providing timber" within the meaning of the provision of United States countervailing duty law that corresponds to Article 1.1(a)(1)(iii) of the *SCM Agreement*. We note that another definition of "provides" is "to put at the disposal of".
>
> 70. Notwithstanding these definitions, Canada submits that the meaning of the term "provides" in Article 1.1(a)(1)(iii) of the *SCM Agreement* should be limited to the supplying or giving of goods or services. Canada raises two arguments to support this view. First, Canada suggests that the terms "provides goods" and "provides services" cannot be read to include the mere "making available" of goods or services, because "[t]o '*make available* services' … would include any circumstance in which a government action makes possible a later receipt of services and to '*make available* goods' would capture every property law in a jurisdiction". Secondly, Canada points to the use of the term "provide" in Articles 3.2 and 8 of the *Agreement on Agriculture* and in Article XV:1 of the *General Agreement on Trade in Services* (the "GATS") to suggest that "provides", when used in the context of the granting of subsidies, requires the actual *giving* of a subsidy.
>
> 71. With respect to Canada's first argument, we do not see how the general governmental acts referred to by Canada would necessarily fall within the concept of a government "making available" services or goods. In our view, such actions would be too remote from the concept of "making available" or "putting at the disposal of", which requires there to be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Indeed, a government must have some control over the *availability* of a specific thing being "made available".[428]

7.235. We agree with these findings by the Appellate Body, and are guided by them. As explained below, we consider that, in certain circumstances, a government might properly be determined to have provided goods by making them available through the grant of extraction rights.

7.236. India submits that, because of the uncertainties involved in mining operations, and because of the amount of work required by the mining entity to extract the iron ore and coal once the lease has been granted, the grant of the mining lease by the GOI is too remote from the extracted minerals to be treated as the "provision" of a good within the meaning of Article 1.1(a)(1)(iii).

7.237. We are not persuaded by India's argument. As a preliminary matter, we observe that India's approach lacks legal certainty, for it would lead to different results, depending on the complexity of the process required to extract the relevant mineral, or the uncertainty regarding the amount of mineral to be extracted.

7.238. More fundamentally, India's approach is at odds with the meaning of the term "provides". We agree with the Appellate Body in *US – Softwood Lumber IV* that to "provide" means to "make available", or "put at the disposal of". Given the GOI's direct control over the availability of the relevant minerals, the GOI's grant of rights to mine those minerals essentially made those minerals available to, and placed them at the disposal of, the beneficiaries of those rights. The grant of a mining lease is more than a mere "general governmental act" that simply facilitates the mining operation. The grant of the right to mine allows the beneficiary to extract government-owned minerals from the ground, and then use those minerals for its own purposes, such as in the production of steel. In our view, this means that the GOI's grant of the right to mine is "reasonably proximate" to the use or enjoyment of the minerals by the mining entity for the grant of a mining right to be treated as the provision of a good within the meaning of Article 1.1(1)(a)(iii) of the SCM Agreement.[429]

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[428] Appellate Body Report, *US – Softwood Lumber IV*, paras. 68-71.

[429] We note some inconsistency in India's position during these proceedings. In the context of its claim against the USDOC's determination that the SDF Managing Committee provided direct transfers of funds, India accepts that the term "provides" means to "make available", or "put at the disposal of" (India's first written

7.239. We acknowledge that the panel in *US – Softwood Lumber IV* seems to have expressed some doubts about treating the grant of certain rights as the provision of a good under Article 1.1(a)(1)(iii):

> we note that there is a clear difference between tenure agreements concerning standing timber and the granting of extraction rights in the case of minerals or oil, or fishing rights where the owner of the right is not at all certain what and how much of it he will find, and what he pays for is the right to explore a particular site and the chance of finding something. In so noting, we do not mean to express a view as to what extent, if at all, this uncertainty would be relevant to a determination whether the granting of such extraction rights represented the provision of goods within the meaning of Article 1.1 (a) (1) (iii) SCM Agreement, an issue which is not before us.[430]

7.240. This statement does not affect our conclusion. First, we observe that the panel expressly refrained from making any findings on the matter at hand. Second, and more importantly, in our view, the panel's statement refers to a possibly relevant difference between rights to extract goods, and rights to explore and, if anything is found, extract the goods. The present case concerns the provision of mining rights, that is the right to extract minerals from known sites, rather than the right to explore or prospect, and, if anything is found, extract it.[431] By acquiring mining rights, steel companies have paid for more than "the right to explore a particular site and the chance of finding something".[432] This is further confirmed by the fact that, according to evidence on the USDOC's record, miners pay royalties under the relevant mining leases per unit of extracted mineral.[433] In these circumstances, we consider that the obiter statement of the panel in *US – Softwood Lumber IV* is not in any event pertinent to our decision, and does not require us to change our views.

7.241. For the above reasons, we reject India's claim that the USDOC's determination that the GOI provided goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

7.4.4 Whether Tata was provided captive coal mining rights by the GOI under the Coal Mines Nationalization Act/Captive Mining of Coal Programme

7.242. The USDOC imposed countervailing duties on imports of steel produced by Tata. The USDOC determined that the GOI had provided Tata with a good, coal, through the grant of captive coal mining rights[434] under the Coal Mines Nationalization Act, which USDOC also refers to as the Captive Mining of Coal Programme.[435] India claims that Tata was not provided any coal mining rights by the GOI under the Coal Mines Nationalization Act (or indeed any other instrument), and thus the USDOC's determination is inconsistent with Article 1.1(a)(1)(iii).

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submission, para. 441). Furthermore, India contends that the term "transfer" is narrower than the term "provides", and yet accepts that the term "transfer" still covers the situation where the rights or interest in an asset are transferred (India's first written submission, paras. 441 and 443).

[430] Panel Report, *US – Softwood Lumber IV*, fn. 99.

[431] The USDOC's determinations concern the grant of mining licences, rather than reconnaissance permits or prospecting licences. The different types of rights associated with mining in India are identified in the Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 2.

[432] Although the panel subsequently referred to "extraction rights", the earlier reference to exploring a site with "the chance of finding something" suggests that the rights envisaged by that panel were markedly different from the rights at issue in the present case.

[433] 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 12 and 16. India has not disputed the United States' assertion that this evidence is proof that miners pay a per unit extraction fee (United States' first written submission, para. 494).

[434] 2006 Preliminary Results, Exhibit IND-32, p. 15 of 22.

[435] The fact that the USDOC's determination concerned the Coal Mines Nationalization Act is demonstrated by the reference to that Act in the USDOC's preliminary determination. Furthermore, India stated in response to Panel question No. 96 that "[t]he program identified and countervailed by the United States in this case is the coal mining rights granted under the Coal Mining Nationalization Act". This was not disputed by the United States in its comments on India's response to Panel question No. 96. Instead, the United States' comments sought to establish that "Tata is a beneficiary under the [Coal Mining Nationalization] Act and therefore a recipient of the subsidy" (United States' comments on India's response to Panel question No. 96, para. 10). This confirms that the USDOC countervailed subsidies allegedly provided to Tata under the Coal Mines Nationalization Act.

7.4.4.1 Main arguments of the parties

7.243. India asserts that Tata was granted a coal mining licence in 1907 by the Raja of Ramgarh, i.e. prior to India attaining independence, and therefore independent of the GOI. India contends that the lease was renewed from time to time, and extended for a term of 999 years in 1946 (still prior to Indian independence and thus independent of the GOI). India submits that Tata continues to mine coal under the said lease, rather than any lease granted by GOI.[436] India denies that Tata was granted any coal mining lease by the GOI under the Coal Mining Nationalization Act, or any amendment thereto. India contends that Tata's coal mines were expressly exempted from that Act.[437] Furthermore, India submits that Tata did not, and was not required to, obtain any additional or new lease from the GOI once the MMDR Act entered into force.[438] Furthermore, India denies that any lease granted to Tata required that producer to captively consume the extracted coal. According to India, the concept of captive mining rights was non-existent in any policy/law existing at the time that Tata's lease was granted or extended.[439]

7.244. The United States[440] asserts that there is no evidence for India's assertion that the requirement in the Coal Mines Nationalization Act, as amended in 1976, that leases for coal mining be restricted to captive mining by public companies, steel companies and power companies does not apply to Tata Steel's lease. The United States maintains that India acknowledges that "in 1976 GOI introduced a condition that coal mining rights will be restricted to companies in the public sector, companies engaged in the production of steel and power, washing of coal and such other uses the GOI may prescribe."[441] The United States submits that India does not identify any specific language in the amended law that exempts Tata Steel's mining lease from restrictions in the law. The United States contends that India fails to recognize that while Tata Steel's "mining facilities" may have been exempt from the nationalization law, the coal that Tata Steel is mining was not. According to the United States, Tata Steel pays the GOI a royalty under the coal mining laws to extract the coal. For the United States, therefore, even though Tata's lease has not been reissued by GOI, Tata is clearly required by the coal law to pay the GOI the royalties established by the law.

7.4.4.2 Evaluation

7.245. India's claim concerns the USDOC's factual determination that Tata was granted captive coal mining rights by the GOI under the Coal Mining Nationalization Act, which the USDOC also refers to as the Captive Coal Mining Programme.[442] In determining that GOI granted Tata captive coal mining rights under the Coal Mining Nationalization Act, the USDOC observed that "in its questionnaire response, Tata acknowledged that the GOI and the State Government of Jharkhand (GOJ) granted it captive coal mining rights".[443] India submits that the USDOC's observation is incorrect and contrary to record evidence.[444] The United States defends the USDOC's observation by referring to Tata's 1 November 2007 Questionnaire Response. According to the United States, in its Questionnaire Response Tata "explicitly notes the existence of 'captive mining operations' as well as its obligations to 'pay the mining royalty in terms of the MMDR Act'".[445]

7.246. Looking at Tata's 1 November 2007 Questionnaire Response, we note that Tata informed the USDOC that "Tata was operating two coking coal mines".[446] Tata further explained that GOI "took over the management of 214 coking coal mines and 12 coke oven plants" in October 1971,

[436] India's first written submission, para. 372.
[437] Ibid. para. 375, referring to Section 36 of the Coal Mines Nationalization Act.
[438] Ibid. para. 374.
[439] Ibid. para. 375.
[440] United States' first written submission, paras. 510-511.
[441] India's first written submission, para. 375.
[442] Since only the Coal Mining Nationalization Act was found by the USDOC to be *de jure* specific, the possibility that Tata could be found to have been granted a coal mining lease by the GOI or a State Government under some other statutory regime is legally not relevant.
[443] 2006 Preliminary Results, Exhibit IND-32, internal page 1591.
[444] India's response to Panel question No. 28.
[445] United States' second written submission, para. 79, referring to 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.
[446] 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.

but not those owned and/or managed by Tata.[447] Tata also explained that when coking coal mines were nationalized by the GOI in May 1972, pursuant to the Coking Coal (Nationalization) Act, Section 36 of that Act excluded entities, including Tata, that were engaged in the production of iron and steel. Tata also explained that the 1973 Coal Mining Nationalization Act covered non-coking coal mines, and that it "is not required to obtain any licence or a mining lease for these coal mines either under the Coal Mines (nationalization) Act or under the MMDR Act".[448]

7.247. We also note Tata's explanation that upon Indian independence in 1947, the mining leases it had been granted by the Raja of Ramgur were transferred to the State Government of Bihar, pursuant to the Bihar Land Reforms Act of 1950. Tata explains that the State Government will continue to hold this lease until it expires in 2945. Tata also explains that the MMDR Act specifies the royalties that it must pay to the State Government to operate under that lease.[449]

7.248. Having reviewed Tata's Questionnaire Responses in full, we do not consider that there was a sufficient evidentiary basis for the USDOC's statement that Tata had "acknowledged that the GOI … granted it captive coal mining rights" under the Coal Mining Nationalization Act. There is no reference in Tata's Questionnaire Responses to any lease having been provided by the GOI under the Coal Mining Nationalization Act, or indeed any other instrument. Rather, Tata stated unequivocally in its original Questionnaire Response that it "is not required to obtain any licence or a mining lease for these coal mines either under the Coal Mines (nationalization) Act or under the MMDR Act".[450] Tata also stated in its Supplemental Questionnaire Response that "it has neither applied for nor obtained any coal mining licence from [GOI]".[451]

7.249. We recall the United States' argument that Tata notes the existence of its captive mining operations in its original Questionnaire Response. However, the fact that Tata has captive coal mining operations says nothing about the legal basis of any lease or licence under which those operations are carried out. Regarding the United States' argument that Tata acknowledged that it pays royalties under the MMDR Act, we recall that the countervailed programme is the Coal Mining Nationalization Act. The United States has not established that Tata's obligation to pay royalties under the MMDR Act somehow depends on a lease having been granted under the Coal Mining Nationalization Act. Furthermore, because Tata explained that royalties under the MMDR Act are paid to the State Government rather than the GOI[452], the fact that Tata pays royalties under the MMDR Act does not establish that Tata was granted any mining lease by the GOI.

7.250. The United States further defends the USDOC's determination in these proceedings by arguing that in 1976 GOI amended the 1973 Coal Mining Nationalization Act to provide that coal mining rights will be restricted to companies in the public sector, companies engaged in the production of steel and power, washing of coal and such other uses the GOI may prescribe. The United States submits that India does not identify any specific language in the amended law that exempts Tata Steel's mining lease from this restriction. While we recognize that India has not identified any provision exempting Tata from the restriction that coal mining rights will be restricted to *inter alia* steel companies, we observe that the USDOC failed to establish that Tata's coking coal mines were covered by the original enactment of the 1973 Coal Mining Nationalization Act (which, according to record evidence[453], concerns non-coking coal mines). In these circumstances, we believe that the onus is on the United States to identify evidence on the USDOC's record that would support a conclusion that, notwithstanding the initial exemption of Tata's coking coal mining operations from the scope of the (non-coking) Coal Mining Nationalization Act, the 1976 Amendment reversed that exemption and brought those coking coal operations within the scope of that Act. The United States has failed to identify any provision in the

[447] 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 19 of 27.
[448] Ibid. p. 20 of 27.
[449] See footnote 452 below.
[450] 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.
[451] 2008 Questionnaire Responses from Tata, Exhibit IND-67, p. 8 of 17.
[452] In its response to Panel question No. 97, India explained that any failure by Tata to pay the relevant royalties could result in Tata being sued by the State Government, rather than the GOI, in its capacity as successor to the Raja of Ramgarh. The United States did not challenge or otherwise comment on India's response to this question.
[453] 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, discussed above. We also observe that there is no reference to Tata's mines (or TISCO's, as Tata was then known) in the Schedule to that Act (Exhibit IND-52A).

1976 Amendment, or any other instrument or evidence, that would have this effect. Moreover, there is nothing before us to suggest that USDOC actually considered this matter in making its determination.

7.251. The United States suggests that the Coal Mining Nationalization Act would apply to Tata because although Tata's mines may have been exempted from nationalization, "the coal that Tata Steel is mining was not".[454] The United States supports this argument with the statement that Tata "pays the GOI a royalty under the coal mining laws to extract the coal, the rights to which it is purchasing on a per unit basis from the GOI for internal consumption".[455] The United States further asserts that India's response to Panel question No. 97 "confirms that if Tata failed to pay royalties under the Coal Mining Nationalization Act, the State Government would be permitted to sue Tata to reclaim these royalties. This legal obligation to pay royalties under the Act confirms that Tata is a beneficiary under the Act".[456] We are unable to accept the factual premise of the United States' arguments, because India has established that Tata's obligation to pay royalties derives from the MMDR Act, rather than the Coal Mining Nationalization Act.[457] As explained above, this was also made clear to the USDOC by Tata during the course of the 2006 administrative review.

7.252. In light of the above considerations, we conclude that the USDOC's determination that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the countervailed programme, i.e. the Captive Mining of Coal Programme/Coal Mining Nationalization Act, lacks a sufficient evidentiary basis. We therefore uphold India's Article 1.1(a)(1)(iii) claim against this determination.[458]

7.4.5 Whether the USDOC properly determined that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific

7.253. In light of our above finding upholding India's claim against the USDOC's determination that GOI granted Tata captive mining rights under the Coal Mining Nationalization Act, it is not necessary for us to resolve India's claim regarding the USDOC's determination that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific. We therefore exercise judicial economy in respect of this claim.

7.4.6 USDOC's determination of benefit regarding the iron ore and coal programmes

7.254. India makes a number of claims regarding the USDOC's determination that the Captive Mining of Iron Ore and Coal Programmes conferred a benefit by providing goods for less than adequate remuneration. The USDOC determined benefit by constructing notional government prices, and then comparing those prices with Tier I and Tier II benchmarks. The USDOC constructed the notional government prices by calculating a per unit price for the captive mining fees paid to GOI, and then adding per unit operational mining costs, which consisted of materials, labour, depreciation, overhead, and royalties.

7.255. India submits that the USDOC's constructed notional government price methodology is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement, and the principle of good faith. India also submits that the USDOC's use of the relevant Tier I and Tier II benchmarks is inconsistent with Article 14(d) of the SCM Agreement. The United States asks the Panel to reject India's claims.

[454] United States' first written submission, para. 511.
[455] Ibid.
[456] United States' Comments on India's response to Panel question No. 96, para. 10.
[457] India's response to Panel question No. 26.
[458] We observe that there would appear to be sufficient evidence on the USDOC's record for a determination that Tata is presently mining coal under a lease that has validity in Indian law, and could therefore be attributed to the GOI. Provided the relevant requirements of the SCM Agreement are complied with, we see no reason why the provision of coal under that lease could not be countervailed. However, the USDOC's determination that the Coal Mining Nationalization Act/Captive Mining of Coal Programme is *de jure* specific would obviously not be relevant in this context.

7.4.6.1 India's claims against the USDOC's notional government price methodology

7.4.6.1.1 Main arguments of the parties

7.256. India contends that because GOI only provided the rights to mine minerals, rather than the extracted minerals themselves, the USDOC violated Articles 1.1(b) and 14(d) of the SCM Agreement by applying a methodology for determining benefit that compared a notional government price for extracted minerals to benchmark prices.[459] India submits that the costs incurred by an Indian miner in extracting the mineral and the reasonable profit, if any, that a miner may obtain upon using/selling such extracted mineral does not devolve on the GOI and cannot form part of the 'remuneration' to be received by the GOI.

7.257. India also recalls its earlier argument that the term 'remuneration' as used in Article 14(d) of the SCM Agreement relates to the compensation receivable by the provider and is independent of the benefit, if any, that may be conferred on the receiver.[460] According to India, the USDOC should have assessed the adequacy of the remuneration for the GOI before assessing whether there was any benefit to the recipient. India contends that the USDOC could have assessed the adequacy of remuneration for the GOI by analysing the royalty rate charged by GOI in comparison to royalty rates in other countries.[461]

7.258. The United States submits that India erroneously argues that the existence of benefit should be determined by reference to the cost to the government of the financial contribution. The United States contends that the Article 14 guidelines for determining benefit state that a benefit calculation shall be based on the benefit to the recipient.

7.259. The United States disagrees with India's argument that USDOC was required to compare the mining rights at issue to a benchmark based on royalty rates in other countries. The United States asserts that the benefit potentially provided by a mining rights programme is the mineral that is obtained by the producer taking advantage of the programme. The United States contends that it would be inappropriate in this case to use the price of mining rights in other countries as a benchmark, because the mining rights at third country prices are not available in the Indian market. The United States asserts that the use of such a price would not reflect the prevailing market conditions in India, as required by the guidelines in Article 14(d).

7.4.6.1.2 Evaluation

7.260. India's claim against the USDOC's notional price methodology is premised on two arguments that, for reasons already addressed, we do not accept. First, we recall our finding that the USDOC was entitled to treat the provision of mining leases as the provision of a good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, we reject India's argument that the steel producers were only provided the right to mine minerals, rather than the extracted minerals themselves. Second, we recall our earlier rejection of India's argument that the adequacy of remuneration should be assessed from the perspective of the government, before assessing whether there is any benefit to the recipient. In our view, the USDOC was entitled to assess adequacy of remuneration as part of its benefit analysis, and to make that assessment from the perspective of the recipient, using a benchmarking methodology. Since the USDOC needed a government price for the provided "good" against which to compare the relevant benchmarks, we consider that it was reasonable for the USDOC to construct a notional government price for the extracted minerals. We note that, apart from challenging the USDOC's basic methodology, India has not challenged the manner in which the relevant notional government prices were constructed by the USDOC. For these reasons, we reject India's claim that such methodology is inconsistent with Article 1.1(b) and 14(d) of the SCM Agreement.

7.261. We note that India has also alleged that the USDOC's notional government price methodology is inconsistent with the principle of good faith. We agree with the United States'

[459] India's first written submission, para. 388.
[460] See section II.B.1 of India's first written submission.
[461] India's first written submission, para. 389.

argument[462] that India's good faith claim falls outside the Panel's terms of reference, since it is not provided for in India's panel request.[463]

7.4.6.2 India's claims against the Tier I and Tier II price benchmarks applied by the USDOC

7.262. India challenges certain aspects of the Tier I and Tier II price benchmarks against which the notional government prices for iron ore and coal were compared.

7.263. For iron ore, the USDOC compared the notional government price benchmarks with the same Tier II benchmarks that it used to determine benefit in respect of sales of iron ore by the NMDC. India repeats the claims it made against those benchmarks in the context of the NMDC.[464] We recall that we have already upheld India's claim regarding the USDOC's rejection of certain domestic price information submitted by GOI and Tata when assessing benefit in the context of the NMDC. That information was also rejected by the USDOC when assessing benefit in the context of the Captive Mining of Iron Ore. For the same reasons, we uphold India's Article 14(d) claim regarding the USDOC's rejection of the relevant domestic price information when assessing benefit in the present context also.

7.264. For coal, the USDOC applied a Tier I benchmark based on actual delivered prices paid by an Indian company for importing coal from a private supplier in Australia. We understand India to claim that the USDOC's use of a delivered price is inconsistent with Article 14(d) of the SCM Agreement.[465] We recall that we have already rejected a very similar argument made in the context of India's claims concerning the NMDC.[466] As we explained, an actual import transaction price, as delivered, necessarily relates to the prevailing market conditions in the country of import. Accordingly, and for the same reasons, we reject the present claim also.

7.4.7 Conclusion

7.265. For the reasons set forth above, we uphold India's claims that (i) the United States acted inconsistently with Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, and (ii) the United States acted inconsistently with Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act. We also uphold India's Article 14(d) claim regarding the USDOC's rejection of certain domestic price information when assessing benefit under the Captive Mining of Iron Ore Programme. We reject India's remaining claim in connection with the Captive Mining of Coal Programme.

7.5 Alleged inconsistencies with respect to the USDOC's treatment of loans provided under the Steel Development Fund

7.266. India challenges the USDOC's determination that loans provided under the Steel Development Fund (SDF) constitute direct transfers of funds by a public body. India also challenges the USDOC's determination that such loans conferred any benefit on the recipient steel producers. The United States asks the Panel to reject India's claims.

7.5.1 The USDOC's determination that direct transfers of funds were provided by a public body: Article 1.1(a)(1)

7.267. India's claims concern the USDOC's determination that the SDF loans are provided by a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement; various aspects of

[462] United States' first written submission, para. 521.
[463] WT/DS436/3.
[464] India's first written submission, para. 403.
[465] Our understanding of India's claim is based on para. 404 of India's first written submission, and fn. 423 thereto. Fn. 423 refers simply to Sections III and VII.D of India's first written submission, without providing any additional explanation of the substance of India's claim. We observe that the common factor challenged in those Sections concerns the use of delivered price benchmarks.
[466] See para. 7.181 above.

the USDOC's determination that there were "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i); and the USDOC's determination in the 2008 administrative review, on the basis of facts available, that "potential direct transfers of funds" were provided, within the meaning of Article 1.1(a)(1)(ii).

7.268. Article 1.1(a)(1) of the SCM Agreement is set forth above.[467]

7.5.1.1 Whether SDF loans are provided by a public body

7.5.1.1.1 Factual clarification by the Panel

7.269. We begin by clarifying the precise scope of the relevant USDOC determinations. In particular, we consider it necessary to clarify which entity was determined by the USDOC to provide the financial contributions at issue. We also consider it necessary to clarify whether that entity was determined to be part of the Indian government, or a public body.

7.270. In its preliminary determination in the original investigation, the USDOC found:

> We preliminary determine that the GOI directed the contribution of funds for the SDF within the meaning of section 771(5)(B) of the Act, by levying price increases on steel products which were routed into the SDF. Furthermore, because the Secretary of the Ministry of Steel has a major leadership role in the JPC and the SDF Managing Committee, the bodies that issue and administer loans under the SDF, we preliminarily determine that the GOI exercises control over the way in which funding is disbursed under this program. Therefore, we preliminarily determine that loans under the SDF constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.[468]

7.271. In its Issues and Decision Memorandum preceding the final determination in the original investigation, the USDOC stated:

> As discussed in the Preliminary Determination and in more detail below, the Department has determined in this proceeding that the SDF Management Committee is a government body.
>
> ...
>
> [T]he SDF operates as a government entity, that all lending decisions are decisions ultimately made by the GOI, and that the decision to forgive SDF loans is also a decision made by the GOI.[469]

7.272. The references by the USDOC to a "governmental body" raise the issue of whether the USDOC determined that the financial contributions at issue were provided by the GOI, or whether they were provided by a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. If provided by a public body, the question arises whether both the JPC and SDF Managing Committee were found to have provided the financial contributions, or only the latter entity.

7.273. In its first written submission, India proceeded on the basis that the USDOC had found that SDF loans were provided by JPC and the SDF Managing Committee, and challenged the USDOC's designation of these entities as "public bodies".[470] In response to a question from the Panel, the

[467] See para. 7.66 above.

[468] Notice of preliminary affirmative countervailing duty determination and alignment of final countervailing determination with final antidumping duty determinations, 20 April 2001, 66 Fed. Reg. 20240 ("2001 Preliminary Determination"), Exhibit IND-6, p. 9.

[469] Issues and decision memorandum: final results of the countervailing duty investigation, 21 September 2001 ("2001 Issues and Decision Memorandum"), Exhibit IND-7, pp. 9 and 10.

[470] India stated that "at no point in time has the United States made an explicit determination that the JPC and / or the SDF Managing Committee is 'government' and not a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement." (India's first written submission, para. 416)

United States asserted that the USDOC determined that "the SDF Managing Committee in particular was a public body that made all final decisions on SDF loans, including setting the terms and approving waivers".[471] We understand this to mean that the phrase "government body" used by the USDOC is synonymous with the phrase "public body" in the SCM Agreement. We also understand the United States' response to have clarified that the USDOC determined that the SDF loans were provided by the SDF Managing Committee, a public body, rather than by the GOI itself. Furthermore, since the United States made no reference to any determination by the USDOC that the JPC constituted a public body, or provided any financial contributions, we understand that the USDOC did not determine that the JPC Committee provided the SDF loans. We observe that India had not challenged the United States' description of the USDOC's determination.

7.274. In light of the above clarifications, we proceed with our analysis on the basis that the USDOC determined that SDF loans were provided by the SDF Managing Committee, in its capacity as a public body. We shall now examine whether the USDOC's determination that the SDF Managing Committee is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement, as alleged by India.

7.5.1.1.2 The USDOC's determination that the SDF Managing Committee constitutes a public body

7.275. Like India's claim regarding the NMDC, India's claim against the USDOC's determination that the SDF Managing Committee is a public body is based primarily on the findings of the Appellate Body in the *US – Anti-Dumping and Countervailing Duties (China)* proceedings. We recall that the Appellate Body issued its report in that case in March 2011, after the relevant USDOC determinations that the SDF Managing Committee is a public body. India submits that, because the USDOC failed to establish that the SDF Managing Committee performs governmental functions, or has the authority to do so, the USDOC failed to comply with the standard laid down by the Appellate Body in that case.[472] India contends that the USDOC's determination was based rather on governmental control allegedly resulting from the fact that the members of the SDF Managing Committee are officials of the GOI.[473] India suggests that such a determination is akin to a determination of public body status based on majority government ownership which, India recalls, was condemned by the Appellate Body in the above-mentioned case.

7.276. Consistent with our evaluation of India's claim against the USDOC's determination that the NMDC is a public body, we do not accept India's argument that a determination of public body status may not be based on a finding of governmental control. Provided an investigating authority finds that a government's control of an entity is "meaningful", we consider that such finding may suffice to support a determination that the entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Furthermore, while "meaningful control" may not be established on the basis of government shareholding alone, a combination of government shareholding plus other factors indicative of such control may suffice. We shall therefore examine whether the USDOC's determination in respect of the SDF Managing Committee can be understood as a finding that the SDF Managing Committee is subject to "meaningful control" by the GOI.

7.277. In respect of its 2001 determination, the USDOC explained in its Issues and Decision Memorandum that:

> the Secretary of the Ministry of Steel, an official one level removed from the Minister of Steel, is the Chairman of the SDF Managing Committee. We further learned that the other three members on the SDF Managing Committee consist of the following GOI officials: the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. In addition, during verification we reviewed numerous notes and minutes from SDF Management Committee meetings. The documents from the meetings demonstrate the SDF Management Committee's ability to control and direct loan approvals, interest payments on SDF loans, and SDF loan waivers. See page 5 and Exhibits 11 and 12 of the GOI Verification Report. Therefore, based on the evidence on the record of this proceeding, we determine that

[471] United States' response to Panel question No. 40, para. 7.
[472] India's first written submission, para. 426.
[473] Ibid. para. 424.

> the SDF operates as a government entity, that all lending decisions are decisions ultimately made by the GOI, and that the decision to forgive SDF loans is also a decision made by the GOI.[474]

7.278. We recall our earlier finding that government involvement in the appointment of an entity's directors is one factor that might indicate meaningful government control. We consider that the relationship between the government and the entity is even closer when the management of the entity is composed exclusively of serving government officials. In our view, India is mistaken in arguing that government appointment of serving government officials is akin, in terms of control, to government shareholding. While government shareholding indicates formal links of ownership between the government and the relevant entity, which may or may not entail a degree of control, the appointment by the government of serving government officials to actually manage an entity in itself demonstrates a degree of control, as the individuals making the decisions for the entity, i.e., exercising control, are public officials acting in their official capacity.[475] Thus, in this situation, the links between the government and the entity will be more substantive, or "meaningful", in nature. We recall in this regard that the SDF Managing Committee was composed of the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. The USDOC found explicitly that the Secretary of the Ministry of Steel served on the SDF Managing Committee in his capacity as head of the Commission for Iron and Steel.[476] In our view, the United States is correct to argue that, as a result of its composition, the SDF Managing Committee was under the "complete control" of the GOI.[477] For this reason, we reject India's claim that the USDOC's determination that the SDF Managing Committee constitutes a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.279. Having established that the USDOC properly determined that the SDF Managing Committee constitutes a public body, we now examine whether the USDOC properly determined that the SDF Managing Committee provided "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.1.2 Whether the USDOC properly determined that SDF Managing Committee provided "direct" "transfers" of funds

7.280. India challenges two aspects of the USDOC's determination that the SDF Managing Committee provided direct transfers of funds. First, India claims that the SDF Management Committee was not *directly* involved in any transfer of funds under the SDF loan programme, such that the SDF Management Committee could not be found to have made any "direct" transfers of funds within the meaning of Article 1.1(a)(1)(i).[478] Second, India submits that SDF loans do not constitute *transfers* of funds falling within the scope of Article 1.1(a)(1)(i), since the relevant funds were neither public in nature, nor resulted in any charge on the public account.[479]

7.5.1.2.1 Main arguments of the parties

7.281. India notes that Article 1.1(a)(1)(i) covers only "direct", rather than indirect, transfers of funds.[480] India contends that the SDF Managing Committee did not *directly* transfer any funds.[481] India contends that funds were instead disbursed by an intervening private agency, namely the JPC. India submits that the SDF Managing Committee played only an indirect role in this process[482], as the loan agreements were executed by JPC with the participating steel plants, and it is JPC that had access to the funds. According to India, the SDF Managing Committee only had a supervisory role over the JPC. India submits that mere regulation of the actions of another funding agency cannot be considered as involving the *direct* transfer of funds in the sense of

[474] 2001 Issues and Decision Memorandum, Exhibit IND-7, pp. 9 and 10.
[475] In response to Panel question No. 102, India stated that there is no evidence on the USDOC's record to suggest that GOI officials served on the SDF Managing Committee in their private capacity.
[476] 2001 Preliminary Determination, Exhibit IND-6, p. 9.
[477] United States' second written submission, para. 97.
[478] India's first written submission, paras. 429-438.
[479] Ibid. paras. 443-448.
[480] Ibid. para. 434.
[481] Ibid. para. 435.
[482] Ibid. para. 436.

Article 1.1(a)(1)(i). India submits that no evidence on record indicates that the SDF Managing Committee itself disbursed any funds.

7.282. India further submits that a direct *transfer* of funds within the meaning of Article 1.1(a)(1)(i) can occur only where a government or public body has title over the funds being transferred or, in the alternative, where the disbursement results in a charge on the public account.[483] India contends that the ordinary meaning of the phrase "*transfer* of funds" would require a person to convey the title over money or financial resources to another person.[484] Thus, the requirement of 'transfer of funds' would only be satisfied if the government or public body is the owner of the funds in question, since it is only the owner of the funds who can transfer the funds to another person. According to India[485], the use of the term "transfer" in Article 1.1(a)(1)(i) can be contrasted with the use of the term "provides" in Article 1.1(a)(1)(iii) of the SCM Agreement. India contends that the term "provides" is much broader, and means to "make available" or "put at the disposal of".[486] Furthermore, recalling that the SCM Agreement covers financial contributions "by" governments or public bodies, India submits that if a person other than the government or public body in question gives the monetary resources or contribution, it would ordinarily not be covered within the scope of the chapeau.

7.283. As an alternative argument, India contends that the term "transfer" requires a charge on the public account.[487] According to India, the essence of a "transfer" involves a situation where, as a result of the "transfer", something originally in the hands of the transferor is moved to the transferee: the rights or interest in the asset in question is terminated in the hands of the transferor and simultaneously created in the hands of the transferee. India submits that, when viewed from this perspective, unless the government incurs a financial charge on its account – such that the funds being transferred would have otherwise been at the disposal of the government – there cannot be a direct "transfer" of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.284. India submits that the USDOC's determination that the SDF Managing Committee made direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement, because the SDF funds were derived from private levies on steel producers, such that title to those funds was not held by GOI, and disbursement of those funds did not result in any charge on the public account. India asserts that the USDOC erred in holding that the funds constituting the SDF were not the steel producers' own funds, but were rather analogous to tax revenues collected from the consumers as mandated by the GOI.[488]

7.285. The United States submits that the facts demonstrate that the USDOC reasonably concluded that the SDF levy operated as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. The United States submits that the USDOC properly found that the loans provided using these funds constituted a "direct transfer" within the meaning of Article 1.1(a)(1)(i).

7.286. According to the United States, the Appellate Body has interpreted Article 1.1(a)(1)(i) to cover any government practice the effect of which is to improve the financial position of the recipient. The United States refers in this regard to the findings of the Appellate Body in *Japan – DRAMS (Korea).*[489] The United States also refers to the finding of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)* that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient."[490]

7.287. The United States submits that the GOI mandated that an additional price element be included in the sale of steel, and also mandated that the amounts collected be transferred to the

[483] India's first written submission, paras. 440-453.
[484] Ibid. para. 440.
[485] Ibid. para. 441.
[486] Appellate Body Report, *US – Softwood Lumber IV*, para. 69
[487] India's first written submission, para. 443.
[488] Ibid. para. 454.
[489] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251.
[490] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614. (emphasis added)

JPC. The JPC then recommends distributing these funds in the form of better-than-market rate loans to steel companies, and the SDF Managing Committee makes a final decision as to the disbursement of such loans. The United States contends that, through the consumer levy and the JPC, these resources are therefore "made available" to recipient companies by the SDF Managing Committee.

7.288. The United States also disputes India's argument that the disbursement of SDF funds as loans cannot constitute a "direct transfer of funds," because a direct transfer may only be provided where the "public body itself owns the 'financial contribution' in question." According to the United States, the Appellate Body has not required that any direct transfer of funds be accomplished through the transfer of ownership of the relevant funds from the government to the recipient. The United States notes that the Appellate Body has simply found that a direct transfer of funds may be found whenever there is "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient."[491]

7.5.1.2.2 Main arguments of the third parties

7.5.1.2.2.1 European Union

7.289. With respect to the question of whether or not there is any direct transfer of funds, the European Union observes that Article 1.1(a)(1)(i) begins with the phrase "a government practice involves". This is therefore what is required to meet the requirements of that provision. The European Union contends that the text does not provide that the transfer must involve a change in ownership over the funds from the government to the putative beneficiary, as India would have it: merely that "a government practice involves" such a transfer. Thus, even if the transfer was made by the JPC, as India asserts but the US contests, that in itself would not necessarily mean that the measure at issue was inconsistent.

7.5.1.2.3 Evaluation

7.290. India's claim raises the issue of whether SDF loans are "direct transfers of funds" within the meaning and coverage of Article 1.1(a)(1)(i) of the SCM Agreement. India asserts that, because of the private status of the entity that actually disbursed the funds (the JPC), and the private source or ownership of the relevant funds, SDF loans are private transfers falling outside the scope of the SCM Agreement. According to India, the SDF Managing Committee did not "directly" transfer any funds itself, such that the USDOC could not properly have determined that "direct" transfers of funds were made by a public body. In addition, India contends that the funds were neither owned by nor sourced from the government, such that the USDOC could not properly have determined that the public body at issue, the SDF Managing Committee, made any direct "transfers" of funds.

7.291. We note that the USDOC did not determine that the JPC is a public body. The USDOC only found that the SDF Managing Committee is a public body. Thus, if SDF loans are not "direct transfers of funds" by the SDF Managing Committee, but rather by the JPC, such loans fall outside the scope of a finding that they constitute countervailable subsidies as direct transfers of funds by a public body. The USDOC made the following observations regarding the role of the SDF Managing Committee in providing SDF loans:

> We asked the GOI officials to describe the role of the SDF Managing Committee. … They stated that the SDF Managing Committee considers and grants the ultimate approval of the proposals put forth by the [JPC]. The JPC handles the day-to-day affairs of the SDF, such as overseeing and administering the SDF loans. GOI officials stated that the SDF Managing Committee handles all decisions regarding the issuance, terms, and waivers of SDF loans.[492]

7.292. India does not deny that the SDF Managing Committee was the decision-maker regarding the issuance, terms and waivers of the SDF loans. However, India considers that this is

[491] The United States refers to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.

[492] 2001 Investigation Verification Report of GOI Responses, Exhibit USA-74, p. 3.

"immaterial for the purposes of present dispute because the disbursement and collection of funds was the responsibility of the JPC".[493] India also contends that the authority to operate the fund is vested only in the JPC, and "the function of management and operation of the corpus of the SDF was with JPC."[494] India also asserts that the SDF loan agreements were executed between the JPC and the member steel plants, with the recitals to the said agreement clearly providing that JPC was constituted with the power to maintain and disburse loans out of the SDF. India also submits that the issuance and administration of loans under the SDF programme was supervised by the JPC.[495]

7.293. We consider that although the JPC may formally have administered the disbursement and collection of funds, and the day-to-day operations of the SDF, the USDOC could reasonably have determined that the SDF Managing Committee was "directly" involved in the issuance of SDF loans. This is because evidence on the USDOC's record indicates that the SDF Managing Committee made the decision whether or not loans should be issued, and on what terms. Thus, while funds were actually disbursed by the JPC, such disbursements were only made following an affirmative decision by the SCM Managing Committee as to the issuance, terms, and conditions of the loans.[496] In this way, it is clear to us that the SCM Managing Committee was "directly" involved in the provision of SDF loans. We recall that India does not deny that the SDF Managing Committee was the decision-maker regarding the issuance, terms and waivers of the SDF loans.

7.294. Regarding the issue of whether or not the USDOC could reasonably have found that the SDF Managing Committee "transfer[red]" the relevant funds, there is nothing in the text of Article 1.1(a)(1)(i) to suggest that the relevant government or public body must have title over the funds being transferred, or that there must be a charge on the public account, in order for a direct "transfer" of funds to occur.

7.295. In the present case, SDF levies are collected by the JPC. The parties have argued extensively whether or not such levies are imposed on consumers pursuant to a government mandate, such that they may be similar to government taxation, or whether they are rather voluntary contributions made by the steel producers. We consider important the GOI's assertion that, once collected, the funds are "remitted to the Fund".[497] We understand that once the funds are remitted to the SDF, the funds are no longer held by either the steel producers or the JPC. They are instead held by the SDF, and disposed of pursuant to the instructions of the SDF Managing Committee. In these factual circumstances, we consider that the USDOC was entitled to find that SDF funds had been "transfer[red]" by the SDF Managing Committee within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Even though the SDF Managing Committee may not have taken title over the funds, or imposed a charge on the public account when releasing those funds as loans, the SDF Managing Committee was instrumental (because of its role as decision-maker regarding the issuance, terms and waivers of SDF loans) in "transfer[ring]" those funds from the SDF to the loan beneficiaries.

7.296. Furthermore, we note the finding of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)* that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient".[498] Even if the SDF Managing Committee could not be said to have "transfer[red] funds" to the SDF loan beneficiaries, at the very least the SDF Managing Committee made those funds available to beneficiaries once it provided the requisite loan authorizations.

[493] India's second written submission, para. 236.
[494] Ibid. para. 241.
[495] Ibid.
[496] We also note in this regard the USDOC's finding that "numerous notes and minutes from SDF Management Committee meetings … demonstrate the SDF Management Committee's ability to control and direct loan approvals, interest payments on SDF loans, and SDF loan waivers" (2001 Issues and Decision Memorandum, Exhibit IND-7, pp. 9 and 10, quoted above at para. 7.277).
[497] Government of India's response to supplemental questionnaire, 20 March 2001 ("GOI's 2001 supplemental questionnaire response"), Exhibit USA-75, p. 3.
[498] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 614. (emphasis added)

7.5.1.2.3.1 Conclusion

7.297. For the above reasons, we reject India's claim that the USDOC's determination that the SDF Managing Committee provided direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.1.3 The USDOC's determination that SDF loans constitute potential direct transfers of funds

7.298. This claim concerns the results of the 2008 administrative review conducted by the USDOC. As a result of a failure by interested parties to provide necessary information, the USDOC performed its assessment of the SDF loans on the basis of facts available. The USDOC found, "as AFA [adverse facts available], that the GOI's provision of SDF loans under this program provide a financial contribution in the form of a potential direct transfer of funds…."[499]

7.5.1.3.1 Main arguments of the parties

7.299. India submits that the USDOC's determination that SDF loans are potential direct transfers of funds is inconsistent with Article 1.1(a)(1)(i). India submits that, for a potential direct transfer of funds to exist, there has to be a government practice that involves: (i) an obligation to make a direct transfer of funds (ii) at some point in the future.[500] According to India, there is no reference in the USDOC's determination to any such future obligation.[501] India further submits that, in view of its earlier treatment of SDF loans as (actual rather than potential) direct transfers of funds, the determination made by the United States is bereft of any form of reasoning and is *ex facie* illogical and unsubstantiated.[502]

7.300. The United States contends that India's concern that this language was intended to address "an obligation on the GOI to provide funds in the future"[503] is misplaced.[504] According to the United States, the USDOC's reference to the term "potential" was simply meant to convey the potential benefit for the 2008 period as there was no specific information on SDF provided by the company during the 2008 Administrative Review.

7.5.1.3.2 Evaluation

7.301. We recall that the USDOC's reference to a "potential direct transfer of funds" was made in applying facts available. In applying facts available, the USDOC explicitly stated that "no new information or evidence of changed circumstances has been submitted in this proceeding to warrant reconsideration" of its earlier determination regarding SDF loans.[505] That earlier determination had treated SDF loans as "direct transfers of funds".[506] The USDOC also stated that, in applying facts available, it "continue[d] to find, as AFA, that the GOI's provision of SDF loans under this program provide a financial contribution …"[507] In our view, consideration of the broader context of the USDOC's determination makes it clear that, in reality, the USDOC was merely *continuing* to apply its earlier determination that SDF loans constitute direct transfers of funds. The USDOC explained that the *continued* application of its previous determination to this effect was appropriate because there had been no changed circumstances to warrant reconsideration of that determination. In this context, we accept the United States' argument that the USDOC used the term "potential" to highlight the fact that the USDOC did not have concrete evidence regarding the actual provision of loans during the relevant period. While the USDOC might have avoided confusion by choosing a different textual formulation, the general sense of the USDOC's determination is clear enough. Accordingly, we reject India's claim that the USDOC's reference to

[499] 2008 Preliminary Results, Exhibit IND-40, internal page 1501.
[500] India's first written submission, para. 464.
[501] Ibid. para. 464.
[502] Ibid. para. 465.
[503] Ibid. para. 575.
[504] United States' first written submission, para. 252 (the United States made this argument in the context of India's Article 12.7 claim concerning this matter).
[505] 2008 Preliminary Results, Exhibit IND-40, internal page 1501.
[506] At para. 465 of its first written submission, India acknowledges that SDF loans had previously been determined to be direct transfers of funds.
[507] 2008 Preliminary Results, Exhibit IND-40, internal page 1501.

SDF loans as "potential direct transfers of funds" in the 2008 administrative review is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.2 Alleged inconsistencies with respect to the USDOC's determination of benefit

7.302. India challenges the manner in which the USDOC determined the benefit conferred by SDF loans in the 2006 and 2008 administrative reviews. The USDOC did so by comparing the rates at which SDF loans were provided with the Prime Lending Rate (PLR) as published by the Reserve Bank of India (RBI).

7.5.2.1 Main arguments of the parties

7.303. India's claims regarding the USDOC's use of PLRs are based on the chapeau to Article 14, and Article 14(b). In respect of the chapeau to Article 14, India notes that investigating authorities are required to explain in any given case the method used to calculate the benefit to the recipient.[508] India further notes that, pursuant to Article 14(b), the investigating authority must compare the terms of the government loan with the terms of a "comparable commercial loan which the firm could actually obtain on the market".[509] India submits that the United States violated its obligations under Article 14(b) and the chapeau to Article 14 by not adequately explaining[510] how the PLRs indicate the amount that an SDF loan recipient would pay on a comparable commercial loan which that recipient could actually obtain on the market.[511] India submits that the PLRs used by the USDOC are interest rates for banks, rather than rates for loans actually disbursed.[512]

7.304. India also claims that the USDOC's determination of benefit in the 2006 administrative review is inconsistent with the chapeau of Article 14, and Article 14(b), because the USDOC did not take into account the costs incurred by exporters to participate in the SDF Programme and obtain SDF loans, or provide any explanation of its treatment of such costs.[513] India submits that the USDOC similarly violated Article 1.1(b) by finding benefit even though the overall scheme of price controls under the SDF actually made producers worse off.

7.305. The United States submits that, during the 2006 administrative review, the USDOC properly used an average of certain PLRs as a commercial benchmark interest rate. The United States contends that the PLRs were compiled and published by the RBI, for loans similar to the SDF loans in currency, structure and maturity. The United States contends that the rate calculated by the USDOC was "comparable" within the meaning of Article 14(b) of the SCM Agreement.[514]

7.306. The United States also submits that Article 14(b) clearly states that a benefit is conferred where there is a "difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." The United States contends that no credits or adjustments are provided for in the SCM Agreement. The United States contends that there is also no requirement to consider that the recipient of a subsidy is required separately to adhere to certain price controls.[515]

7.5.2.2 Evaluation

7.307. We begin by addressing India's claim that the USDOC failed to adequately explain how the PLRs applied by the USDOC represent the amount that the firm would pay on a "comparable

[508] India's first written submission, para. 469.
[509] Ibid. para. 470.
[510] Ibid. para. 475.
[511] Ibid. para. 473.
[512] India's second written submission, para. 255.
[513] India's first written submission, para. 476.
[514] 2006 Issues and Decision Memorandum, Exhibit IND-33, section "B- Long-Term Benchmarks and Discount Rates."
[515] United States' first written submission, para. 574.

commercial loan which the firm could actually obtain on the market", contrary to the chapeau of Article 14, and Article 14(b), of the SCM Agreement.[516]

7.308. The chapeau of Article 14 requires that the application of the "method used by the investigating authority to calculate the benefit to the recipient … to each particular case shall be transparent and adequately explained". We have already explained that the requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied.[517] We also agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis.[518]

7.309. In the present case, we are not persuaded that, having explained that it would determine benefit by comparing SDF loan rates with PLRs, and how it proceeded to apply those PLRs[519], the USDOC was also required by the chapeau of Article 14 to indicate the reasons why it chose to determine benefit on that basis. In our view, its explanation was such that the application of its benefit methodology was clear and intelligible, and could be easily understood and discerned.

7.310. Regarding the USDOC's obligations under Article 14(b), we understand India to argue that the USDOC's use of PLRs was inappropriate because PLRs are bank rates, rather than rates for loans actually disbursed, i.e. loans "which the firm could actually obtain on the market".[520] In this regard, we note the finding by the Appellate Body that "Article 14(b) does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies".[521] We agree with this finding, and similarly consider that an investigating authority is entitled to rely on constructed interest rate proxies where actual comparable commercial loan rates are not available. Contrary to India's claim, the USDOC was not prevented from applying the PLRs simply because they did not represent rates that SDF loan recipients could actually obtain. India's approach to Article 14(b) would be excessively formalistic, and would ignore the flexibility found in the Article 14(b) guideline.[522] We observe that India has not argued that the PLRs used by the USDOC are otherwise not meaningful proxies for comparable commercial loan rates that SDF loan recipients could have obtained on the market.[523]

7.311. We next turn to India's claim that the USDOC violated Article 14(b), and the chapeau of Article 14, by failing to account, in applying the comparable commercial loan rate, for the costs incurred by steel producers in participating in the SDF scheme. India refers in this regard to the fact that steel producers "contributed their own funds to the SDF Program and as a result, lost the interest that they could otherwise obtain on their own funds had it been invested elsewhere."[524] Further, India argues that there were various other "administrative expenses" and charges incurred by the steel producers participating in the SDF Programme.[525] As a factual matter, we do not agree that SDF levies should have been treated as the producers' own funds. SDF levies were

[516] It is unclear whether India's claim under Article 14(b) is dependent on its claim under the chapeau to Article 14, or whether India is also challenging the USDOC's use of PLRs independent of its transparency claim. We shall cover both issues, for the sake of completeness.

[517] According to the Fifth Edition of the Shorter Oxford English Dictionary, the verb "explain" in relevant context means to "make clear or intelligible (a meaning, difficulty, etc.); …. Give details of (a matter, *how*, etc.)" (emphasis original). The term "transparent", when used figuratively, means "easily seen through or understood; easily discerned; evident; obvious".

[518] United States' response to Panel question No. 104, para. 60.

[519] The relevant explanation is provided in Memorandum to the File regarding India's prime lending rate, 28 November 2007 ("India's Prime Lending Rate"), Exhibit USA-77, pp. 4-5. This is a public document that was expressly referred to in fn. 14 of the USDOC's 2006 Preliminary Results, Exhibit IND-32, p. 6 of 22.

[520] India's second written submission, para. 255.

[521] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 480.

[522] We are guided in this respect by the findings set forth at paras. 480-490 of the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*.

[523] It is also undisputed that the PLRs were the only interest rates on record that were comparable to SDF loans examined in the 2006 administrative review (United States' first written submission, paras. 568-569).

[524] India First Written Submission, para. 477.

[525] Ibid. para. 478.

rather collected from consumers, through an addition to the steel producers' ex-works prices, and then remitted[526] directly to the SDF. Since the levies were collected from consumers and always destined for the SDF, steel producers would not have been able to obtain interest by investing those funds elsewhere. As a legal matter, we do not consider that investigating authorities are required to take account of the costs incurred by recipients in participating in the scheme under which the loans are provided. We note in this regard that the text of Article 14(b) provides for a comparison "between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan". Article 14(b) states that the benefit "shall" be the difference between those amounts. The focus of Article 14(b) is therefore on the difference between the amounts paid "on" the relevant loans. There is no reference in Article 14(b) to the amount of any cost incurred in obtaining the loans. Furthermore, while Article 14(c) provides that the amount of benefit in respect of loan guarantees shall be "adjusted for any differences in fees", there is no such requirement in Article 14(b). Accordingly, Article 14(b) does not require the USDOC to take into account the costs incurred by SDF loan recipients in obtaining SDF loans. Furthermore, since Article 14(b) does not contain any such requirement, there is no basis to conclude that the chapeau of Article 14 required the USDOC to adequately explain how it had complied with that requirement.

7.312. Regarding India's Article 1.1(b) claim, we note that the basis for that claim is essentially the same as the basis for India's Article 14(b) claim discussed in the preceding paragraph. Thus, India's Article 1.1(b) claim is again concerned with the fact that steel producers allegedly had to contribute their own funds, and lost interest that they would otherwise have earned on those funds.[527] Article 14 contains guidelines for calculating the benefit to the recipient under Article 1.1(b). Since India has failed to establish that the USDOC's failure to take account of costs incurred by SDF loan recipients is inconsistent with the Article 14(b) guideline for calculating benefit within the meaning of Article 1.1(b), its claim that the very same conduct is inconsistent with Article 1.1(b) must also fail. By complying with the Article 14(b) guideline in respect of loan recipients' costs, the USDOC necessarily complied with Article 1.1(b) in respect of that same matter.

7.5.3 Conclusion

7.313. For the above reasons, we reject India's claims against the USDOC's determinations that loans provided under the SDF constitute direct transfers of funds by public bodies, and that such loans conferred benefit on the recipient steel producers.

7.6 USITC's injury assessment

7.314. India claims that certain US provisions relating to injury assessment are "as such" and "as applied" inconsistent with a number of provisions of the SCM Agreement. In addition, India claims that the USITC's injury determination in the CVD investigation of the imports from India is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

7.315. We begin by addressing issues concerning cumulation in original investigations, and then in reviews. Thereafter, we turn to the issue of whether or not the USITC considered all of the mandatory economic factors in its injury determination.

7.6.1 Whether the SCM Agreement permits "cross-cumulation" in original investigations

7.316. India claims that Section 1677(7)(G) is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original investigation because, in certain situations, this provision requires the cumulative assessment of the effects of subsidized imports

[526] See para. 7.295 above. India contends that the SDF levy, even if derived from customers, "cannot be considered as materially different from the manner in which any commercial company would make profits" (India's response to Panel question No. 3). We disagree. The SDF levy is not akin to profit, since profits derived from sales to customers would not be remitted to the SDF for disbursement pursuant to the instructions of a public body.

[527] India's first written submission, para. 483. Furthermore, the Article 1.1(b) and Article 14(b) claims are both addressed in the same paragraph, and on the basis of the same reasoning, at para. 256 of India's second written submission.

with the effects of imports not subject to simultaneous countervailing duty investigations.[528] Moreover, India claims that Section 1677(7)(G) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement "as such" and "as applied" in the original investigation because, in certain situations, this provision requires the assessment of injury based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports.[529]

7.6.1.1 Relevant WTO provisions

7.317. Article 15.1 of the SCM Agreement provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.
>
> ————————
>
> [46] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.318. Article 15.2 of the SCM Agreement provides:

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

7.319. Article 15.3 of the SCM Agreement provides:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.320. Article 15.4 of the SCM Agreement provides:

> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased

[528] India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.

[529] India's first written submission, paras. 128-132, 500-506 and 510-517; opening statement at the first meeting of the Panel, paras. 22-23 and 44; and second written submission, paras. 54 and 260.

> burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.321. Finally, Article 15.5 of the SCM Agreement provides:

> It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.
>
> _____
>
> [47] As set forth in paragraphs 2 and 4.

7.6.1.2 Factual background

7.322. India's claims with respect to original investigations concern Section 1677(7)(G) which requires the USITC to cumulatively assess, for purposes of determining material injury, the effects of dumped and subsidized imports on the domestic industry when certain conditions are met. The US provision provides in relevant part:

> (G) Cumulation for determining material injury
>
> (i) In general
>
> For purposes of clauses (i) and (ii) of subparagraph (C), and subject to clause (ii), the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which–
>
> (I) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day,
>
> (II) investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or
>
> (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day,
>
> if such imports compete with each other and with domestic like products in the United States market.[530]

7.323. In its injury assessment in the original CVD investigations, the USITC cumulated the effects of subsidized imports from India with those of imports from ten other countries. Imports from Argentina, India, Indonesia, South Africa and Thailand were subject to simultaneous CVD investigations and parallel AD investigations. Imports from the remaining six countries (China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine) were only subject to parallel AD investigations.[531]

[530] Title 19, Customs Duties, USC, Exhibit IND-1, p. 34, internal page 343.

[531] USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and hot-rolled steel products from Argentina and South Africa, Investigation No. 701-TA-404 (final) and Investigations Nos. 731-TA-898 and 905 (final), August 2001, publication 3446 ("USITC Final

7.6.1.3 Main arguments of the parties

7.6.1.3.1 India

7.6.1.3.1.1 Article 15.3 of the SCM Agreement

7.324. India submits that in cases where only a sub-set of countries subject to AD investigations are subject to simultaneous CVD investigations, Section 1677(7)(G) requires the cumulative assessment of the effects of subsidized imports with the effects of imports not subject to simultaneous CVD investigations.[532] India contends that "the US investigating authority inherently increases the probability of reaching a positive injury finding."[533] India recalls that in the CVD investigation at issue here, the USITC cumulated the effects of imports from India with those of imports from ten other countries, emphasizing that imports from only four of those other countries were also subject to simultaneous CVD investigations.[534]

7.325. India argues that imports from a country that is subject only to an AD investigation should not be cumulated under Article 15.3 of the SCM Agreement, as the plain words of this provision permit a cumulative assessment only of imports from countries that are simultaneously subject to CVD investigations.[535] India submits that the term "imports" in Article 15.3 must be understood in the context provided by Article 15 of the SCM Agreement. India contends that the expression "subsidized imports" in Articles 15.1 and 15.2 of the SCM Agreement refers only to imports for which the subsidy margin is more than *de minimis*, which would exclude imports that are not subsidized or that are not even alleged to be subsidized.[536]

7.326. Moreover, India submits that Article 15.3 of the SCM Agreement allows a cumulative assessment of subsidized imports only when three conditions are satisfied: (i) the amount of subsidization from each country is more than *de minimis*, (ii) the volume of imports from each country is not negligible, and (iii) there is competition amongst imports and between imports and the like domestic product. With respect to the first two conditions, India argues that these must be satisfied for "each country", i.e. a separate and independent country-by-country assessment.[537] India contends that the measure at issue requires cumulation without examining whether (i) the amount of subsidization for imports from "each" country is above *de minimis*, and (ii) the volume of imports from "each" country is individually not negligible.[538]

7.6.1.3.1.2 Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.327. India contends that the plain meaning of Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement requires consideration of "subsidized imports" for the determination of injury because of the repeated reference to "subsidized imports".[539] Thus, India argues that (i) the "effects" analysis under Article 15.2, (ii) the "impact" analysis under Article 15.4, and (iii) the "causal link" analysis under Article 15.5 shall be limited only to subsidized imports.[540] India recalls its arguments that "subsidized imports" under Article 15 of the SCM Agreement means only imports for which the subsidy margin is above *de minimis*. India argues that imports from

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Determinations"), Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

[532] India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.

[533] India's first written submission, paras. 108 and 113. See also India's opening statement at the first meeting of the Panel, para. 23.

[534] India's first written submission, para. 499.

[535] Ibid. para. 111; and opening statement at the first meeting of the Panel, para. 22.

[536] India's first written submission, paras. 112, 114 and 498-499; second written submission, para. 54.

[537] India's first written submission, paras. 116-117 and 121; opening statement at the first meeting of the Panel, para. 22; second written submission, paras. 56 and 72-73; and closing statement at the second meeting of the Panel, para. 4.

[538] India's first written submission, paras. 119-120, 123-127 and 497-499.

[539] Ibid. para. 128, citing the Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2116. See also India's second written submission, para. 63.

[540] India's first written submission, para. 128; opening statement at the first meeting of the Panel, para. 22; and second written submission, paras. 57-58 and 61.

countries subject solely to AD investigations are not "subsidized imports", because the lack of any finding relating to the SCM Agreement means their subsidy margin is zero.[541]

7.328. According to India, Section 1677(7)(G) requires the USITC to cumulatively assess the effects of subsidized imports with the effects of imports subject only to AD investigations. India contends that Section 1677(7)(G) results in the inclusion of non-subsidized imports in the assessment of (i) the increase in volume of subsidized imports as well as their effect on domestic prices, under Article 15.2, and (ii) the impact of subsidized imports on the domestic industry, under Article 15.4.[542] India recalls that, in the CVD investigation at issue, the USITC cumulatively assessed the volume and effects of allegedly subsidized imports with the volume and effects of imports from six countries not subject to simultaneous CVD investigations, which imports must therefore be considered non-subsidized.[543]

7.329. As a result of the cumulative assessment mandated by Section 1677(7)(G), India contends that the causal link between subsidized imports and injury under Article 15.5 of the SCM Agreement is seriously disturbed because the volume, effects and impact of non-subsidized imports are taken into account.[544] India recalls that Article 15.5 mandates investigating authorities to not attribute to the subsidized imports injury caused by any known factor other than the subsidized imports. In this respect, Article 15.5 lists as a possibly relevant factor "the volume and prices of non-subsidized imports of the product in question".[545] In the CVD investigation at issue, India contends that the existence of non-subsidized imports was "known" to the USITC at the time of the injury investigation.[546] However, according to India, the United States failed even to "identify individual shares of the subsidized imports from the total imports, leave alone the volume and price effects, and the consequential impact of such imports."[547]

7.6.1.3.2 United States

7.6.1.3.2.1 Article 15.3 of the SCM Agreement

7.330. The United States makes two main arguments seeking to demonstrate that Section 1677(7)(G) is not "as such" or "as applied" inconsistent with Article 15.3 of the SCM Agreement.[548]

7.331. First, the United States argues that Article 15.3 only addresses the conditions for cumulation of the effects of imports from multiple countries that are subject to simultaneous countervailing duty investigations. Thus, according to the United States, as this provision is silent concerning whether an investigating authority may cumulate the effects of *dumped* and *subsidized* imports in original investigations, it cannot be said to prohibit such practice.[549] The United States also contends that the *de minimis* subsidy limitation on cumulation raised by India only applies to imports that are "simultaneously subject to countervailing duty investigations". Consequently, it does not limit the types of other unfairly traded imports that may be cumulated with the subsidized imports.[550] With regard to the country-specific "negligibility" requirement posited by India, the United States submits that Article 15.3 does not define the term "negligibility" in the

[541] India's first written submission, para. 129.
[542] Ibid. para. 130. See also India's first written submission, paras. 128-132, and 500-501; opening statement at the first meeting of the Panel, paras. 22-23; and second written submission, para. 54.
[543] India's first written submission, para. 502. See also India's first written submission, paras. 502-506; and opening statement at the first meeting of the Panel, para. 44.
[544] India's first written submission, para. 131; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 57-58 and 61.
[545] India's first written submission, paras. 131 and 514.
[546] Ibid. para. 514.
[547] Ibid. paras. 513-514. See also India's second written submission, para. 61.
[548] United States' first written submission, paras. 117, 129 and 147; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 81; and opening statement at the second meeting of the Panel, para. 51.
[549] United States' first written submission, paras. 83 and 117-120; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 90; and opening statement at the second meeting of the Panel, para. 52.
[550] United States' first written submission, para. 130.

manner proposed by India, and argues that the type of aggregated analysis provided for by the US statue is not inconsistent with this provision.[551]

7.332. Second, the United States asserts that the relevant context of Article 15.3 of the SCM Agreement, and the object and purpose of the SCM Agreement and AD Agreement support the proposition that cumulation of the effects of dumped and subsidized imports is permitted.[552] With respect to the relevant context, the United States notes that the AD Agreement and the SCM Agreement contain nearly identical provisions on injury analysis, including cumulation. The United States recalls that provisions in both agreements allow investigating authorities to consider the cumulative effect of unfairly traded imports from multiple sources, given that imports can have a cumulative injurious impact on the domestic industry. The United States submits that Article 15.3 of the SCM Agreement should be read in the context of the WTO Agreement as a whole, including in particular the AD Agreement.[553] In addition, the United States notes that Article VI:6(a) of the GATT 1994 is referred to by Article 15.1 of the SCM Agreement and Article 3.1 of the AD Agreement.[554] The United States argues that Article VI:6(a) supports the view that "cross-cumulation" is permitted because it refers to "injury" in the singular when addressing "the effect of the dumping or subsidization".[555]

7.333. Turning to the object and purpose of the Agreements, the United States refers to the Appellate Body's reports in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews* which reflect the view that cumulation of the effects of imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement. The United States argues that the same reasoning is applicable to a situation where dumped *and* subsidized imports are having a simultaneous injurious impact on an industry.[556] The United States contends that an analysis focused solely on the effects of either dumped or subsidized imports alone would necessarily prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, and consequently frustrate the purpose of both the SCM Agreement and the AD Agreement.[557]

7.6.1.3.2.2 Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.334. The United States submits that there is no basis for India's "as such" and "as applied" claims under these provisions for several reasons.[558] First, "to the extent that the Panel agrees [that] the cumulation of subsidized and dumped imports is not inconsistent with Article 15.3, it would necessarily be reasonable for an investigating authority to analyze the volume and price effects of subsidized and dumped imports on the industry, as provided under Articles 15.1, 15.2, 15.3 and 15.4."[559] Second, the phrase "subsidized imports" in these provisions does not limit the scope of an authority's injury investigation. If an investigating authority assesses the larger group of unfairly traded imports, which includes all subsidized imports, such assessment will necessarily address the effects of subsidized imports.[560] Third, the United States argues that the injury assessments cannot be limited to "subsidized imports" because of practical difficulties for investigating authorities to disentangle the effects of dumped imports from those of subsidized

[551] The United States submits that the definition of "negligibility" contained in Article 5.8 of the AD Agreement is relevant context to interpret Article 15.3 of the SCM Agreement. The United States contends that Article 5.8 permits the type of aggregated analysis provided in the US statue. United States' first written submission, para. 132 and fn. 222. See also opening statement at the second meeting of the Panel, paras. 64-65.

[552] United States' first written submission, paras. 83 and 126; and opening statement at the second meeting of the Panel, paras. 51 and 57.

[553] United States' first written submission, paras. 125 and 127; opening statement at the first meeting of the Panel, paras. 21-23; and opening statement at the second meeting of the Panel, paras. 53 and 57-58.

[554] United States' response to Panel question Nos. 57, paras. 54-55; and 60, para. 69.

[555] United States' response to Panel question No. 57, para. 54; and opening statement at the second meeting of the Panel, para. 58.

[556] United States' first written submission, paras. 123-125; and second written submission, para. 93, fn. 164.

[557] United States' first written submission, paras. 122 and 126; and opening statement at the second meeting of the Panel, para. 56.

[558] United States' first written submission, para. 147.

[559] Ibid. para. 133.

[560] United States' response to Panel question No. 57, paras. 54-57.

imports.[561] In addition, the United States submits two separate arguments referring respectively to Articles 15.4 and 15.5 of the SCM Agreement. The United States contends that the existence of dumped imports in the marketplace is a "relevant factor", for purposes of Article 15.4 of the SCM Agreement, and argues that it would be anomalous for the Panel to find that an authority could not cumulatively assess both sets of unfairly traded imports.[562] The United States also argues that, because an authority may cumulate the injurious effects of all unfairly traded imports that are simultaneously affecting the industry, the authority need not perform a non-attribution analysis for unfairly traded imports that are cumulated in its analysis.[563]

7.335. Finally, the United States submits that, contrary to India's assertion, the record of the CVD investigation at issue does not show that the USITC's cumulative analysis made it more likely that it would find injury caused by the subsidized imports than if it had not cumulated them with dumped imports.[564]

7.6.1.4 Main arguments of the third parties

7.6.1.4.1 European Union

7.336. The European Union submits that Article 15.3 of the SCM Agreement only permits the cumulation of subsidized imports if three conditions are met. First, the amount of subsidization from each country must be more than *de minimis*, otherwise imports cannot be considered as "subsidized imports". Second, the volume of imports from each country must not be negligible. If either of these two conditions is not met, the investigation with respect to imports from that particular country must be terminated pursuant to Article 11.9 of the SCM Agreement. Third, the cumulative assessment must be appropriate in light of the conditions of competition between imported products and between imported products and the like domestic product.[565]

7.337. The European Union contends that the inclusion of non-subsidized dumped imports in the volume of subsidized imports for purposes of injury assessment in a CVD investigation "would not be based on any provision of the SCM Agreement and would be illogical."[566] The European Union argues that "cumulation of imports makes sense in the context of investigation of the *same* phenomenon (dumping or subsidies), where the objective is to determine the total impact of the imports at issue on the domestic industry."[567]

7.6.1.5 Evaluation

7.338. India submits two sets of closely related claims relating to Section 1677(7)(G). First, India claims that Section 1677(7)(G) is "as such" and "as applied" inconsistent with Article 15.3 of the SCM Agreement. India argues that, in certain situations, the US provision requires the cumulative assessment of the effects of subsidized imports with the effects of imports not subject to simultaneous countervailing duty investigations.[568] Second, India claims that Section 1677(7)(G) is "as such" and "as applied" inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, because, in certain situations, the US provision requires that the assessment of injury be based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports.[569]

[561] United States' response to Panel question No. 56, paras. 49-53; second written submission, paras. 90-91; and opening statement at the second meeting of the Panel, paras. 55-56.
[562] United States' first written submission, para. 134.
[563] United States' response to Panel question No. 58, para. 59.
[564] United States' first written submission, paras. 148-149.
[565] European Union's third-party submission, paras. 63, 65-66, 70-72.
[566] Ibid. para. 67.
[567] Ibid. para. 69. (emphasis original)
[568] India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.
[569] India's first written submission, paras. 128-132, 500-506 and 510-517; opening statement at the first meeting of the Panel, paras. 22-23 and 44; and second written submission, paras. 54 and 260.

7.6.1.5.1 Whether Section 1677(7)(G) is "as such" and "as applied" inconsistent with Article 15.3 of the SCM Agreement

7.339. The issue before the Panel is whether the SCM Agreement permits the cumulative assessment of the effects of imports that are subject to a CVD investigation with the effects of imports that are subject only to a parallel AD investigation ("cross-cumulation"). Conceptually, this issue relates to whether the SCM Agreement only allows an investigating authority to consider cumulatively, that is, together or as a whole, the effects of one set of imports of a product (those subject to simultaneous CVD investigations), or whether it also allows an investigating authority to consider together or as a whole the effects of two sets of imports of the same product (those subject to simultaneous CVD investigations *and* those subject only to parallel, simultaneous AD investigations).[570] This issue arises because, pursuant to Section 1677(7)(G), the United States shall undertake, in certain situations, a single injury assessment for "unfairly traded imports"[571], that is, subsidized imports and dumped imports when there are simultaneous countervailing and anti-dumping investigations of the same product from different countries.[572] The SCM and AD Agreements regulate investigations for subsidized and dumped imports – including injury determinations – separately.

7.340. In our view, Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports.

7.6.1.5.1.1 The text of Article 15.3 of the SCM Agreement

7.341. We begin our examination with the text of Article 15.3 of the SCM Agreement. This provision starts with the phrase:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if ….

We agree with India that the term "simultaneously" suggests that imports under consideration must all be subject to CVD investigations at the same time.[573] In our view, the plain text of Article 15.3 only allows a cumulative assessment of the effects of imports which are *simultaneously subject to countervailing duty investigations*.[574] We consider that this fact, that imports are subject to simultaneous CVD investigations, is a necessary pre-condition for a cumulative assessment to be undertaken consistently with Article 15.3.[575] Imports which are only the subject of a parallel, simultaneous anti-dumping duty investigation plainly do not satisfy this requirement as a matter of fact. Thus, we agree with India both that the requirement that imports be subject to a CVD investigation is a threshold requirement for cumulation, and that under Article 15.3 the effects of imports which are not subject to CVD investigation cannot be cumulatively assessed with those of imports which are subject to CVD investigation.[576]

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[570] India clarified that its challenges are limited to "[c]umulation of subsidized imports with dumped imports, where all the dumped imports are not subsidized". India expresses no opinion on the cumulation of subsidized imports, where all imports are also simultaneously dumped. India's second written submission, paras. 48-49; and response to Panel question No. 32. Thus, our examination and findings are limited to the "cross-cumulation" of the effects of subsidized imports with the effects of non-subsidized, dumped imports. We need not and do not examine any other type or form of cumulative assessment involving subsidized and dumped imports in this report.

[571] We note that, although this expression is not found in the US provision at issue, it is repeatedly used by the United States in its arguments. See, e.g., United States' first written submission, paras. 83, 121-122, 125-126, 130, and 134.

[572] United States' response to Panel question No. 61, para. 70.

[573] India's first written submission, para. 111.

[574] We note that, although the expression "subsidized imports" is not explicitly used in Article 15.3, both parties agree that Article 15.3 only refers to imports that are "simultaneously subject to countervailing duty investigations". India's first written submission, para. 111; United States' first written submission, para. 117; and second written submission, para. 90.

[575] We note that the text of Article 15.3 also lists a number of conditions that must be fulfilled for an investigating authority to cumulatively assess the effects of the imports at issue.

[576] India's first written submission, para. 111; and opening statement at the second meeting of the Panel, para. 18.

7.342. The United States argues that Article 15.3 of the SCM Agreement does not regulate "cross-cumulation", because this provision only addresses the conditions for cumulation of the effects of imports from multiple countries that are *subject to simultaneous CVD investigations*, but does not address the possibility of "cross-cumulation" of other imports that are not subject to CVD investigation. Thus, the United States contends that Article 15.3 does not prohibit the cumulation of the effects of subsidized imports with the effects of other unfairly traded imports, namely non-subsidized, dumped imports.[577] We understand the United States' argument to be anchored in its view that Article 15.3 does not regulate the type of "cross-cumulation" at issue here because its *scope of application* is limited by the expression "simultaneously subject to countervailing duty investigations". In other words, for the United States, Article 15.3 simply does not address the question whether a cumulative assessment of the effects of imports which are not subject to simultaneous CVD investigations is permissible.

7.343. We are unable to reconcile the United States' position with the text of Article 15.3 in the overall context of Article 15 of the SCM Agreement. As noted above, Article 15.3 only refers to imports that are "simultaneously subject to countervailing duty investigations". In addition, as discussed further below, all the provisions in Article 15 refer only to "subsidized imports" in setting out the requirements for injury determinations. It is clear to us that the *object* of the analysis to be made under Article 15 is injury caused by "subsidized imports", and not injury caused by "unfairly traded imports". In our view, it would not be reasonable to conclude that Article 15, in specifying criteria for an examination of injury based on the effects of subsidized imports, would nevertheless allow – or at least not prevent – the inclusion of non-subsidized imports in that analysis without at least an indication in the text to that effect. While imports subject to an anti-dumping investigation may be unfairly traded, they are clearly not subsidized imports, and the United States does not contend otherwise. We decline to read into the text of Article 15.3 an implicit authorization to consider non-subsidized imports in assessing injury caused by subsidized imports. As stated above, in our view, the expression "simultaneously subject to countervailing duty investigations" in Article 15.3 establishes a necessary pre-condition for cumulative assessment of the effects of the imports in question – i.e. that they must be subject to countervailing duty investigations – rather than a limitation on the scope of application of Article 15.3.[578]

7.344. Thus, we consider that Article 15.3 does not authorize investigating authorities to cumulatively assess the effects of imports that are not subject to simultaneous CVD investigations with the effects of imports which are subject to CVD investigation, for purposes of making an injury determination in a countervailing duty investigation.

7.6.1.5.1.2 The relevant context of Article 15.3 of the SCM Agreement

7.345. We consider that the whole of Article 15 of the SCM Agreement and Article VI:6(a) of the GATT 1994 provide relevant context for our understanding of Article 15.3, which supports our view that only the effects of imports subject to simultaneous CVD investigations may be assessed cumulatively for purposes of an injury analysis in a countervailing duty investigation.

7.346. Article 15.3 is the only provision of the SCM Agreement that specifically addresses cumulation, and it allows for such analysis only if certain specific criteria are satisfied. Moreover, there is nothing in Article 15.3, or in the rest of Article 15, that suggests that there is any possibility for cumulation in circumstances other than those provided for in Article 15.3, i.e. where imports are simultaneously subject to CVD investigations and the criteria in that provision are satisfied. Articles 15.1, 15.2, 15.4 and 15.5, which set out the different elements required for injury analysis, consistently refer to "subsidized imports". There is no mention in any of these

[577] United States' first written submission, paras. 83 and 117-120; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 90; and opening statement at the second meeting of the Panel, para. 52.

[578] Taking this view, we need not and do not address India's additional arguments relating to whether (i) the amount of subsidization from each country is more than *de minimis*, and (ii) the volume of imports from each country is not negligible. India's first written submission, paras. 116-127 and 497-499; opening statement at the first meeting of the Panel, para. 22; second written submission, paras. 72-73; and closing statement at the second meeting of the Panel, para. 4.

provisions of other "unfairly traded" imports.[579] This express limitation of the imports to be considered under Article 15 suggests to us that, in an injury analysis under that provision, the effects of other "unfairly traded" imports is not a relevant consideration because such imports are not "subsidized imports".

7.347. Turning to Article VI of the GATT 1994, we first note that this provision is referred to in Article 15.1 of the SCM Agreement.[580] Article VI:6(a) provides in relevant part:

> No contracting party shall levy any anti-dumping or countervailing duty … unless it determines that the effect of the dumping *or* subsidization, *as the case may be*, is such as to cause or threaten material injury to an established domestic industry … (emphasis added)

As Article VI of the GATT 1994 concerns both anti-dumping and countervailing duties, Article VI:6(a) specifically refers to both types of duties. However, the text of Article VI:6(a) refers to the "effect of the dumping or subsidization, as the case may be". The United States argues that this phrase indicates that "the injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports."[581] However, the United States appears to read an additional alternative into the text of Article VI:6(a). We agree with India that this phrase suggests that injury may be caused by either the effect of the subsidy (one "case") or the effect of dumping (the other "case").[582] In our view, the phrase "as the case may be" more logically can be understood to refer to one of the two alternatives expressly listed in this provision. The third alternative posited by the United States – "dumped and subsidized imports", or "unfairly traded imports" – is not present in Article VI:6(a). In our view, this supports our understanding of Article 15.3 that, for purposes of injury analysis in a countervailing duty investigation, the effects of subsidized imports may not be "cross-cumulated" with the effects of non-subsidized, dumped imports, since to do so would create an additional third "case", the effect of dumping *and* subsidy, not envisaged by Article VI:6(a).

7.348. Moreover, we consider that the use of the conjunction "or" instead of "and" in this phrase suggests on its face that these effects are not to be considered cumulatively but rather separately. The United States submits that "or" should be read as "an inclusive 'or', meaning 'and/or'."[583] In our view, the United States' view that Article VI:6(a) allows the consideration of the effects of both dumped imports and subsidized imports does not comport with the use of the word "effect" in the singular immediately before the reference to "dumping or subsidization". For Article VI:6(a) to be understood as the United States does, as referring to the effects of both dumping and subsidization on a cumulative basis, one would have expected to see the plural "effects" rather than the singular.

7.349. The United States also argues that the use in Article VI:6(a) of the term "injury" in the singular "points toward the assessment on a cumulated basis of the effects of the unfairly traded imports, whether subsidized or dumped."[584] However, in our view, the use of the term "injury" in the singular does not support the United States' view. If anything, it suggests the opposite, as it relates logically to a single injury determination as a result of the "effect" of the dumping, or the "effect" of the subsidization, "as the case may be".

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[579] Article 15.5 does require investigating authorities to not attribute to the subsidized imports any injury caused by, *inter alia*, the volumes and prices of non-subsidized imports of the product in question. In our view, this does not lend any support to the United States' arguments. First, it seems to us that this non-attribution analysis is not a part of the affirmative determination whether subsidized imports are causing injury, but is a possible circumstance that would undermine or detract from such a determination. In addition, and more importantly, "non-subsidized imports" in this context may be fairly traded or unfairly traded. If the latter, the analysis under Article 15.5 would not lead to a finding of injury by such imports, but rather a possible finding that the injurious effects of such imports are such as to preclude or undermine a finding of injury by the subsidized imports under investigation. We cannot, in this context, agree with the United States that such non-subsidized imports can be affirmatively considered in the assessment of injury in a cumulative analysis.

[580] United States' response to Panel question Nos. 57, paras. 54-55, and 60, para. 69; and opening statement at the second meeting of the Panel, para. 58.

[581] United States' response to Panel question No. 60, paras. 66-68.

[582] India's second written submission, para. 65.

[583] United States' response to Panel question No. 60, para. 68.

[584] United States' responses to Panel questions Nos. 57, para. 54; and 61, para. 72.

7.350. We note that the United States' arguments relating to Article VI:6(a) place emphasis on the fact that this provision regulates both anti-dumping and countervailing duties. However, the United States has not explained why Article VI:6(a) would support the conclusion that "cross-cumulation" is permitted, when the relevant provisions on injury determination in the SCM and AD Agreements – which implement the provisions of Article VI of the GATT 1994 in the application of anti-dumping and countervailing measures[585] – do not refer to "subsidized and/or dumped imports". Rather, Articles 15 of the SCM Agreement and Article 3 of the AD Agreement refer only to "subsidized imports" and "dumped imports" respectively.[586]

7.351. Finally, we note that the United States argues that Article 15.3 of the SCM Agreement should be interpreted in light of Article 3.3 of the AD Agreement; the parallel provision regulating cumulation in AD investigations. According to the United States, "cross-cumulation" is permitted because both Article 15.3 and Article 3.3 allow investigating authorities to consider the cumulative effect of unfairly traded imports from multiple sources.[587] Thus, according to the United States, an investigating authority may "cross-cumulate" the effects of dumped imports in a CVD investigation because dumped imports are unfairly traded imports.[588] However, we note that Article 15.3 and Article 3.3 do not refer to "unfairly traded imports". Article 15.3 allows, under certain conditions, the cumulative assessment of the effects of imports subject to simultaneous CVD investigations. Article 3.3 allows, under certain conditions, the cumulative assessment of the effects of imports subject to simultaneous AD investigations. Since neither provision refers to "cross-cumulation", it is unclear to us why the authorization to cumulate in each type of investigation would, in addition, allow investigating authorities to "cross-cumulate" the effects of non-subsidized but dumped imports in CVD investigations.

7.6.1.5.1.3 Object and purpose of the SCM Agreement

7.352. Relying on the Appellate Body reports in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews*, the United States also refers to the object and purpose of the SCM Agreement to support its position regarding "cross-cumulation". The United States submits that the Appellate Body recognized that the ability to cumulate the injurious effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD and SCM Agreements.[589] The United States contends that an analysis focused solely on the effects of either dumped or subsidized imports alone would necessarily prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, and consequently frustrate the purpose of both the SCM Agreement and the AD Agreement.[590]

7.353. In *EC – Tube or Pipe Fittings*, the Appellate Body examined whether an investigating authority must first analyse the volumes and prices of dumped imports on a country-by-country basis under Article 3.2 of the AD Agreement as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3 of the AD Agreement. *EC – Tube or Pipe Fittings* concerned a cumulative assessment of the effects of imports from multiple countries subject to simultaneous AD investigations, and did not raise issues relating to "cross-cumulation". The

[585] Article 10 of the SCM Agreement and Article 1 of the AD Agreement.

[586] See fn. 579 above. Our comments concerning Article 15.5 of the SCM Agreement relate equally to the parallel provision of the AD Agreement, Article 3.5.

[587] United States' first written submission, paras. 125 and 127; and opening statement at the first meeting of the Panel, paras. 21-23.

[588] The United States compares two scenarios to support its rationale. In the first scenario, imports from five countries are found to be subsidized. When considered separately, the subsidized imports from country A do not cause material injury to the domestic industry. However, when the effects of such imports are cumulated with the effects of the subsidized imports from the other four countries, the subsidized imports are found to be causing injury to the domestic industry. In the second scenario, imports from the same five countries are found to be dumped, but only the imports from country A are found to be subsidized. The unfairly traded imports have the same volume and price effects on the domestic industry as in the first scenario. The United States argues that in both scenarios imports from all five countries are unfairly traded and injuring the industry in exactly the same manner. However, if "cross-cumulation" is not permitted, the subsidized imports from country A would only be subject to countervailing duties in the first scenario. United States' opening statement at the first meeting of the Panel, paras. 22-24. See also United States' opening statement at the second meeting of the Panel, para. 57.

[589] United States' first written submission, paras. 121 and 124-125.

[590] Ibid. paras. 122 and 126; and opening statement at the second meeting of the Panel, para. 56.

Appellate Body explained the rationale for cumulation of the effects of dumped imports, the only issue that was before it, as follows:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. … In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.[591]

In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body addressed whether a cumulative analysis of the effects of dumped imports is permissible in sunset reviews under Article 11.3 of the AD Agreement. *US – Oil Country Tubular Goods Sunset Reviews* did not include issues relating to "cross-cumulation". The Appellate Body stated that:

> Although *EC – Tube or Pipe Fittings* concerned an original investigation, we are of the view that this rationale is equally applicable to likelihood-of-injury determinations in sunset reviews. Both an original investigation and a sunset review must consider possible sources of injury ... Injury to the domestic industry—whether *existing* injury or *likely future* injury—might come from several sources simultaneously, and the cumulative impact of those imports would need to be analyzed for an injury determination.
>
> Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose—or continue to impose—anti-dumping duties on products from those sources.[592]

7.354. Both Appellate Body reports highlight the usefulness of cumulation for examining the impact of imports from all sources of dumped, or likely to be dumped, imports in assessing injury or the need for continuation of an anti-dumping measure. Although these reports refer only to dumped imports, the United States submits that they are equally relevant to investigations involving both subsidized and dumped imports.[593] However, the United States does not clearly explain why the Appellate Body's understanding of the rationale for cumulation of the effects of dumped or subsidized imports justifies the "cross-cumulation" of the effects of both types of imports. In these reports, the Appellate Body only considered cumulation in the context of investigations and reviews under the AD Agreement, and thus was concerned only with cumulation of the effects of one type of unfairly traded imports, dumped or likely dumped imports. Reading both passages together, it is clear that the Appellate Body's reference to "all sources of injury" is simply a rejection of a country-specific analysis, and does not address the possibility of "cross-cumulation", an issue which, as noted, was not before it. Nothing in these passages suggests, as the United States argues, that a conclusion that "cross-cumulation" is not provided for in Article 15.3 of the SCM Agreement would prevent an investigating authority from taking into account the injurious effect of all unfairly traded imports which are *relevant* under the SCM Agreement – subsidized imports. Therefore, in our view, the Appellate Body's views, which were made in the context of analysis of the AD Agreement, do not give any support for the United States' understanding.

7.355. As for the object and purpose of the SCM Agreement, the United States appears to understand from these Appellate Body reports that "the object and purpose of the SCM and

[591] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.
[592] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 296-297.
[593] United States' first written submission, para. 125; opening statement at the first meeting of the Panel, para. 21; response to Panel question No. 59, para. 64; second written submission, para. 93; and opening statement at the second meeting of the Panel, para. 53.

AD Agreements … authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources."[594] However, it is unclear to us that this is an accurate reflection of the object and purpose of these Agreements.[595] Indeed, the United States does not identify an actual object and purpose of the SCM Agreement that could assist the Panel in interpreting Article 15.3 of the SCM Agreement. In addition, as seen above, the United States' understanding of "sources of injury" does not comport with our understanding of the views expressed in the Appellate Body reports on which the United States relies. Given that our understanding of Article 15.3 is based squarely on the text of that provision, in its context, we fail to see anything in the Unites States' arguments concerning object and purpose of the SCM Agreement that would outweigh that understanding so as to authorize "cross-cumulation" in CVD investigations.

7.6.1.5.1.4 Conclusion

7.356. Therefore, in light of the above, the Panel upholds India's claims that Section 1677(7)(G) is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original investigation at issue.[596]

7.6.1.5.2 Whether Section 1677(7)(G) is "as such" and "as applied" inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.357. Turning to India's claims under Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, the main question before the Panel is whether the use of the expression "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports.

7.358. It is clear to us that Section 1677(7)(G) requires, in certain situations, the USITC to cumulatively assess the effects of subsidized imports with the effects of dumped, non-subsidized imports. In our view, this results in an assessment of injury based on *inter alia* the volume, effect and impact of non-subsidized, dumped imports.

7.359. India's claims relating to Article 15.3 of the SCM Agreement, which we have upheld, are closely related to its claims under Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement. Indeed, we have already considered the latter provisions as relevant context in our consideration of the meaning of Article 15.3. We will follow a consistent approach examining this set of claims.

7.360. We recall our conclusion that the *object* of the analysis to be made under Article 15 of the SCM Agreement is injury caused by "subsidized imports", and not injury caused by "unfairly traded imports". Indeed, we recall that Articles 15.1, 15.2, 15.4 and 15.5, which set out the different

[594] United States' first written submission, para. 83.

[595] While the SCM Agreement has no express indication of its object and purpose, the Appellate Body in *US – Carbon Steel* examined the object and purpose of the SCM Agreement and stated that "Part V of the *SCM Agreement* … permit[s] Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy." Appellate Body Report, *US – Carbon Steel*, para. 73. Referring to its report in *US – Carbon Steel*, the Appellate Body in *US – Softwood Lumber IV* stated that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions." Appellate Body Report, *US – Carbon Steel*, para. 64. Finally, the Appellate Body in *China – GOES* examined the objective of Article 3 of the AD Agreement and Article 15 of the SCM Agreement, and stated that "Articles 3 and 15 are intended to delineate the framework and relevant disciplines for the authority's analysis in reaching a final determination on the injury caused by subject imports, and to ensure that the analysis and the conclusion drawn therefrom is robust." Appellate Body Report, *China – GOES*, para. 153.

[596] It is undisputed that, in the CVD investigation at issue, the USITC cumulated the effects of subsidized imports from India with the effects of non-subsidized, dumped imports from China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine, which were only subject to parallel AD investigations. USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and USITC Final Determinations, Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

elements required for injury analysis, consistently refer only to "subsidized imports". As explained above, the express limitation of the imports to be considered under Article 15 suggests to us that, in an injury analysis under that provision, the effects of other "unfairly traded" imports is not a relevant consideration because such imports are not "subsidized imports". Thus, in our view, the use of the term "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports. We also recall our consideration of Article VI:6(a) of the GATT 1994 as context for Article 15.3, and our conclusion that it supports our understanding that the effects of subsidized imports are not to be cumulatively assessed with the effects of non-subsidized, dumped imports. Thus, consistent with our views concerning Article 15.3, it would seem likely that Section 1677(7)(G) is inconsistent "as such" and "as applied" with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement.

7.361. The United States submits two general arguments in support of its views concerning the import of the use of the term "subsidized imports" in Articles 15.1, 15.2 and 15.4 of the SCM Agreement. First, while the United States accepts that the phrase "subsidized imports" "cover[s] imports that an authority has found to have received a subsidy"[597], the United States submits that this phrase does not limit the scope of an authority's injury investigation. The United States argues that the investigating authority's assessment of a larger group of "unfairly traded" imports, which includes all subsidized imports, will necessarily address the effects of subsidized imports under Articles 15.1, 15.2, and 15.4.[598] The United States' attempt to expand the coverage of the injury analysis implies that the phrase "subsidized imports" in the provisions at issue refers to the minimum group of imports that must be examined by an investigating authority. We do not accept this view. To us, the phrase "subsidized imports" as used in these provisions is more logically understood to describe with precision the group of imports that must be examined in an injury analysis under those provisions, and not merely the necessary minimum subset of some undefined larger group of "unfairly traded" imports that may be examined in that analysis. We recall, in this context, that the phrase "unfairly traded" imports does not appear in the SCM Agreement. Nor is it clear to us that "unfairly traded" imports would be limited to subsidized and dumped imports, as the United States seems to assume. It is not difficult to conceive of other circumstances in which imports might be considered "unfairly traded". In our view, it is far more likely that the SCM Agreement, in referring to "subsidized imports" in the provisions at issue, describes the entire group of imports to be considered in an injury analysis, and does not leave open the possibility of expanding that group as posited by the United States.

7.362. Second, the United States argues that the injury assessments under Articles 15.1, 15.2 and 15.4 of the SCM Agreement cannot be limited to "subsidized imports" because it is impossible, in practice, for an investigating authority to disentangle the effects of dumped imports from those of subsidized imports.[599] The United States submits that when subsidized and dumped imports and dumped imports are both having injurious effects on the domestic industry, both groups of imports will have mutually reinforcing negative effects on the industry's pricing and sales levels.[600]

7.363. As an initial matter, we note that the United States' argument appears to have no relevance in respect of the obligation set out in Articles 15.1 and 15.2 of the SCM Agreement to assess the volume of subsidized imports. It is unclear to us why any alleged difficulty in practice to disentangle the *effects* of subsidized imports from the *effects* of dumped imports would affect the investigating authority's ability to examine the *volume* of subsidized imports, including considering whether there has been a significant increase in subsidized imports.

7.364. Articles 15.1, 15.2, and 15.4 further require that investigating authorities examine (i) the effect of the subsidized imports on prices, and (ii) the impact of the subsidized imports on the domestic industry. Again, we do not see the difficulty posited by the United States. The United States asserts that it is difficult to "disentangle" the effects of subsidized imports from those of dumped imports of the same product which may or may not also be subsidized. However, it is not clear to us, and the United States has not explained, how this alleged problem arises. The question before the Panel is whether an investigating authority may consider only subsidized

[597] United States' response to Panel question No. 57, para. 54.
[598] Ibid. para. 57.
[599] United States' response to Panel question No. 56, paras. 49-56; and second written submission, paras. 90-91.
[600] United States' response to Panel question No. 56, para. 50; and second written submission, para. 91.

imports (regardless of whether such subsidized imports are also dumped) in its injury assessment in countervailing duty investigation, or whether it can also include non-subsidized, dumped imports in that injury assessment. It seems clear to us that an investigating authority can examine the effects of a defined body of imports – subsidized imports – on prices, and the impact of that same body of imports on the domestic industry, consistently with the criteria set out in Articles 15.2 and 15.4, without in addition considering the effects and impact of dumped imports, whether or not those dumped imports are also subsidized.[601] We fail to see how including in the examination of the effects of subsidized imports an additional group of dumped imports which are not subsidized would add anything to the examination of the effects of the subsidized imports. Moreover, the United States appears to ignore that "fairly" traded imports – e.g. more efficiently produced imports – may also have injurious effects on the domestic industry. Thus, the same practical difficulties raised by the United States would appear to arise in this case as well, and yet we do not understand the United States to suggest that the effects of such imports should also be included in an investigating authority's examination of the effects and impact of subsidized imports.[602] Thus, the "practical difficulty" identified by the United States, to the extent it actually may arise, does not justify expanding the meaning of the term "subsidized imports" to also include dumped imports.

7.365. Finally, the United States submits two separate arguments referring respectively to Articles 15.4 and 15.5 of the SCM Agreement. With respect to Article 15.4, although the United States accepts that Article 15.4 does not contain a "non-attribution" obligation[603], the United States contends that, when "subsidized and dumped imports are found to be simultaneously injuring the industry, the existence of the dumped imports in the marketplace is a 'relevant factor' that must be examined by an authority to assess whether those dumped but non-subsidized imports are exacerbating the injury being caused by the subsidized imports."[604] The United States contends that the phrase "relevant economic factors and indices having a bearing on the state of the industry" in Article 15.4 encompasses factors and indices that are *indicative* of the state of the industry, as well as those that are *responsible* for the state of the industry.[605]

7.366. We are unable to reconcile the United States' argument with the text of Article 15.4 of the SCM Agreement. The introductory sentence of Article 15.4 states that "[t]he examination of the *impact of the subsidized imports* on the domestic industry shall include an evaluation of all *relevant* economic factors and indices having a bearing on the state of the industry".[606] We understand that dumped imports may have caused, or be causing, injury to the same domestic industry under consideration in a countervailing duty case. We also understand that this may be seen in the condition of the domestic industry as reflected in the data concerning the Article 15.4 criteria, and may be a relevant factor having a bearing on the state of the industry. However, we fail to understand how this fact justifies reading the reference to the "impact of the subsidized

[601] The fact that some of those subsidized imports may also be dumped does not affect this analysis, which is in our understanding an examination of the effect or impact of the imports, and not of the effects of the subsidization *per se*. In our view, the "disentangling" problem identified by the United States arises only if an investigating authority is required to examine the injurious effects of subsidization independently of the injurious effects of dumping. Article 15.5 makes clear that the "effects of subsidies" that are relevant to the analysis of injury in a countervailing duty investigation are those set out in paragraphs 2 and 4 of Article 15, both of which refer to the price effects and impact of subsidized imports alone. We do not understand the United States to be arguing to the contrary, and therefore this is not an issue we are required to address or resolve in this dispute. India has made clear that its claims are confined to the cumulation of the effects of subsidized imports with the effects of non-subsidized, dumped imports, and do not relate to the possible disentanglement of the effects of subsidization and dumping in the case of imports that are both subsidized and dumped. India's response to Panel question No. 32; and second written submission, paras. 48-49. In our view, the United States appears to rely on the alleged impossibility of disentangling the injurious effects of subsidization from the injurious effects of dumping in support of its view that cumulative analysis of the effects of subsidized imports with the effects of dumped imports is permissible. United States' response to Panel question No. 56, paras. 49-51; response to Panel question No. 58, para. 60; and second written submission, para. 90.

[602] Of course, as discussed above, in fns. 579 and 586, the injurious effects of such imports must not be attributed to the subsidized, or dumped, imports at issue in a countervailing or anti-dumping investigation under the SCM or AD Agreement, as the case may be.

[603] United States' response to Panel question No. 116(a), para. 92.

[604] United States' first written submission, para. 134.

[605] United States' response to Panel question No 116(b), paras. 93-94.

[606] Article 15.4 of the SCM Agreement. (emphasis added)

imports" in the first sentence of Article 15.4 to include consideration of the impact of dumped, non-subsidized imports on the domestic industry.

7.367. With respect to Article 15.5 of the SCM Agreement, the United States argues that "because an authority may cumulate the injurious effects of all unfairly traded imports that are simultaneously affecting the industry, the authority need not … perform a non-attribution analysis for unfairly traded imports that are cumulated in its analysis."[607] This element of the United States' submission fails because we have found above that an investigating authority may not cumulate the injurious effects of all "unfairly traded" imports that are simultaneously affecting the industry.

7.368. The United States also holds that a finding contrary to "cross-cumulation" would "negate the authority's cumulated analysis because it would require the authority to assess certain groups of cumulated imports as though they were not unfairly traded sources of injury."[608] In our view, the United States' arguments import elements into Article 15.5 which are not found in the text of this provision. Article 15.5 of the SCM Agreement requires an investigating authority to "examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry", identifies "the volume and prices of non-subsidized imports of the product in question" as a factor which may be relevant in this respect, and requires the investigating authority to ensure that "the injuries caused by these other factors [are] not attributed to the subsidized imports."[609] The United States contends that dumped imports are not an "other known factor" of injury.[610] We do not agree. In our view, the reference in Article 15.5 to "non-subsidized imports" as an "other known factor" would also include "non-subsidized, dumped imports". The text of this provision does not suggest that whether non-subsidized imports are "fairly" or "unfairly" traded must be determined, or, indeed, is even relevant. Rather, the relevant consideration in this respect is that the imports considered in a non-attribution analysis are not subsidized, so as to ensure that injury caused by other factors, including non-subsidized imports, is not attributed to *subsidized* imports.

7.6.1.5.2.1 Conclusion

7.369. Therefore, in light of the above, the Panel upholds India's claims that Section 1677(7)(G) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement "as such" and "as applied" in the original investigation at issue.[611]

7.6.2 Whether Article 15 of the SCM Agreement applies to sunset reviews

7.370. India claims that Sections 1675a(a)(7) and 1675b(e)(2) are "as such" inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement because they require a cumulative assessment of the effects of both subsidized and non-subsidized imports in sunset reviews.[612] In addition, India claims that Section 1675a(a)(7), "as applied" in the sunset review at issue here, is inconsistent with Articles 15.1-15.5 and 21.3 of the SCM Agreement for essentially the same reasons.[613]

7.6.2.1 Relevant WTO provisions

7.371. Article 21.3 of the SCM Agreement provides:

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[607] United States' response to Panel question No. 58, para. 59.

[608] Ibid.

[609] The Appellate Body has explained that the non-attribution language of Article 15.5 of the SCM Agreement requires that "an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the [subsidized] imports". Appellate Body Report, *China – GOES*, para. 150, quoting the Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[610] United States' response to Panel question No. 58, para. 59.

[611] It is undisputed that, in the CVD investigation at issue, the USITC cumulated the effects of subsidized imports from India with the effects of non-subsidized, dumped imports from China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine, which were only subject to parallel AD investigations. USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and USITC Final Determinations, Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

[612] India's first written submission, paras. 136-137, 146, 148-149 and 152.

[613] Ibid. paras. 518-519 and 521.

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.
>
> _____
>
> [52] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.372. Footnote 45 to Article 15 provides:

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

7.373. Articles 15.1, 15.2, 15.3, 15.4, and 15.5 of the SCM Agreement are set forth above.[614]

7.6.2.2 Factual background

7.374. India's claims relating to cumulative assessment in sunset reviews refer to two provisions: Sections 1675a(a)(7) and 1675b(e)(2). Section 1675a(a)(7) regulates cumulation with respect to the determination of likelihood of continuation or recurrence of material injury in sunset reviews (under Section 1675(c)).[615] It provides as follows:

> For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

7.375. Section 1675b(e)(2) regulates cumulation of the effects of imports in investigations concerning countries that were not GATT signatories[616] and simultaneous expedited sunset reviews (under Section 1675(c)). It provides as follows:

> If a review under Section 1675(c) of this title is initiated under paragraph (1), such review shall be treated as having been initiated on the same day as the investigation under this Section, and the Commission may, in accordance with Section 1677(7)(G) of this title, cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which such investigations are treated as initiated on the same day.

7.376. In its likelihood-of-injury assessment for purposes of the sunset review in the case at hand, the USITC cumulated the effects of imports from India with those of imports from five other countries. Of these, imports from only two countries (Indonesia and Thailand) were subject to sunset reviews of the countervailing duty orders. Imports from the remaining three countries

[614] See paras. 7.317-7.321 above.

[615] The provision also regulates cumulation in changed circumstances reviews (under Section 1675(b)), which are not at issue in this dispute.

[616] Both parties agree that this provision does not apply to cumulation in changed circumstances review. See India's response to Panel question No. 31, and United States' first written submission, fn. 112.

(China, Taiwan, and Ukraine) were only subject to sunset reviews of the anti-dumping duty orders.[617]

7.6.2.3 Main arguments of the parties

7.6.2.3.1 India

7.377. India notes that, although Article 21.3 of the SCM Agreement is silent on whether cumulation is permitted, this provision uses the term "injury" in regulating sunset reviews. India argues that this term has a specific meaning within the SCM Agreement flowing from footnote 45 to Article 15 of the SCM Agreement. According to India, unless otherwise specified, a reference to "injury" in the SCM Agreement means "injury" that has been determined in accordance with Article 15.[618] As Article 15.3 of the SCM Agreement is the sole provision dealing with cumulation, India contends that, for purposes of sunset reviews under Article 21.3, Article 15.3 results in an obligation to not cumulatively assess likely subsidized goods with non-subsidized goods when determining the "likelihood" of injury.[619] India refers to its arguments relating to the inconsistency of Section 1677(7)(G) with Articles 15.3 and 15.5 of the SCM Agreement in support of its argument. For essentially the same reasons, India claims that Section 1675a(a)(7) is inconsistent with Articles 15.3 and 15.5.[620] Relying on the panel in *EU – Footwear (China)*, India further argues that a causal link analysis which is inconsistent with Article 15.5 during the original investigation will remain tainted and still inconsistent with Article 15.5 even during the sunset review.[621]

7.378. Moreover, India notes that although Section 1675a(a)(7) contains the word "may", the consistent practice of the USITC over a long period of time reveals that it does not have any discretion in reality to choose not to cumulate non-subsidized imports.[622] Alternatively, even if the United States retains the discretion under Section 1675a(a)(7) to not cumulatively assess imports from non-subsidizing countries, India claims that Section 1675a(a)(7) would still be inconsistent with Articles 15.1-15.5 of the SCM Agreement.[623] India argues that an interpretation of Article 15.3 in good faith should not allow the United States to enact legislation permitting cumulative assessment of imports where the conditions of Article 15.3 are not met, as it would reserve the right of the United States to perform an act which the United States had promised not to do.[624]

7.379. India also argues that Section 1675a(a)(7) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement because it mandates or, alternatively permits, the investigating authority to cumulate the effects of both subsidized and non-subsidized imports for purposes of determining injury.[625]

7.380. India recalls that, in the sunset review determination at issue, the USITC cumulatively assessed the likely volume, price effects and impact of subsidized imports with those of non-subsidized imports because it included imports from China, Taiwan and Ukraine in its analysis, even though no subsidies were alleged against these three countries.[626] India contends that the United States determined the likelihood of continuation or recurrence of injury based on subsidized and non-subsidized imports.[627] India claims that this application of Section 1675a(a)(7) was

[617] India's first written submission, para. 519; United States' first written submission, para. 108, and response to Panel question No. 63, fn. 62; and Hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Investigation Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (review), October 2007, publication 3956 ("USITC Sunset Determinations"), Exhibit USA-10, p. 18.
[618] India's first written submission, paras. 137-138.
[619] Ibid. paras. 139-141; and second written submission, paras. 75-78.
[620] India's first written submission, paras. 141-142.
[621] Ibid. para. 142, citing the Panel Report, *EU – Footwear (China)*, para. 7.495; and response to Panel question No. 34.
[622] India's first written submission, paras. 134-135; and second written submission, paras. 83 and 86.
[623] India's first written submission, paras. 143 and 146.
[624] Ibid. paras. 144-145.
[625] Ibid. paras. 146-149.
[626] Ibid. para. 519.
[627] Ibid. para. 520.

inconsistent with Articles 15.1-15.5 and 21.3 for the same reasons put forward with respect to its "as such" claims.[628]

7.381. Turning to Section 1675b(e)(2), India notes that it refers back to Section 1677(7)(G), which requires the cumulative assessment of subsidized and non-subsidized imports. India recalls its arguments that Section 1677(7)(G) is inconsistent with Articles 15.1-15.5 of the SCM Agreement, and for essentially the same reasons, India claims that Section 1675b(e)(2) is also "as such" inconsistent with these provisions of the SCM Agreement.[629]

7.6.2.3.2 United States

7.382. The United States submits that Section 1675a(a)(7) is not "as such", or "as applied" in the investigation at issue here, inconsistent with Articles 15.3, 15.5 and 21.3 of the SCM Agreement.[630] The United States also submits that Section 1675b(e)(2) "has nothing to do with cumulation in changed circumstances reviews".[631]

7.383. The United States submits that, as India has not raised an "as such" or "as applied" claim under Article 21.3 of the SCM Agreement in its panel request, any claim under this provision falls outside the Panel's terms of reference.[632]

7.384. In addition, the United States argues that the cumulation requirements in Article 15.3 of the SCM Agreement are not applicable to sunset reviews. The United States refers to Appellate Body's findings that the provisions governing injury determinations in original AD investigations, including cumulation requirements, do not apply to the likelihood of injury analysis in subsequent sunset reviews.[633] Given that there are no pertinent differences between Article 11.3 of the AD Agreement and Article 21.3 of the SCM Agreement, the United States contends that Article 21.3 of the SCM Agreement "imposes no specific limitation on an investigating authority's cumulation decisions in a sunset review."[634] In addition, the United States disagrees with India's argument based on the definition of the term "injury" in footnote 45 of the SCM Agreement, and recalls that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* rejected the very same argument under the AD Agreement.[635]

7.385. The United States also submits two alternative arguments. First, the United States contends that, even if the provisions of Article 15.3 of the SCM Agreement were understood to apply to sunset reviews, for the same reasons it put forward with respect to India's Article 15.3 claims, this provision does not preclude the cumulation of subsidized and dumped imports in sunset reviews.[636] Second, even if Article 15.3 were understood to prohibit cumulation in sunset reviews, the United States argues that India still has no basis for its claims because Section 1675a(a)(7) does not mandate cumulation in sunset reviews; rather it explicitly gives the USITC discretion not to cumulate even when the statutory standards are met.[637]

7.386. With respect to India's claims under Article 15.5 of the SCM Agreement, the United States points out that India fails to acknowledge that all imports found by USDOC to be subsidized in the original investigation, including those from India, were also found by USDOC to be dumped. Thus, the United States explains that under Article 3.3 of the AD Agreement, the USITC was authorized to cumulate the dumped and subsidized imports for purposes of its injury analysis.[638] Moreover,

[628] India's first written submission, paras. 518-519 and 521.
[629] Ibid. para. 152.
[630] United States' first written submission, paras. 137, 140, 147 and 150.
[631] Ibid. fns. 112 and 252.
[632] United States' second written submission, paras. 84-85; and response to Panel question Nos. 63, para. 75, and 64, para. 81.
[633] United States' first written submission, paras. 83 and 137-139; response to Panel question No. 64, para. 83; second written submission, paras. 82-83 and 93; and opening statement at the second meeting of the Panel, paras. 51 and 59-62.
[634] United States' first written submission, para. 140.
[635] Ibid. para. 141.
[636] Ibid. para. 142.
[637] Ibid. paras. 89-90 and 143-144; response to Panel question No. 63, para. 77; and response to India's question No. 1, para. 1.
[638] United States' first written submission, para. 150.

the United States contends that if the Panel were to conclude that cumulation of subsidized and dumped products is prohibited, "it would require an investigating authority to separate out the injurious effects of imports that result from their status as 'dumped imports' from the effects that are the result of their simultaneous status as 'subsidized imports', even though the imports would, by definition, have the exact same price and volume effects."[639]

7.6.2.4 Evaluation

7.6.2.4.1 The Panel's terms of reference: Article 21.3 of the SCM Agreement

7.387. Before turning to the substance of India's claims, we must address the issue raised by the United States regarding the Panel's terms of reference. As noted by the United States[640], India has not raised any "as such" or "as applied" claims of inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement in its panel request. Thus, there is no claim in this respect before us, and India's arguments relating to an alleged "as applied" inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement relate to a claim that is not within the Panel's terms of reference. Therefore, we will not consider India' arguments in this respect, or make any rulings with respect to this putative claim.

7.6.2.4.2 Alleged inconsistency of US provisions regarding cumulative analysis in sunset reviews

7.388. Turning to the substance of India's challenges, India claims that US provisions on cumulative assessment in sunset reviews, as well as the sunset review determination at issue here, are inconsistent with a number of obligations in Article 15 of the SCM Agreement, which is the provision governing injury determinations in original investigations. The United States argues that Article 15 does not impose obligations with regard to sunset reviews.[641]

7.389. In the context of the AD Agreement, the Appellate Body has explained that the AD Agreement distinguishes between *determinations of injury*, under Article 3 of the AD Agreement, and *determinations of likelihood of continuation or recurrence of injury*, under Article 11.3 of the AD Agreement.[642] After emphasizing the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand[643], the Appellate Body concluded that:

> Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.[644]

Article 21.3 of the SCM Agreement is substantially identical to Article 11.3 of the AD Agreement. In light of this, and the close parallels between the provisions of Article 3 of the AD Agreement and

[639] United States' first written submission, para. 151.
[640] United States' second written submission, paras. 84-85; and response to Panel question Nos. 63, para. 75, and 64, para. 81.
[641] United States' first written submission, paras. 83 and 137-139; response to Panel question No. 64, para. 83; and second written submission, paras. 82-83 and 93.
[642] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.
[643] The Appellate Body stated that "[o]riginal investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review an anti-dumping duty order that has already been established—following the prerequisite determinations of dumping and injury—so as to determine whether that order should be continued or revoked." Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.
[644] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280.

Article 15 of the SCM Agreement[645], we consider that the same rationale should apply in the context of the SCM Agreement. Thus, we are of the view that, to paraphrase the Appellate Body, for the "review" of a determination of injury that has already been established in accordance with Article 15, Article 21.3 does not require that injury again be determined in accordance with Article 15, and consequently investigating authorities are not *mandated* to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.[646]

7.390. India argues that the term "injury" in Article 21.3 of the SCM Agreement, as defined in footnote 45 of the SCM Agreement, should be understood as a reference to "injury" that has been determined in accordance with the provisions of Article 15 of the SCM Agreement, in particular Article 15.3 of the SCM Agreement.[647] Essentially the same argument was addressed by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*. In that case, the Appellate Body examined the definition of "injury" in footnote 9 of the AD Agreement, which is identical to the definition of injury in footnote 45 of the SCM Agreement. While the Appellate Body understood that footnote 9 defines "injury" for the whole AD Agreement, the Appellate Body concluded that "[i]t does not follow … from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3."[648] We agree, and consider that the mere use of the term "injury" in Article 21.3 does not alone require the application of the provisions of Article 15, including Article 15.3, to sunset reviews.

7.391. In addition, we note India's reliance on the finding by the panel in *EU – Footwear (China)* that a causal link analysis which is inconsistent with Article 15.5 of the SCM Agreement in the original investigation will remain tainted and still inconsistent with Article 15.5 during the sunset review.[649] We fail to understand why India relies on this case, since in our view, this finding is not relevant to this dispute. First, the panel in *EU – Footwear (China)* only addressed the application of obligations relating to original investigations in the context of sunset reviews because the European Union had made a new injury determination in the context of a sunset review, and relied on that determination in finding a likelihood of continuation or recurrence of injury.[650] However, the United States has clarified that the relevant US provision does not mandate the USITC to make new injury determinations in sunset reviews, and the USITC did not do so in the sunset review at issue here.[651] Second, the panel in *EU – Footwear (China)* considered that "a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a 'reasoned conclusion', which would result in a violation of Article 11.3 of the AD Agreement."[652] Thus, ultimately, the panel's analysis and determination concerned whether the determination of likelihood of continuation or recurrence of injury was consistent with Article 11.3, which is the provision in the AD Agreement dealing with sunset reviews. However, as we have found India's Article 21.3 claims to be outside the Panel's terms of reference above, no such analysis would be possible in this case, even assuming there were a new determination of injury by the USITC to be considered, which as noted, there is not.

7.6.2.4.3 Conclusion

7.392. Therefore, in light of the above, the Panel concludes that India has failed to establish a *prima facie* case that Sections 1675a(a)(7) and 1675b(e)(2) are "as such" inconsistent with

[645] As noted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, "Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word 'countervailing' is used in place of the word 'anti-dumping' and the word 'subsidization' is used in place of the word 'dumping'.". The Appellate Body went on to conclude that "[g]iven the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*." Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn. 114.

[646] In light of this conclusion, we need not and do not address the disagreement between India and the United States relating to the relevance of Section 1675b(e)(2) to cumulation in sunset reviews. See India's first written submission, paras. 151-152; and response to Panel question No. 31; and United States' first written submission, fns. 112 and 252.

[647] India's first written submission, paras. 137-141.

[648] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

[649] India's first written submission, para. 142; and response to Panel question No. 17.

[650] Panel Report, *EU – Footwear (China)*, paras. 7.333-7.334 and 7.495-7.496.

[651] United States' response to Panel question No. 63, paras. 78 and 80.

[652] Panel Report, *EU – Footwear (China)*, para. 7.333.

Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement, and that Section 1675a(a)(7), "as applied" in the sunset review at issue here, is inconsistent with the above provisions of the SCM Agreement. Finally, the Panel concludes that India's arguments relating to an alleged "as applied" inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement relate to a claim that is not within the Panel's terms of reference.

7.6.3 Whether certain economic factors were evaluated by the USITC in its injury determination

7.393. India claims that the injury determination in the original investigation at issue here is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement because the USITC failed to include all mandatory economic factors listed in Article 15.4.[653]

7.6.3.1 Relevant WTO Provisions

7.394. Articles 15.1 and 15.4 of the SCM Agreement are set forth above.[654]

7.6.3.2 Main arguments of the parties

7.6.3.2.1 India

7.395. India submits that, pursuant to Article 15.4 of the SCM Agreement, the examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all factors listed therein, including growth, return on investment, and ability to raise capital. India contends that there is no written record relating to these three factors in the USITC's determination of injury. India submits that the absence of evaluation of mandatory parameters is in itself sufficient to establish an inconsistency with Articles 15.1 and 15.4.[655] In addition, India argues that the mere collection of data and responses from the domestic industry is not sufficient to fulfil the requirement in Article 15.4 to evaluate the information submitted by interested parties.[656]

7.6.3.2.2 United States

7.396. The United States recalls the Appellate Body's explanation in *EC – Tube or Pipe Fittings* that an authority is not required to make specific findings for each impact factor listed in Article 3.4 of the AD Agreement, which is nearly identical to Article 15.4 of the SCM Agreement. The United States explains that, pursuant to the Appellate Body, while it is mandatory to evaluate all fifteen factors listed[657], Article 3.4 does not address the manner in which the results of the investigating authority's analysis of each injury factor are to be set out in the published document.[658]

7.397. The United States contends that, consistently with Article 15.4, the USITC evaluated the three factors identified by India. The United States submits that the USITC's evaluation of growth trends in the industry's condition is necessarily entailed in the USITC's assessment of the changes in the industry's production, production capacity, capacity utilization, shipments, employment levels, prices, operating profits and orders over the period.[659] Turning to the industry's return on investment and ability to raise capital, the United States submits that the USITC (i) specifically stated that it considered all relevant economic factors, including these two factors; (ii) obtained detailed financial data from the industry; (iii) received from the industry a number of confidential

[653] India's first written submission, para. 508.
[654] See paras. 7.317 and 7.320 above.
[655] India's first written submission, paras. 508-509.
[656] India's second written submission, para. 263.
[657] United States' first written submission, para. 154. However, we note that elsewhere the United States appears to suggest that the evaluation of all fifteen factors is not mandatory. The United States submits that "in addition to limiting the required evaluation to 'relevant' economic factors, the SCM Agreement includes the term 'or' rather than 'and' between the factors listed. … Therefore, an authority is required to evaluate only those factors which are relevant to its analysis." United States' response to Panel question No. 118, fn. 139.
[658] United States' first written submission, paras. 153-154.
[659] Ibid. paras. 104 and 156.

comments on the negative effects of imports on the industry's growth, investment, ability to raise capital, and/or development efforts; and (iv) specifically addressed in its analysis the industry's profitability and returns on operations, the changes in productive capacity levels, and overall financial operations.[660]

7.6.3.3 Evaluation

7.398. The issue before the Panel is whether the USITC properly evaluated (i) growth, (ii) return on investment, and (iii) ability to raise capital as relevant economic factors under Article 15.4 of the SCM Agreement.

7.399. The Appellate Body in *US – Hot-Rolled Steel* stated that "Article 3.4 [of the AD Agreement] lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities."[661] Given the close identity of the texts, we consider that this understanding applies with equal force to Article 15.4[662] of the SCM Agreement.[663]

7.400. The Appellate Body in *EC – Tube or Pipe Fittings* stated that "because Articles 3.1 and 3.4 [of the AD Agreement] do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, … it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4."[664] The Appellate Body also stated that the particular facts of each case will determine whether a panel is able to find in the record "sufficient and credible evidence" that a factor has been *evaluated*, even though a separate record of the evaluation of that factor has not been made.[665] Thus, we examine below the USITC's injury determination to assess whether it is possible, based on the determination itself, the underlying evidence, and the arguments present, to satisfy ourselves that the factors at issue were evaluated by the USITC as required by Article 15.4 of the SCM Agreement.

7.401. The USITC's injury determination states in relevant part:

> Both commercial shipments and production for downstream processing by the domestic industry were higher in 2000 than in 1998. Capacity, production, and capacity utilization rates all rose from 1998 to 2000. Yet despite increased production and shipments, the domestic industry's financial performance was poor throughout most of the POI. The domestic industry had operating losses on commercial sales and total production in both 1999 and 2000. Several domestic producers entered Chapter 11 bankruptcy proceedings, and two ceased operations altogether. The number of production related workers declined throughout the POI, as did the number of hours worked and total wages paid. Total capital expenditures increased between 1998 and 2000 but expenditures on research and development dropped.
>
> Undoubtedly, the industry's performance in the early portion of the POI reflected the adverse effects of unfairly traded hot-rolled steel imports from Brazil, Japan, and Russia. But quarterly data indicate that the domestic industry had gained some benefit from the import relief imposed on imports from Brazil, Japan, and Russia by mid-1999. For a brief time, shipments increased, prices increased, and the domestic industry's financial performance improved, although prices generally remained below pre-injury levels. …

[660] United States' first written submission, paras. 105 and 157. See also United States' response to Panel question No. 118, para. 102.
[661] Appellate Body Report, *US – Hot-Rolled Steel*, para. 194. See also Appellate Body Report, *Thailand – H-Beams*, para. 125.
[662] We note that Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement are similarly worded, and that the former includes all general factors listed in the latter.
[663] With similar understanding, see Panel Reports, *EC – Countervailing Measures on DRAM Chips*, paras. 7.356 and 7.359; and *US – Softwood Lumber IV*, para. 7.123.
[664] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[665] Ibid.

> This improvement did not last. Virtually every financial and production indicator was lower in interim 2001 than in interim 2000. Shipments by the domestic industry to the merchant market in interim 2001 were 11.4 percent lower than in interim 2000. Total shipments, including internal consumption, were 16.5 percent lower in interim 2001 than in interim 2000. Operating loss per ton of net sales was $50 in interim 2001, compared to a positive income per ton of $16 in interim 2000. Operating loss per ton of total production was $63 in interim 2001, compared to a positive income per ton of $5 in interim 2000. Operating losses were widespread in the industry, affecting 17 of 21 reporting firms in 2000. Only 12 of 21 firms had reported losses in 1998, and only 13 of 21 firms had reported losses in 1999, when imports from Brazil, Japan, and Russia were adversely affecting the domestic industry. The number of production related workers was 29,123 in interim 2001, compared to 31,639 in interim 2000. Hours worked were 16.3 million in interim 2001, compared to 18.2 million in interim 2000.
>
> The record indicates that the domestic industry's condition has been affected by a drop in consumption since the latter part of 2000. The industrial production index peaked in the third quarter of 2000 and declined thereafter. Similarly, total apparent domestic consumption of steel declined in the second half of 2000. We also note that, while the industry's internal transfers declined by only 5.3 percent from the first to the third quarter of 2000, commercial shipments fell by 19.2 percent. This is further evidence that the general drop in demand for hot-rolled steel did not begin until the end of 2000, and that the sharp drop in commercial shipments through the third quarter of 2000 was due primarily to subject imports. However, the weakening in the domestic industry's condition began before the decline in overall consumption. The order books of integrated producers peaked in the fourth quarter of 1999; minimill order books peaked a quarter earlier, in the third quarter of 1999. Domestic shipments to the merchant market peaked in the first quarter of 2000, as did total domestic shipments, including internal transfers. Domestic shipments to the merchant market declined by 7.8 percent from the first quarter of 2000 to the second. …
>
> We note that the volume of subject imports has declined since the second quarter of 2000, although the volume remained notably high compared to pre-1999 levels through the third quarter of 2000. We also note that some overselling by subject imports occurred in the second half of 2000 as import volume contracted. Nonetheless, we find present material injury by reason of subject imports. Domestic shipments and production contracted at a time when overall apparent domestic consumption was still strong, as shown by the rapid growth in subject imports. In contrast, subject import volume grew rapidly through most of the POI. Subject imports gained those sales from the domestic industry largely through underselling. …
>
> In sum, the record indicates there have been significant increases in the volume and market share of the subject imports, and that the subject imports have undersold the domestic like product and have had a significant suppressing and depressing effect on domestic prices. As a result, the overall condition of the industry declined during the period. Accordingly, we find that the subject imports are having a significant adverse impact on the domestic industry.[666]

7.402. In our view, the above excerpt clearly supports the conclusion that the USITC evaluated "growth" in the domestic industry, albeit implicitly. The determination identifies and discusses negative trends in the evaluation of certain injury factors – particularly profit; employment; wages; market share; shipments; and financial performance. Logically, these negative trends imply a lack of "growth" in the industry. India does not dispute the accuracy of the trend information, nor its relevance to a consideration of growth. Our reasoning is consistent with the understanding of the Appellate Body in *EC – Tube or Pipe Fittings*, where the Appellate Body stated:

> Having regard to the nature of the factor "growth", we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4.

[666] USITC Final Determinations, Exhibit IND-9, pp. 23-26. (footnotes omitted)

> Consequently, the evaluation of those factors could cover also the evaluation of the factor "growth".
>
> ...
>
> From our perspective, the "declines" and "losses" observed with respect to several of the factors examined in this particular case necessarily relate to the issue of "growth" as well. To put it more precisely, the negative trends in these factors point to a lack of "growth". This, in turn, supports the conclusion that the European Commission evaluated this injury factor.[667]

7.403. We now turn to the factors "return on investment" and "ability to raise capital". With respect to the former, we note that the injury determination indicates that the USITC examined capital expenditures, and research and development expenditures.[668] This part of the USITC's written analysis also refers to Table VI-8, which contains data, compiled from responses to USITC's questionnaires, on US producers' capital expenditures, research and development expenses, and assets utilized (including book value of production facilities).[669] The table is preceded by the following written analysis:

> Capital expenditures continuously increased from 1998 through 2000 and R&D expenses increased from 1998 to 1999 and decreased from 1999 to 2000. … The original cost and book value of productive facilities increased continuously from 1998 through 2000. For the interim periods, capital expenditures decreased substantially while R&D expenses increased slightly from interim 2000 to interim 2001. …[670]

At the same time, the injury determination indicates that the USITC evaluated profitability, and production.[671] This part of the USITC's written analysis includes references to Table VI-1, concerning US producers' commercial sales, and Table VI-5, concerning US producers' commercial sales, internal consumption and transfers. These tables present data, compiled from responses to USITC's questionnaires, on *inter alia* sales, gross profit, operating income and operating losses.[672] Furthermore, by gathering and examining information on capital and R&D expenditures and the book value of production facilities, on the one hand, and operating income and operating losses, on the other hand, we consider that the USITC had relevant information to evaluate "return on investment".

7.404. With regard to the factor "ability to raise capital", the injury determination indicates that the USITC evaluated profitability, as explained above, and the domestic industry's financial performance.[673] This part of the USITC's written analysis includes a reference to Table VI-1, concerning US producers' commercial sales. This table contains data, compiled from responses to USITC's questionnaires, on *inter alia* the cash flow of US producers.[674] Once again, in our view, the information on these factors is clearly relevant to an evaluation of an industry's "ability to raise capital". In our view, there is no basis to think that, having requested this information, compiled it, and presented it in its report, the USITC somehow ignored it in its analysis and determination. Thus, we consider that the USITC's determination and the underlying evidence support the conclusion that it did, in fact, evaluate both "return on investment" and "ability to raise capital".

7.405. In addition, with regard to both "return on investment" and "ability to raise capital", the United States submits that the USITC "requested the members of the industry to 'describe any actual or potential negative effects of imports of hot-rolled steel products from the subject countries on their growth, investment, ability to raise capital, and/or their development efforts,'

[667] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 162 and 165.
[668] USITC Final Determinations, Exhibit IND-9, p. 24.
[669] Ibid. p. VI-8.
[670] Ibid. p. VI-7.
[671] Ibid. pp. 23-25.
[672] Ibid. pp. VI-2 and VI-5.
[673] Ibid. pp. 23-24.
[674] Ibid. p. VI-2.

receiving a significant number of comments from the producers, which were confidential."[675] More specifically, the USITC asked domestic producers whether they had:

> experienced any actual negative effects on its return on investment or its growth, investment, ability to raise capital, existing development and production efforts (including efforts to develop a derivative or more advanced version of the products), or the scale of capital investments as a result of imports of hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, and Ukraine.[676]

Again, the information requested was compiled and presented in the USITC's report, although it was redacted from the non-confidential version. We recall that the USITC specifically stated in its injury determination that it "considered all relevant economic factors that bear on the state of the industry in the United States. These factors include … return on investment [and] ability to raise capital".[677] We see no basis to conclude that the USITC nonetheless failed to do so.

7.406. India argues that mere collection of data and comments from the industry is not sufficient to fulfil the requirement in Article 15.4 to *evaluate* information submitted by interested parties.[678] We agree with India that the mere fact that data were collected may not suffice to demonstrate that certain relevant factors were evaluated in making an injury determination, as required by Article 15.4. However, based on our review of the USITC's determination, and the underlying evidence on the record to which it refers, it is clear to us that the USITC went beyond the mere collection of data, and evaluated the factors at issue in making its decision, even though it did not explicitly discuss them in its written determination. First, the USITC did explicitly discuss its evaluation of factors which are closely related to "return on investment" and "ability to raise capital". Second, the information on assets (including book value of production facilities), capital expenditures, research and development expenditures, production, profitability (including operating income and operating losses), and the domestic industry's financial performance was explicitly requested, compiled and set out in its report, ensuring that the USITC had relevant information before it to evaluate "return on investment" and "ability to raise capital". Third, the USITC requested and received from domestic producers responses to specific questions relating to actual negative effects on "return on investment" and "ability to raise capital", which again are set out in its report, albeit not in the public version.[679] Finally, the USITC specifically stated in its injury determination that it had considered all relevant economic factors that bear on the state of the domestic industry, including "return on investment" and "ability to raise capital". Given that relevant information on these factors was before it, and in view of the legal standard set out above, which does not require an explicit discussion of each Article 15.4 factor in order to be sufficient, we cannot conclude merely from the lack of explicit reference to these factors in the written determination that the USITC failed to evaluate them. Thus, we are satisfied that the USITC properly evaluated "return on investment" and "ability to raise capital", albeit implicitly, as required by Article 15.4 of the SCM Agreement.

7.407. Finally, India argues that, unlike in the investigation at issue, "the Appellate Body [in *EC – Tube or Pipe Fittings*] found that there was considerable analysis regarding the mandatory parameters in question, which satisfied the requirement under Article 15.4."[680] We do not agree with India that the Appellate Body Report in *EC – Tube or Pipe Fittings* stands for the proposition

[675] United States' first written submission, para. 157.

[676] Appendix E: effect on imports on producers' existing development and production efforts, growth, investment, and ability to raise capital ("Appendix E"), Exhibit USA-117 (BCI), p. 3. We note that Appendix E contains a compilation of the confidential responses of various domestic producers and includes data on assets, capital expenditures, and research and development; and comments on the actual and negative effects on these issues. See United States' response to Panel question No. 118, para. 104. We also note that the USITC did not include in its determination a separate and specific record of its analysis of the information presented in Appendix E.

[677] USITC Final Determinations, Exhibit IND-9, p. 23. See also United States' first written submission, para. 157.

[678] India's second written submission, para. 263.

[679] The confidential domestic industry comments and questionnaire responses in this regard are redacted, but are clearly part of the report that was before the decision makers.

[680] India's opening statement at the second meeting of the Panel, para. 48. See also India's second written submission, para. 263.

that the requirements under Article 15.4 will be only satisfied if "considerable analysis" regarding the mandatory factor has been undertaken by the investigating authority. Rather, as explained above, we understand the Appellate Body to have taken the view that a panel must be able to find in the injury determination and the evidence on which it is based a sufficient and credible basis to satisfy itself that the factors at issue were evaluated by the investigating authority as required by Article 15.4. A panel's analysis in this regard will clearly depend on the particular facts of each case. In the investigation at issue, and explained above, we have been able to conclude, based on the record evidence and the USITC's injury determination, that (i) growth, (ii) return on investment, and (iii) ability to raise capital were evaluated by the USITC, even though a separate record of the evaluation of these factors has not been made.

7.408. Therefore, in light of the above, the Panel concludes that India has not established a *prima facie* case that the USITC's injury determination at issue is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

7.7 Whether the use of "facts available" is consistent with Article 12.7 of the SCM Agreement

7.409. India claims that Sections 1677e(b) of the USC and 351.308(a), (b) and (c) of the CFR (AFA Provisions) are "as such" inconsistent with Article 12.7 of the SCM Agreement[681], because, according to India, these Sections (i) do not require the use of facts that are most fitting or appropriate, and (ii) enable the use of "facts available" in a punitive manner.[682] In addition, India challenges 407 instances of application of the AFA Provisions in the proceedings at issue. India claims that the United States acted inconsistently with Article 12.7, because the USDOC applied "facts available" to penalize allegedly non-cooperating interested parties.[683]

7.7.1 Relevant WTO provisions

7.410. Article 12.7 of the SCM Agreement provides:

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

7.7.2 Factual background

7.411. Section 1677e(b) refers to adverse inferences in determinations on the basis of facts available. It provides:

> If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—
>
> (1) the petition,

[681] In its first written submission, India submitted that "the AFA provisions are 'as such' inconsistent with Articles 12.1 and 12.7 of the SCM Agreement". (India's first written submission, para. 156) The United States requested the Panel to find that India's claim under Article 12.1 is outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU. (United States' first written submission, para. 159) However, in its second written submission, India clarified that its claims relating to the AFA Provisions were only brought under Article 12.7, and that Article 12.1 was merely referred to as part of the relevant context to interpret Article 12.7. (India's second written submission, para. 87) In light of India's clarification, the Panel will not make any findings under Article 12.1.

[682] India's first written submission, paras. 172 and 175; and response to Panel question No. 36.

[683] India's first written submission, paras. 525-576.

(2) a final determination in the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(4) any other information placed on the record.

7.412. The corresponding implementing regulation is found in Section 351.308, which also refers to determinations on the basis of facts available. Sections 351.308(a)-(e) provide:

(a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Secretary may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. This section lists some of the sources of information upon which the Secretary may base an adverse inference and explains the actions the Secretary will take with respect to corroboration of information.

(b) In general. The Secretary may make a determination under the Act and this part based on the facts otherwise available in accordance with section 776(a) of the Act.

(c) Adverse inferences. For purposes of section 776(b) of the Act, an adverse inference may include reliance on:

(1) Secondary information, such as information derived from:

(i) The petition;

(ii) A final determination in a countervailing duty investigation or an antidumping investigation;

(iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or

(2) Any other information placed on the record.

(d) Corroboration of secondary information. Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

(e) Use of certain information. In reaching a determination under the Act and this part, the Secretary will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.

7.413. In the investigation at issue, the USDOC relied on "facts available" in a large number of instances where the USDOC considered interested parties to be non-cooperative.[684]

7.7.3 Main arguments of the parties

7.7.3.1 India

7.414. India makes two main arguments seeking to demonstrate that the AFA Provisions are, "as such" and "as applied" in the investigation at issue, inconsistent with Article 12.7 of the SCM Agreement. First, the AFA Provisions do not require the use of facts that are "most fitting" or "most appropriate" since they allow the investigating authority to use adverse facts without an evaluative, comparative assessment of all available evidence.[685] Recalling the views of the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, India argues that the United States is under an obligation to engage in an evaluative, comparative assessment of the available evidence, and employ the best, most fitting or most appropriate information available.[686]

7.415. Second, India contends that the AFA Provisions grant the right to draw adverse conclusions, resulting in the punitive application of "facts available", because they do not require the investigating authority to comply with the standard in Article 12.7, and instead allow the investigating authority to use selected facts solely in view of the adverse consequences it would have against the party concerned.[687] India notes that this use of "facts available" is not set out in Article 12.7 of the SCM Agreement. This silence means that Article 12.7 cannot be interpreted as granting the right to make determinations based on "adverse facts" or draw adverse inferences in all cases of non-cooperation.[688] Consequently, the United States is prohibited from using "facts available" in a punitive manner. India contends that the purpose behind Article 12.7 is not to punish an allegedly non-cooperating Member, but to ensure that the failure of an interested party to provide necessary information does not hinder the investigation.[689]

7.416. India also submits that although the AFA Provisions appear not to mandate, but rather give discretion to draw adverse inferences, India can still bring an "as such" challenge. This is because the AFA Provisions are incompatible with the ordinary meaning of Article 12.7 of the SCM Agreement.[690] India argues the AFA Provisions bulldoze the need for an assessment of the most appropriate information available, and explicitly allow the investigating authority to draw certain inferences solely because they are adverse to the party concerned.[691]

7.417. Alternatively, in case the Panel concludes that only mandatory legislation can be challenged "as such", India argues that the consistent practice of the United States reveals that the AFA Provisions in fact *require* the investigating authority "to draw the worst possible inferences and choose the highest prior margin to ensure that the party concerned is penalized for non-cooperation."[692]

7.418. With respect to the "as applied" claims, India identifies a large number of instances where the USDOC allegedly used adverse "facts available" to penalize non-cooperating interested parties, including instances where more appropriate information was made available to the USDOC through other means, and where adverse inferences were taken without any factual foundation.[693]

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[684] See India's first written submission, paras. 524-576; and United States' first written submission, paras. 213-234 and 254-259, with references to the relevant Exhibits.
[685] India's first written submission, paras. 172 and 175; and response to Panel question No. 36.
[686] India's first written submission, paras. 161-164 and 166, referring to the Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.
[687] India's first written submission, paras. 164-165, 172 and 175; second written submission, para. 113; and opening statement at the second meeting of the Panel, para. 23.
[688] India's first written submission, paras. 158-160 and 165.
[689] Ibid. paras. 157, 164 and 166.
[690] Ibid. paras. 167, 169 and 178.
[691] Ibid. para. 178.
[692] Ibid. para. 187.
[693] Ibid. paras. 525-576.

7.7.3.2 United States

7.419. As an initial matter, the United States points out that two aspects of India's claims are outside the Panel's terms of reference, because they were not included in India's requests for consultations and establishment of a panel: (i) the "as applied" claim under Article 12.7 of the SCM Agreement relating to the application of "facts available" concerning MML as a public body in the 2006 administrative review[694]; and (ii) the "as applied" claims under Article 12.7 relating to the 2013 sunset review.[695] With respect to the claim that USDOC assumed without proper factual basis that MML purchased iron ore for more than adequate remuneration, the United States alternatively argues that the information contained in US Steel's petition was the factual basis for the USDOC's determination.[696]

7.420. Turning to India's "as such" claims under Article 12.7 of the SCM Agreement, the United States makes two main arguments. First, the United States contends that India may not bring "as such" claims against the US facts available provisions. The United States explains that the US facts available provisions do not mandate, but rather provide discretion for the USDOC to use an inference that is adverse to the interests of non-cooperating parties in selecting from among the facts otherwise available.[697] Moreover, according to the United States, India's arguments relating to the USDOC's consistent practice cannot stand because India neither identified such practice in its panel request, nor demonstrated in its first written submission that the USDOC's practice amounts to a norm or rule of general and prospective application.[698]

7.421. Second, the United States argues that Article 12.7 of the SCM Agreement does not limit the application of "facts available" to those facts most favourable to the interests of a non-cooperating interested party, because the expression "facts available" does not speak to which facts should be selected.[699] According to the United States, India fails to acknowledge that the USDOC's use of an adverse inference is based on the application of available facts, and that the "adverse" element is introduced when USDOC decides which available facts are appropriate to use when a responding party has not provided verifiable, substantiated information.[700] The United States contends that Article 12.7 allows an investigating authority to incentivize responding Members and interested parties to participate in an investigation, ensuring that "an interested party may not evade the application of countervailing duties through non-cooperation, and may not obtain a duty margin *more* favorable to its interests for having not cooperated."[701]

7.422. Turning to the "as applied" claims, the United States reiterates the above arguments that Article 12.7 of the SCM Agreement does not limit the application of "facts available" to those facts most favourable to the interests of a non-cooperating interested party.[702] The United States also submits arguments and evidence to show that USDOC's determination in each case reflected a reasoned analysis and was based upon a factual foundation.[703]

7.7.4 Main arguments of the third parties

7.7.4.1 Canada

7.423. Canada submits that the use of adverse facts and, under certain circumstances, drawing of adverse inferences, is consistent with Article 12.7 of the SCM Agreement.[704] Noting that Article 12.7 does not distinguish between "facts available" that are favourable to a respondent and

[694] United States' first written submission, para. 269.
[695] Ibid. paras. 24 and 274-275; and response to Panel question No. 62, para. 74.
[696] United States' first written submission, paras. 270-272.
[697] Ibid. paras. 161-163 and 167-168.
[698] Ibid. paras. 197-210.
[699] Ibid. para. 180.
[700] Ibid. para. 190.
[701] Ibid. para. 189.
[702] Ibid. paras. 214-215.
[703] Ibid. paras. 216-272.
[704] Canada's third-party submission, paras. 22 and 25.

those that are not, Canada contends that this provision should be read in the context of Annex II to the AD Agreement.[705]

7.424. Canada submits that the investigating authority's discretion to choose among the available facts is not unlimited. First, an investigating authority must take into account all "substantiated facts" even where they constitute an incomplete response to a question. Second, "facts available" may only be used where they reasonably replace the information not provided by an interested party. Finally, a determination must have a factual foundation.[706]

7.425. However, Canada holds that if there are several sets of "facts available" on the record, a reasonable and objective investigating authority may choose facts unfavourable to a respondent because "a party should not benefit from a lack of cooperation" as it is "aware of the record evidence and [], if it had more favourable information, that party could certainly have provided it to the investigating authority in its own best interest."[707] Canada argues that an investigating authority must have discretion in deciding what is necessary to conduct its investigation effectively and in a reasonable and objective way.[708]

7.7.4.2 China

7.426. China submits that Article 12.7 of the SCM Agreement permits only the use of "facts available", not "adverse facts available", let alone "adverse inferences".[709]

7.427. China considers that Annex II of the AD Agreement serves as relevant context to the interpretation of Article 12.7 of the SCM Agreement. China submits that under Article 12.7 (i) an investigating authority must, to the extent possible, take into account all substantiated facts provided by an interested party, even if they may not constitute the complete information requested from that party, and (ii) "facts available" are generally limited to those that may reasonably replace the information that an interested party failed to provide.[710] China submits that, pursuant to Article 12.7, an investigating authority must evaluate objectively the "facts available" on the record, and is precluded from using whatever evidence it wishes. Even in cases of non-cooperation, an investigating authority may only replace missing information with the most fitting and appropriate information available in order to arrive at an accurate subsidization or injury determination.[711] Finally, China contends that an investigating authority must treat information from secondary sources "with special circumspection" by ascertaining "for itself the reliability and accuracy of such information."[712]

7.428. China highlights that the more fundamental requirement under Article 12.7 of the SCM Agreement is that the investigating authority's determination be based on actual facts on the record. China contends that an investigating authority is allowed to use "facts available" to make a determination in the face of incomplete information, but it is prohibited from drawing adverse inferences that could not find factual foundations on the record. Otherwise, China argues that an investigating authority would have a vehicle to punish non-cooperation by reaching a result adverse to the interests of the responding party, in contradiction to the purpose of Article 12.7.[713]

7.429. Finally, China notes that the United States includes China among the WTO Members that have "incorporated some role for 'adverse inferences' in their legislation governing the use of facts available." China submits that the United States' assertion is misplaced, and that China's legislation is in line with Article 12.7 of the SCM Agreement.[714]

[705] Canada's third-party submission, paras. 27 and 29-30.
[706] Ibid. para. 32.
[707] Ibid. para. 34.
[708] Ibid. para. 38.
[709] China's third-party submission, paras. 62 and 77.
[710] Ibid. paras. 66-67 and 70.
[711] Ibid. paras. 65 and 68-70.
[712] Ibid. paras. 68-70.
[713] Ibid. paras. 71-73.
[714] Ibid. para. 76 and fn. 78.

7.7.4.3 European Union

7.430. The European Union considers that Article 12.7 of the SCM Agreement is a vital tool to counteract non-cooperation and the withholding of information by interested parties in a countervailing duty investigation.[715]

7.431. The European Union submits that "inference" is a routine and necessary part of all economic law determinations. "Inference" is also related to the concept of "facts available", and both are subject to the same principles. If there are two different equally possible inferences, the investigating authority is not permitted to select the inference that is more adverse to the interests of a particular interested party solely because it is more adverse. Rather, the investigating authority must draw the inference that best fits the facts that have been evidenced.[716] The European Union contends that there are no facts that are *per se* excluded from the set of facts to be taken into consideration by the investigating authority. These facts include the precise question that has been put, the procedural circumstances, the availability of evidence being sought, and all the circumstances surrounding the absence of the requested information from the record. In this context, the European Union argues that the behaviour of an interested party can colour the inference that may be reasonable to draw in a particular instance; "[t]he more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw."[717]

7.432. Thus, the European Union understands that the issue before the Panel depends less upon the particular label that has been used, and more upon a specific examination of all the surrounding facts and procedural context of the proceedings at issue. For this reason, the European Union considers that the issue "may be more amenable to resolution on an 'as applied' basis rather than an 'as such' basis."[718] The European Union is not persuaded that India has demonstrated that the US law is "as such" inconsistent with the SCM Agreement.[719]

7.7.4.4 Turkey

7.433. Turkey submits that there is textual and conceptual parallelism between Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement. Turkey contends that Annex II to the AD Agreement should be considered as an integral part of Article 12.7 of the SCM Agreement. Turkey considers that it would be unreasonable to hold that investigating authorities are subject to "clear-cut and detailed rules and procedures" in AD investigations, while at the same time conclude that investigating authorities may "free-ride" in CVD investigations "for the simple reason that there is no legal discipline resembling the rules in Annex II."[720] By accepting Annex II as an integral part of Article 12.7, Turkey contends that investigating authorities have the discretion to use "adverse facts available" in CVD investigations, subject to the same obligations found in Paragraph 7 of Annex II.[721]

7.7.5 Evaluation

7.434. India claims that Sections 1677e(b) and 351.308(a), (b) and (c) are "as such" and "as applied" inconsistent with Article 12.7 of the SCM Agreement. We begin by addressing India's "as such" claims.

[715] European Union's third-party submission, para. 76.
[716] Ibid. paras. 77-79 and 81-82.
[717] Ibid. paras. 80-82.
[718] Ibid. para. 84.
[719] Ibid. paras. 86-87.
[720] Turkey's third-party statement, paras. 12-16.
[721] Ibid. paras. 5-10 and 17.

7.7.5.1 India's "as such" claims of inconsistency with Article 12.7 of the SCM Agreement

7.435. The main issue before the Panel is whether Section 1677e(b) of the US statute and Sections 351.308(a), (b) and (c) of the US regulation[722] are "as such" inconsistent with Article 12.7 of the SCM Agreement, because (i) they provide for the use of "facts available" without an evaluative, comparative assessment of all evidence, and consequently do not require the use of "best information", i.e. facts that are "most fitting" or "most appropriate"; and (ii) they punish non-cooperation by granting the USDOC a right to draw adverse conclusions in all cases of non-cooperation.[723] We turn to each of these aspects of India's claim below.

7.7.5.1.1 The use of "facts available" without an evaluative, comparative assessment of evidence for selecting the *best* information, i.e. the most fitting or most appropriate information available

7.436. India first argues that Article 12.7 of the SCM Agreement obligates investigating authorities to engage in an evaluative, comparative assessment of the available evidence, and employ the best, most fitting or most appropriate information available.[724] India asserts that the US provisions at issue do not require the use of facts that are most fitting or most appropriate since they allow the investigating authority to use adverse facts without an evaluative, comparative assessment of all available evidence.[725]

7.437. The text of Article 12.7 of the SCM Agreement does not set out any express conditions for determining which and what type of "facts available" should be used by an investigating authority when necessary information is not provided. We note, however, that Article 12.7 refers to "*facts* available". Thus, we agree with the panel in *China – GOES* that "even when applying facts available, an investigating authority's determination must have a *factual foundation*."[726]

7.438. In addition, we recall that the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* examined the context of Article 12.7, and concluded that an investigating authority faces certain limits when using "facts available". The Appellate Body stated that "Article 12 of the *SCM Agreement* as a whole 'set[s] out evidentiary rules that apply *throughout* the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* … an investigation'."[727] The Appellate Body also stated that the "due process obligation [in Article 12.1 of the SCM Agreement]—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party."[728] The Appellate Body recalled the purpose of Article 12.7[729], and concluded that:

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[722] The United States submitted that India cannot challenge the USDOC's "approach" to making determinations "as such" because (i) such claim is not within the Panel's terms of reference, and (ii) India has not identified the USDOC's "approach" as a "measure" of general and prospective application that may be challenged "as such". (United States' first written submission, paras. 196-203; and second written submission, para. 121) India clarified that India does not challenge the USDOC's "practice" or "approach" as a "measure", and recalled that India's claims relate to US law "as such", i.e. Sections 1677e(b) and 351.308 (India's second written submission, para. 89) Thus, our examination is limited to the US provisions "as such". We need not and do not examine the USDOC's "approach" as a "measure".

[723] India's first written submission, paras. 164-165, 172 and 175; and response to Panel question No. 36.

[724] India's first written submission, paras. 161-164 and 166, referring to the Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

[725] India's first written submission, paras. 172 and 175; and response to Panel question No. 36.

[726] Panel Report, *China – GOES*, para. 7.296. (emphasis added)

[727] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292, quoting Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 138, and *EC – Bed Linen (Article 21.5 - India)*, para. 136.

[728] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

[729] The Appellate Body stated that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.)

> [R]ecourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. First, such recourse is not a licence to rely on only part of the evidence provided. To the extent possible, an investigating authority using the "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.[730]

7.439. When referring to the "most fitting" or "most appropriate" facts and the "evaluative, comparative assessment of all available evidence", India relies on the findings of the panel in *Mexico – Anti-Dumping Measures on Rice* concerning Article 6.8 of the AD Agreement, read in light of Annex II to the AD Agreement. We are not convinced that these findings in *Mexico – Anti-Dumping Measures on Rice* support India's understanding of the obligations set forth in Article 12.7 of the SCM Agreement. We recall that the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* were requested to examine the consistency of certain Mexican legislation with both Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, read in light of Annex II to the AD Agreement. Although the Appellate Body endorsed the panel's finding with regard to the legal standard applicable under Article 6.8 of the AD Agreement read in light of Annex II to that Agreement, the Appellate Body very clearly did not apply that same standard in respect of its findings pursuant to Article 12.7 of the SCM Agreement, noting expressly the lack of an equivalent to Annex II of the AD Agreement in the SCM Agreement.[731] Thus, as noted above, the Appellate Body concluded that, in the absence of more detailed conditions such as those in Annex II of the AD Agreement, Article 12.7 requires that (i) an investigating authority must, to the extent possible, take into account all the substantiated facts provided by an interested party, and that (ii) the use of "facts available" be generally limited to those that may reasonably replace the missing information.[732] In our view, India's argument seeks to import into the standard under Article 12.7 the specific requirements the Appellate Body found applicable under Article 6.8 of the AD Agreement read in light of Annex II of that Agreement. We do not consider this appropriate, given the lack of an equivalent to that Annex in the SCM Agreement. Thus, we reject India's assertion that the findings of the panel in *Mexico – Anti-Dumping Measures on Rice* establish that Article 12.7 of the SCM Agreement requires that investigating authorities engage in a comparative evaluation of all available evidence with a view to selecting the *best* information, i.e. the most fitting or most appropriate information available.

7.7.5.1.2 Adverse conclusions

7.440. India also argues that the US provisions at issue punish non-cooperation by granting the USDOC a right to draw adverse conclusions in all cases of non-cooperation, without regard to the requirements of Article 12.7 of the SCM Agreement. India accepts that adverse conclusions may be drawn under Article 12.7, but claims that adverse conclusions may only be drawn on the basis of

[730] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

[731] The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* began its examination of Article 12.7 of the SCM Agreement by observing that "there are important textual differences between the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*—namely, the absence in the *SCM Agreement* of an equivalent to Annex II to the *Anti-Dumping Agreement*." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 290) The Appellate Body also noted that "[u]nlike the *Anti-Dumping Agreement*, the *SCM Agreement* does not expressly set out in an annex the conditions for determining precisely which 'facts' might be 'available' for an agency to use when a respondent fails to provide necessary information. This does not mean, however, that no such conditions exist in the *SCM Agreement*." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291)

[732] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. In addition, the Appellate Body considered that Annex II of the AD Agreement supported its Article 12.7 interpretation. ("This understanding of the limitations on an investigating authority's use of 'facts available' in countervailing duty investigations is further supported by the similar, limited recourse to 'facts available' permitted under Annex II to the *Anti-Dumping Agreement*. Indeed, in our view, it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.") (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295)

the "best information available", following an "evaluative, comparative assessment" of the evidence available.[733]

7.441. We have already rejected India's understanding that Article 12.7 of the SCM Agreement requires an investigating authority to employ the "best information available", following an "evaluative, comparative assessment" of the evidence available. As a result, we must also reject India's argument that adverse conclusions may only be drawn under Article 12.7 on the basis of the "best information available". Contrary to India's understanding, the standard in Article 12.7 of the SCM Agreement requires that all substantiated facts on the record be taken into account, that "facts available" determinations have a factual foundation, and that "facts available" be generally limited to those facts that may reasonably replace the missing information. Provided adverse conclusions are drawn on the basis of this standard, such conclusions will not be punitive.[734]

7.442. India has not argued that the US provisions at issue provide for the drawing of adverse conclusions in a manner inconsistent with the *proper* Article 12.7 standard, as detailed above. Furthermore, we note that Sections 1677e(b) and 351.308(a) provide that the USDOC may only use an inference that is adverse to the interests of a non-cooperating party "in selecting from among the facts otherwise available."[735] This indicates that any adverse inference drawn by the USDOC will in fact be based on the facts available. Furthermore, there is nothing in the US provisions at issue to suggest that the USDOC is not required to take into account all substantiated facts on the record[736] or to apply "facts available" that do not reasonably replace the missing information.[737]

7.443. Our understanding is consistent with the views of the panel in *EC – Countervailing Measures on DRAM Chips*. While emphasizing that Article 12.7 of the SCM Agreement does not allow investigating authorities to punish non-cooperation, particularly in the absence of a factual foundation, that panel considered that in certain circumstances an investigating authority may be justified in drawing adverse inferences from non-cooperation in selecting from and assessing "facts available":

> In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain

[733] India's first written submission, para. 164 ("While the 'best information' may lead to a conclusion adverse to the party concerned, this is not necessarily true in all cases, since the *most fitting or most appropriate information* available in a given case may also be favourable to a party concerned.") See also India's first written submission, paras. 175.

[734] In the case of non-cooperation by an interested party (where the investigating authority has not otherwise obtained the information requested, for instance, from another source), the investigating authority will not know the actual missing relevant information. Therefore, the investigating authority will also not know whether the application of "facts available", selected on the basis of "adverse inferences", will lead to a conclusion which is less favourable or more adverse to the interests of the uncooperative party. (See United States' response to Panel question No. 69(d), para. 103). It could well be that the most unfavourable "fact available", selected on the basis of "adverse inferences" as a result of non-cooperation, is still *more* favourable to the interests of the uncooperative party than the unknown missing information would be.

[735] See United States' first written submission, para. 190. We also note that the United States submits that "[t]here is no intended difference between the term 'adverse' and the term 'less favourable' referenced in Annex II of the AD Agreement." (United States' response to Panel question No. 69(d), fn. 74) See also United States' response to Panel question No. 76, para. 131.

[736] We note that Section 351.308(e) of the US regulation establishes that the investigating authority "will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements" if certain conditions are met. Pursuant to Section 782(e), these conditions are: (i) the information is submitted by the deadline established for its submission, (ii) the information can be verified, (iii) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (iv) the interested party has demonstrated that it acted to the best of its ability, and (v) the information can be used without undue difficulties.

[737] Depending on the particular facts of the case, it may well be that an investigating authority acts inconsistently with Article 12.7 of the SCM Agreement in relying on "facts available". However, this would lead to an "as applied" inconsistency, and not an "as such" one.

> direction. Depending on the circumstances of the cases, we consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. …
>
> We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.
>
> …
>
> [W]e are of the view that facts available should not be used as a punishment, and that non-cooperation does not allow an investigating authority to simply use the information available which leads to the worst possible result for the interested party that failed to provide such information. Ultimately, the determination still has to be based on the facts that are available, not on mere inferences. But it is not because facts available should not be used in a punitive manner that the failure to cooperate becomes completely irrelevant in weighing and assessing the information before the authority.[738]

7.444. Finally, we note India's reliance on the Panel Report in *China – GOES* to argue that Article 12.7 of the SCM Agreement does not grant the right to draw adverse inferences or consequences in all cases of non-cooperation.[739] We recall that the panel in *China – GOES* concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation."[740] It is unclear to us how this conclusion supports India's claims. The expression "adverse inferences" in *China – GOES* refers to determinations that were based on speculative "adverse inferences", and thus devoid of any factual foundation.[741] This is entirely different from the "adverse inferences" envisaged in Sections 1677e(b) and 351.308(a)-(e), which properly rest on factual foundations.

7.7.5.1.3 Conclusion

7.445. In light of the above, the Panel concludes that India has failed to establish a *prima facie* case that Sections 1677e(b) and 351.308(a), (b) and (c) are "as such" inconsistent with Article 12.7 of the SCM Agreement.[742]

7.7.5.2 India's "as applied" claims of inconsistency with Article 12.7 of the SCM Agreement

7.446. India challenges 407 instances of application of "facts available" in the proceedings at issue. India claims that the United States' determinations under Sections 1677e(b) and 351.308 were inconsistent with Article 12.7 of the SCM Agreement, because the USDOC used (i) "facts available" devoid of any factual foundation or (ii) adverse "facts available" to penalize allegedly

[738] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.60-7.61 and 7.80. See also para. 7.143.

[739] See India's first written submission, para. 165, quoting Panel Report, *China – GOES*, para. 7.302.

[740] Panel Report, *China – GOES*, para. 7.302

[741] The panel in *China – GOES* examined a situation where the investigating authority drew speculative adverse inferences from the failure to cooperate, and the breadth of such inferences grew commensurate with the level of non-cooperation.

[742] Taking this view, we need not and do not address the United States' argument that the US provisions at issue are not mandatory in nature and thus cannot breach the United States' obligations under the WTO Agreements. (United States' first written submission, paras. 161-169)

non-cooperating interested parties, not employing the most fitting or most appropriate information available.[743] We examine the challenged instances below.

7.7.5.2.1 Use of the highest non-*de minimis* subsidy rate

7.447. India has identified 230 instances where, as "facts available", the USDOC applied the highest non-*de minimis* subsidy rate calculated in previous determinations. India asserts that the USDOC punished non-cooperation by assuming the worst possible consequence against the non-cooperating party, inconsistently with Article 12.7 of the SCM Agreement.[744] India's claims concern what it terms the "rule"[745] applied by the USDOC in selecting a subsidy rate on the basis of "facts available". According to India, pursuant to this "rule", the USDOC relies on "facts available" to select a calculated subsidy rate in the following manner:

- The USDOC first attempts to identify the highest non-*de minimis* subsidy rate calculated for the *identical* subsidy programme.
- Where any such rate is unavailable, the USDOC expands its consideration to a broader group to identify the highest non-*de minimis* subsidy rate calculated for a *similar* subsidy programme.
- Where any such rate is also unavailable, the USDOC further expands its consideration to identify the highest non-*de minimis* subsidy rate calculated for any programme in any CVD proceeding involving the same country, as long as the industry at issue could have used the programme for which these rates were calculated.[746]

7.448. Although India has presented these arguments under its "as applied" claims, India effectively challenges the USDOC's "rule" "as such". In our view, the US methodology on its face appears consistent with Article 12.7 of the SCM Agreement. The USDOC methodology explicitly requires that the investigating authority's determination have a factual foundation. First, it mandates that the investigating authority use subsidy rates previously calculated for a subsidy programme. Such rates, in our view, are by definition facts. Second, by requiring the investigating authority to use such subsidy rates in a progressive fashion – i.e. first using those calculated for the identical programme, then using those calculated for similar programmes, and only in the absence of either of these two using those calculated for any programme in any CVD proceeding involving the same country – we consider that the investigating authority is directed, in selecting "facts available", to use those facts which most reasonably replace the missing information, in light of all substantiated facts on record. In other words, pursuant to this alleged "rule", the USDOC is required to replace unknown facts with the most relevant known facts, and only move on to other known facts, in diminishing degrees of relevance, when more closely relevant facts are not available.

7.449. In our view, the question whether the highest non-*de minimis* subsidy rate does not reasonably replace the missing information or constitutes a punitive use of "facts available" can only be determined on a case-by-case basis. However, in challenging the USDOC's use of the highest non-*de minimis* subsidy rate calculated in a previous determination in specific instances, India has not explained how each specific use of that information does not, in each instance, reasonably replace the missing information, or is otherwise inconsistent with Article 12.7 of the

[743] India's first written submission, paras. 524-576.
[744] Ibid. paras. 526-528; opening statement at the first meeting of the Panel, paras. 46-47; and second written submission, para. 265.
[745] See India's first written submission, paras. 526-528. We note that the United States has not contested India's use of the term "rule" with respect to the USDOC's selection of subsidy rates on the basis of "facts available". In its first written submission, the United States describes the USDOC's search for "proxies" to select subsidy rates in the proceedings at issue. (see United States' first written submission, paras. 218-222) In our findings, we refer to the term "rule", as used by India, for the sake of convenience. However, we wish to be clear that our use of this term is without any implications as to whether or not the USDOC's selection might be a measure of general application that can be challenged in WTO dispute settlement.
[746] See India's first written submission, para. 526. See also United States' first written submission, paras. 218-221; and, for example, 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 22 and, 2006 Issues and Decision Memorandum, Exhibit IND-33, p. 6.

SCM Agreement. Rather, India has generally referred to a large number of instances where the USDOC applied this alleged "rule".[747] As stated above, however, we do not consider the "rule", on its face, inconsistent with Article 12.7. Thus, there is no basis to conclude that challenged application of that "rule" is inconsistent with that provision.

7.450. In light of the above, the Panel concludes that India has failed to establish a *prima facie* case that the USDOC's "rule", either in general or as applied in the 230 instances identified by India is inconsistent with Article 12.7 of the SCM Agreement.

7.7.5.2.2 JSW's purchase of iron ore from NMDC

7.451. India challenges one instance of application of "facts available" in the USDOC's determination (in the context of the USDOC's examination of the sale of high-grade iron ore for less than adequate remuneration) that JSW purchased iron ore from the NMDC at no charge during the period of review of the 2006 administrative review. India claims that this application of "facts available" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC's determination was devoid of any factual foundation and contradicted the "facts available" from the 2006 administrative review.[748] India submits that in its questionnaire response, "the GOI had specifically stated that JSW purchased iron ore from NMDC, *inter alia*, from its Donimalai mines and the response also contained information of the rates charged by NMDC *to all domestic purchasers* of iron ore."[749] In addition, India contends that "the facts available before the United States during the 2006 AR itself included information as to the prices at which Essar and ISPAT purchased iron ore from NMDC."[750]

7.452. We consider that the record evidence referred to by India is sufficient to establish *prima facie* that the USDOC's finding that NMDC did not provide iron ore to JSW at no charge lacked a factual foundation. To rebut this *prima facie* case, the United States would have to identify record evidence sufficient to show that the USDOC's finding that NMDC actually provided iron ore to JSW at no charge had a factual foundation. The United States has failed to do so. Instead, the United States questions the relevance of the information submitted by the GOI relating to JSW. The United States contends that the single price point reported by the GOI was not a substantiated fact for JSW's actual pricing during the period of review.[751] The United States also submits that the following "facts available" supported the USDOC's determination that JSW received iron ore from NMDC at no charge during the period of time at issue:

> (1) the subsidy program was demonstrated to exist; (2) the program was found to provide a countervailable subsidy in the 2nd Administrative Review of the program …; (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 2nd Administrative Review; (4) hot-rolled steel producers, Ispat and Essar, in the current

[747] India's first written submission, paras. 526-528; opening statement at the first meeting of the Panel, paras. 46-47; and second written submission, para. 265.

[748] India's first written submission, paras. 529-534; and second written submission, paras. 267-270.

[749] India's first written submission, para. 530. (footnotes omitted, emphasis original) In its questionnaire response to USDOC, the GOI stated that "during the period under review (2006) NMDC supplied Iron ore to … M/s JSW Steel (JSW) from its Donimalai and Kumarswamy mines. JSW was not supplied any quantity from Bailadila. … Since NMDC supplied iron ore to the respondents, mentioned above, at the same price at which the company exports iron ore to Japanese Steel Mills and not at 'less than adequate remuneration' - the Standard Questionnaire and the Provision of Goods/Services Appendices are not applicable. … The NMDC iron ore lump and fines prices published in the Tex Report are f.o.b. in US $ per DLT (Dry long ton). For the purpose of supplies to domestic customers of NMDC including IIL and JSW, the FOB port prices applicable as 1st Apr'05 are converted for FOR (mine) prices in Rs. Per WMT (Wet metric tonne) after taking into consideration the expenses on account of rail freight, port charges etc. The derived prices were made applicable for supplies to the domestic buyers of NMDC form its Bailadila and Donimalai mines." In addition, the GOI included a table with the prices as published in the Tex Report for the fiscal years 2005-2006 and 2006-2007 in respect of NMDC iron ore on FOB basis. (Administrative review for the period 01/01/2006 to 31/12/2006, Government of India's response to USDOC's questionnaire, 23 April 2007 ("2007 Questionnaire Response from GOI for 2006 AR"), Exhibit IND-59, pp. 5-6, internal pages 40-41) (italics omitted)

[750] India's first written submission, para. 530. See 2006 Preliminary Results, Exhibit IND-32, p. 10, internal page 1587.

[751] See also United States' first written submission, para. 264; and 2006 Issues and Decision Memorandum, Exhibit IND 33, pp. 92-94.

> review at issue were found to have received a benefit from this same subsidy program during the 2006 period of review; (5) JSW is a hot-rolled steel producer.[752]

However, the United States has not referred to any evidence on the record that could establish a factual foundation for the USDOC's determination that JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review. Thus, the Panel upholds India's claim that the application of "facts available" at issue is inconsistent with Article 12.7 of the SCM Agreement because it is devoid of any factual foundation.

7.7.5.2.3 VMPL's alleged benefit under certain KIP subsidy programmes administered by the SGOK

7.453. India challenges four instances of application of "facts available" in the USDOC's determination, in the context of the 2006 administrative review, that VMPL received benefits under the 1993 KIP, the 1996 KIP, the 2001 KIP, and the 2006 KIP. India claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation.[753]

7.454. In the 2006 administrative review, the petitioner submitted new subsidy allegations against JSW, contending that JSW received benefits from the SGOK by virtue of its ownership and control over VMPL.[754] India asserts that, while the petitioner alleged that VMPL received certain subsidies from the SGOK, the petitioner did not allege that VMPL received benefits under the KIP subsidy programmes at issue.[755] Nevertheless, the USDOC included these new subsidies against VMPL in the 2006 administrative review. Noting that the VMPL did not submit a response to its questionnaire[756], the USDOC applied "facts available" against VMPL "to address omissions for each type of assistance provided by the SGOK".[757]

7.455. The United States submits that the USDOC's determination at issue was not specifically detailed because "no party raised the specific issue of benefits to VMPL through the KIP subsidy programs for purposes of the final determination."[758] Nevertheless, the United States contends that the following facts on the record allowed the USDOC to "reasonabl[y] infer that VMPL used and benefitted from the KIP programs":

> (1) all subsidy programs under 1993 KIP, 1996 KIP, 2001 KIP, and 2006 KIP were demonstrated to exist; (2) VMPL received subsidies from the state government of

[752] United States' response to Panel question No. 108, para. 68. (footnotes omitted) In addition, the United States submits that "JSW's refusal to provide the necessary information, taken together with the above factors, provides a reasonable basis for the inference relied upon in this case, consistent with Article 12.7 of the SCM Agreement. That is, had the price paid by JSW been at least as high as those reported in the Tex Report on the record, it would have had every reason to cooperate and supply those prices. The refusal to cooperate permitted a reasonable inference that JSW benefitted to the maximum extent possible under the program." United States' response to Panel question No. 108, para. 69. See also 2006 Preliminary Results, Exhibit IND-32, p. 10, internal page 1587; and 2006 Issues and Decision Memorandum, Exhibit IND-33, pp. 16 and 92-94.

[753] India's first written submission, para. 540; and second written submission, paras. 271 and 274.

[754] India's first written submission, para. 535; and New subsidy allegations, 23 May 2007 ("2007 New Subsidy Allegations (JSW) for 2006 AR"), Exhibit IND-25, pp. 20-30.

[755] India's first written submission, paras. 536-537; and second written submission, paras. 272-274.

[756] India contends that no separate questionnaire was provided to VMPL. (India's first written submission, para. 539) However, we note that the USDOC stated that in a "supplemental questionnaire covering the new subsidies, [the USDOC] asked VMPL, as iron ore supplier that is majority owned by JSW, to respond to the questions regarding its receipt of assistance under the 1993 KIP." (2006 Preliminary Results, Exhibit IND-32, p. 17, internal page 1594) In its response to Panel question No. 108, the United States submits that the USDOC issued VMPL a questionnaire regarding the assistance it received from the SGOK, to which VMPL did not provide a response. (United States' response to Panel question No. 108, para. 71) Referring to the fact that "India complains that the questionnaire was not directly delivered to VMPL, but was instead provided to JSW", the United States submits that India has not explained how this action is inconsistent with Article 12.7 of the SCM Agreement. (United States' first written submission, para. 268) In our view, India has not sufficiently explained whether it takes issue with the questionnaire delivery, including how this action could be inconsistent with Article 12.7. Thus, we do not address this matter in our Report.

[757] 2006 Preliminary Results, Exhibit IND-32, p. 17, internal page 1594. See India's first written submission, paras. 538-539.

[758] United States' response to Panel question No. 108, para. 71.

> Karnataka through MML; (3) to the extent JSW provided any information on the KIP programs, it showed that JSW received benefits under the programs for those in which it chose to respond [to questionnaires] (namely, the 1993 KIP tax incentives and VAT refunds programs), which shows that these subsidy programs are available to and have been used by JSW; (4) VMPL was operated as a vehicle for the state government of Karnataka to subsidize JSW; (5) JSW stated that eligibility for the KIP subsidies was limited to industries located within designated regions of Karnataka, and VMPL was located in Karnataka; (6) VMPL did not provide any information specifically requested by Commerce concerning the KIP subsidy programs; and (7) the GOI did not provide any information concerning these subsidy programs, as requested by Commerce.[759]

7.456. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that could establish a factual foundation for the USDOC's determinations that VMPL used and benefited from the KIP subsidy programmes at issue.[760] Therefore, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.4 MML's alleged subsidies to JSW

7.457. India challenges two instances of application of "facts available" in which the USDOC allegedly assumed that (i) MML is a government or public body, and that (ii) the purchase of iron ore by MML was for more than adequate remuneration, in order for the USDOC to determine, in the context of the 2006 administrative review, that the alleged financial contribution by MML to JSW (through VMPL) is a subsidy within the meaning of Article 1.1 of the SCM Agreement.[761] India claims that the alleged applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation.[762]

7.458. The United States submits that the USDOC did not rely upon or apply "facts available" in making its determination that MML is a government or public body.[763] We agree that the USDOC's determination in this regard is based on evidence contained in the record and not on facts

[759] United States' response to Panel question No. 108, para. 71. (footnotes omitted)

[760] We note that the United States' assertions that "VMPL received subsidies from the state government of Karnataka through MML" (which we examine below), and that "VMPL was operated as a vehicle for the state government of Karnataka to subsidize JSW" refer to the petitioner's allegations, which India contends did not allege that VMPL received benefits under the KIP subsidy programmes at issue. (India's first written submission, paras. 536-537; and 2007 New Subsidy Allegations (JSW) for 2006 AR, Exhibit IND-25, pp. 20-30) We also note that, with respect to these assertions, the United States quotes the USDOC's memorandum on "JSW Steel Limited New Subsidy Allegations". However, the United States refers to page 8 of this document, which was not included in the USDOC's memorandum regarding new subsidy allegations for JSW Steel Limited, 27 September 2007 ("USDOC's memorandum on new subsidy allegations for JSW"), Exhibit USA-59.

[761] The United States requested the Panel to find that India's claim under Article 12.7 of the SCM Agreement relating to the treatment of MML as a public body falls outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU. (United States' first written submission, para. 269) In our view, the United States' request is based on the understanding that India claimed that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in treating MML as a public body. However, India's claims here refer to an alleged inconsistency with Article 12.7, which was included in India's panel request. (WT/DS436/3) Therefore, with respect to the alleged inconsistency with Article 12.7, we conclude that India's panel request complies with the requirements in Article 6.2 of the DSU. Consequently, India's arguments at issue relate to a claim that falls within the Panel's terms of reference. Therefore, we will consider these claim and arguments in our disposition of the issues in this case.

[762] India's first written submission, paras. 541-544.

[763] United States' response to Panel question No. 110, para. 74.

available.[764] As the USDOC did not apply "facts available" in making this determination, we see no factual basis for India's Article 12.7 claim.[765] We reject that claim accordingly.

7.459. With respect to the alleged payment of more than adequate remuneration by MML for iron ore supplied by VMPL, India contends that "nothing on the record provided sufficient information or evidence for the United States to have assumed that the purchase of iron ore by MML was for more than adequate remuneration."[766] The United States submits that the information contained in the petitioner's allegation served as the factual foundation for the USDOC's "facts available" determination at issue.[767] In examining the petitioner's allegations, the USDOC found that "there is sufficient evidence to believe or suspect that MML's failure to enforce pre-existing agreements with VMPL that resulted in MML paying higher prices for iron ore constitutes a financial contribution … because MML purchased a good from VMPL at more than adequate remuneration."[768] India has not pointed to any record evidence demonstrating that MML failed to enforce pre-existing agreements with VMPL. In light of this, and the United States' explanations, we conclude that the new subsidy allegations provided a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information.[769] We therefore reject India's claim that the USDOC's determination that the purchase of iron ore by MML was for more than adequate remuneration is inconsistent with Article 12.7 of the SCM Agreement.

7.7.5.2.5 Tata's alleged benefit from programmes administered by the SGOJ

7.460. India challenges 13 instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the SGOJ.[770] India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation and contradicted the "facts available" from the 2006 administrative review.[771]

7.461. With respect to the programmes, under the 2001 JSIP, on exemption of electricity duty, capital power generating subsidy, interest subsidy, and stamp duty and registration, India contends that Tata declared itself ineligible in the 2006 administrative review (with the eligibility criterion being reiterated by the GOI), because these programmes were only available to "new industrial units".[772] With respect to the programmes, under the 2001 JSIP, on capital investment

[764] We note that, in examining the petitioner's allegations, the USDOC "determined that the petitioner [by referencing the Report by the Comptroller and Auditor General of India] has supported its allegation that MML is a state-owned company and that VMPL is jointly owned by MML and JSW." USDOC's memorandum on new subsidy allegations for JSW, Exhibit USA-59, p. 2, internal page 10. See also United States' response to Panel question No. 110, para. 74.

[765] We note that if India actually intended to challenge the USDOC's determination to consider MML as a government or public body, India would have brought a claim under Article 1.1(a)(1) of the SCM Agreement.

[766] India's first written submission, para. 543.

[767] United States' first written submission, para. 272. See also United States' response to Panel question No. 111, para. 75.

[768] USDOC's memorandum on new subsidy allegations for JSW, Exhibit USA-59, p. 2, internal page 10.

[769] We note that if India actually intended to challenge the USDOC's determination that MML paid more than adequate remuneration for iron ore supplied by VMPL, India would have brought a claim under Articles 1.1(a)(1) and 14(d) of the SCM Agreement.

[770] These programmes included those under the 2001 JSIP ((i) exemption of electricity duty; (ii) offset of Jharkhand sales tax; (iii) capital investment incentive; (iv) capital power generating subsidy; (v) interest subsidy; (vi) stamp duty and registration; (vii) feasibility study and project report cost reimbursement; (viii) pollution control equipment subsidy; (ix) incentive for quality certification; and (x) employment incentives), and under the infrastructure subsidies to mega projects ((i) tax incentives; (ii) grants; and (iii) loans). (Issues and decision memorandum: final results and partial rescission of countervailing duty administrative review, 19 July 2010 ("2008 Issues and Decision Memorandum"), Exhibit IND-41, pp. 39-45; and 75 Fed. Reg. 1503-1518, 11 January 2010, Exhibit USA-40, pp. 14-16, internal pages 1516-1518)

[771] India's first written submission, para. 560.

[772] Ibid. paras. 547 and 550-552, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 7-8; and Administrative review for the period 01/01/2006 to 31/12/2006, questionnaire response from the Government of India regarding new subsidy allegations against Tata Steel Limited, 8 November 2007 ("2007 Questionnaire Response from the GOI re. Tata for 2006 AR"), Exhibit IND-60, pp. 8-9. India contends that these programmes had a cut-off date in 2005, and thus "[f]or obvious and logical reasons, if Tata was ineligible for these programs in 2006, this could not have changed in 2008." (India's second written submission, para. 275)

incentive, incentive for quality certification, and employment incentives, India contends that Tata declared itself ineligible in the 2006 administrative review (with the eligibility criteria being reiterated by the GOI), because these programmes were only available respectively to small or medium enterprises; small scale and ancillary industries; and Khadi and Village Industries, farm based industries and forest based industries.[773] With respect to the offset of Jharkhand sales tax, feasibility study and project report cost reimbursement, and the pollution control equipment subsidy, under the 2001 JSIP, and the tax incentive, grants and loans programmes, under the infrastructure subsidies to mega projects, India contends that Tata declared, in the 2006 administrative review, that it had not benefited from these subsidies.[774]

7.462. The United States recalls that Tata did not provide any information in the 2008 administrative review. The United States asserts that the USDOC could not have relied on the information submitted to the 2006 administrative review, because (i) the fact that a company did not receive benefits in a prior period does not mean that the company will never receive benefits under a programme in the future, and (ii) to rely on the information submitted for a past review would defeat the purpose of having a review for the current period.[775]

7.463. The United States submits that "[i]n the 2008 Administrative Review, the factual foundation relied upon by [the USDOC] to make its determination was the factual information that provided the basis for initiating the investigation into these programs."[776] The United States also submits that "the factual description of each of the 13 programs is drawn from both the GOI's April 23, 2009 response and the petitioners' subsidy allegation."[777] In addition, the United States submits that the following "facts available" supported the USDOC's determinations:

> (1) each subsidy program has been demonstrated to exist; (2) each subsidy program was found countervailable (*i.e.*, that it constituted a financial contribution, provided a benefit, and was specific); (3) each subsidy was available to steel producers in the state of Jharkhand; (4) Tata is a steel producer; and (5) Tata has facilities located in at least the state of Jharkhand; (6) the GOI provided a qualified statement that "GOI *understands* that Tata did not avail any benefits under this program", but did not provide any documentation to support that statement, as Commerce requested; (7) with respect to Infrastructure Subsidies to Mega Projects, referred to in items l. and m. above, the GOI stated: "For the benefits if any availed by Tata, please see the response filed by Tata"; and (8) that Tata refused to provide a response, and thus did not provide any of the necessary information requested by Commerce, including any information pertaining to the Infrastructure Subsidies to Mega Projects referenced by the GOI in its April 23, 2009 response.[778]

7.464. After examining the USDOC's new subsidy allegation memorandum of 27 September 2007[779], and the petition dated 23 May 2007 (on which the memorandum is based)[780], we conclude that, as contended by the United States, the petition establishes a

[773] India's first written submission, paras. 549, 555 and 557, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 8-9; and 2007 Questionnaire Response from the GOI re. Tata for 2006 AR, Exhibit IND-60, pp. 9-10.

[774] India's first written submission, paras. 548, 553-554 and 556, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 7-9.

[775] United States' first written submission, paras. 236 and 240-241. See also fn. 790 below for the United States' explanation of incorporating record from prior segments of the particular proceeding or other proceedings into the record of a current review.

[776] United States' first written submission, para. 241.

[777] United States' response to Panel question No. 112, para. 76.

[778] Ibid. para. 77. (footnotes omitted)

[779] USDOC's memorandum regarding new subsidy allegations for Tata Steel Limited, 27 September 2007 ("USDOC's memorandum on new subsidy allegations for Tata"), Exhibit IND-30. We note that this memorandum is referred to in the USDOC's preliminary determination for the 2008 administrative review with respect to certain subsidy programmes (see 75 Fed. Reg. 1503-1518, Exhibit USA-40).

[780] New subsidy allegations against Tata Steel Limited, 23 May 2007 ("2007 New Subsidy Allegations (Tata) for 2006 AR"), Exhibit IND-26. We note that although both documents (Exhibits IND-26 and IND-30) refer to the 2006 administrative review, the United States submits, and India has not contested, that they are on the administrative record of the 2008 administrative review. See United States' response to Panel question No. 112, para. 76.

sufficient factual foundation for the USDOC's determinations relating to the following subsidy programmes:

> (a) with respect the 2001 JSIP: (i) exemption of electricity duty; (ii) offset of Jharkhand sales tax; (iii) capital power generating subsidy; (iv) interest subsidy; (v) stamp duty and registration; and (vi) pollution control equipment subsidy.[781]
>
> (b) with respect to the infrastructure subsidies to mega projects: (i) tax incentives; (ii) grants; and (iii) loans.[782]

Based on this evidence, and in light of the United States' explanations, we conclude that the new subsidy allegations provided a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information. Thus, the Panel concludes that India has failed to establish that the USDOC's determinations with respect to these subsidy programmes are inconsistent with Article 12.7 of the SCM Agreement.

7.465. However, we note that the memorandum and the petition at issue do not refer to the following subsidy programmes under the 2001 JSIP: (i) capital investment incentive; (ii) feasibility study and project report cost reimbursement; (iii) incentive for quality certification; and (iv) employment incentives. The United States has not cited any other evidence on the record that could establish a factual foundation for the USDOC's determinations that Tata used and benefited from these 2001 JSIP subsidy programmes during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that these applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.6 Tata's alleged benefit from certain programmes administered by the SGOG, SGOM, SGOK, SGAP and SGOC

7.466. India challenges 55 instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from (i) six programmes administered by the SGOG[783]; (ii) eight programmes administered by the SGOM[784]; (iii) ten programmes administered by the SGAP[785]; (iv) nine programmes administered by the SGOC[786]; and (v) 22 programmes administered by the SGOK.[787] India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation[788] and, with respect to certain programmes, contradicted the "facts available" from the 2006 administered review.[789]

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[781] 2007 New Subsidy Allegations (Tata) for 2006 AR, Exhibit IND-26, pp. 14-15. See also USDOC's memorandum on new subsidy allegations for Tata, Exhibit IND-30, pp. 4-5.

[782] 2007 New Subsidy Allegations (Tata) for 2006 AR, Exhibit IND-26, pp. 20-22. See also USDOC's memorandum on new subsidy allegations for Tata, Exhibit IND-30, pp. 5-6.

[783] 2008 Preliminary Results, Exhibit IND-40, internal pages 1507-1509; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 21-25.

[784] 2008 Preliminary Results, Exhibit IND-40, internal pages 1509-1511; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 25-29.

[785] 2008 Preliminary Results, Exhibit IND-40, internal pages 1511-1514; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 29-34.

[786] 2008 Preliminary Results, Exhibit IND-40, internal pages 1514-1519; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 34-39.

[787] 2008 Preliminary Results, Exhibit IND-40, internal pages 1519-1524; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 45-55.

[788] India's first written submission, para. 563. India contends that "[a] perusal of the new subsid[y] allegation petitions would reveal that only programs administered by the SGOJ were alleged against Tata; no other programs administered by any other state government were alleged against Tata." India's first written submission, para. 563. (footnote omitted)

[789] India submits that Tata had stated in the 2006 administrative review that "it was not located in the SGOG and that its manufacturing facility for the subject product was not located in the SGOM." (India's first written submission, para. 565) India also contends that this information was corroborated by the questionnaire response submitted by the GOI, since Tata was not listed as a party receiving any benefit from the SGOG and SGOM. (India's first written submission, para. 565)

7.467. The United States submits that the record of the 2006 administrative review is not automatically part of the record of the 2008 administrative review.[790] In addition, the United States contends that, due to the collective refusal of the GOI and Tata to provide the requested information, the USDOC's determination "relied upon evidence provided by petitioners in previous reviews and on prior determinations" as available facts.[791] The United States also submits that the following "facts available" supported the USDOC's determinations:

> (1) each subsidy program was demonstrated to exist; (2) each subsidy program is countervailable (*i.e.*, each was based on a financial contribution that provides a benefit, and each program was specific); (3) each subsidy is available to steel producers; (4) Tata is a steel producer; (5) Commerce specifically requested that the GOI "indicate the states in India in which Tata, the respondent company, had operations during the POR [period of review]" [to which] the GOI responded that "[n]o information is available with the Government of India in this regard" and that "USDOC may contact Tata Steel for a list of States in which they had operations during the POR."; (6) Commerce specifically requested that Tata state the nature and locations of its facilities during the 2008 period; and (7) Tata refused to participate in the review or provide any necessary information that Commerce requested to make its determination.[792]

7.468. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Although the United States generally contends that the USDOC's determinations were based on evidence provided by petitioners in previous reviews and on prior determinations, the United States has not identified which petitioner allegations and prior determinations, or which specific facts, it relies upon in this regard.[793] Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.7 Tata's alleged benefit from certain programmes administered by the GOI

7.469. India challenges nine instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the GOI. India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations ignored evidence produced by the GOI in the 2008 administrative review and were devoid of any factual foundation.[794]

7.7.5.2.7.1 Purchase of high-grade iron ore from NMDC

7.470. It is undisputed that, in the 2008 administrative review, the GOI provided a list of companies that purchased high-grade iron ore from NMDC during the period of review, and that

[790] United States' first written submission, para. 242. The United States submits that when the USDOC relies on a prior determination, from the same or different proceedings, as a fact available, such determination is incorporated into the record of the current review. However, this does not mean that the underlying record of such prior determination (including responses to questionnaires) is automatically incorporated into the record of the current review, unless the concerned party submits such information from the prior review onto the record of the current review. United States' response to Panel question No. 144, para. 87.

[791] United States' response to Panel question No. 113, para. 78. See also United States' first written submission, para. 245.

[792] United States' response to Panel question No. 113, para. 79. (footnotes omitted)

[793] In addition, we accept India's argument that petitions in the 2006 administrative review could not have provided a factual foundation for the USDOC's determinations at issue, since India contends that none of the subsidy programmes at issue were alleged as new subsidies against Tata in the new subsidy allegation petitions for the 2006 and 2008 administrative reviews. India's first written submission, para. 563, and second written submission, para. 276.

[794] India's first written submission, paras. 567-574; second written submission, paras. 278-279; and response to Panel question No. 115.

Tata was not included on that list.[795] However, as India provided no supporting documentation, the United States contends that "the list, standing alone, did not constitute complete and verifiable evidence" that Tata did not purchase high-grade iron ore from NMDC during the period of review.[796] The United States also submits that the following facts supported the USDOC's determination at issue:

> (1) the subsidy program was demonstrated to exist; (2) the program was found to provide a countervailable subsidy in the 2nd, 4th, and 5th Administrative Reviews of hot-rolled carbon steel flat products from India (*i.e.*, financial contribution, benefit, and specificity); (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 5th Administrative Review; (4) hot-rolled steel producers, Ispat and Essar, in the 4th Administrative Review covering the 2006 period of review were found to have received a benefit from this subsidy program; (5) Tata is a hot-rolled steel producer; (6) Commerce requested, and Tata was given the opportunity to provide, necessary information concerning any purchases of high-grade iron ore from NMDC; and (7) Tata refused to provide any information on this subsidy program, as requested by Commerce.[797]

7.471. After carefully reviewing the United States' arguments and the evidence cited, we find that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determination that Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the application of "facts available" at issue is inconsistent with Article 12.7 of the SCM Agreement because it is devoid of any factual foundation.

7.7.5.2.7.2 MDA and MAI Programmes

7.472. It is undisputed that, in the 2008 administrative review, the GOI stated that Tata did not benefit from the MDA and MAI subsidy programmes, and submitted certificates from the administering authority attesting to this fact.[798] However, in the absence of Tata's cooperation, the USDOC considered that the GOI's submissions did not constitute complete and verifiable evidence that Tata did not benefit from the subsidy programmes at issue.[799] The United States submits that, in its application of "facts available", the USDOC relied on its examination of the subsidy

[795] Administrative review for the period 01/01/2008 to 31/12/2008, questionnaire response from the Government of India, 23 April 2009 ("2009 Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-32a, p. 43; Administrative review for the period 01/01/2008 to 31/12/2008, supplemental questionnaire response from the Government of India, 10 August 2009 ("2009 Supplemental Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-34, p. 5; 2008 Preliminary Results, Exhibit IND-40, p. 8, internal page 1503; United States' response to Panel question No. 113, para. 81; and India's first written submission, para. 567, second written submission, para. 278, and response to Panel question No. 107.

[796] United States' response to Panel question No. 114, para. 81. See also 2008 Issues and Decision Memorandum, Exhibit IND-41, p. 13; and 2008 Preliminary Results, Exhibit IND-40, p. 8, internal page 1503 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"); and United States' first written submission, para. 251.

[797] United States' response to Panel question No. 114, para. 80. (footnotes omitted) See also United States' response to Panel question No. 114, para. 88.

[798] 2009 Questionnaire Response from the GOI for 2008 AR, Exhibit USA-32a, pp. 59 and 67; Administrative review for the period 01/01/2008 to 31/12/2008, supplemental questionnaire response from the Government of India, 4 September 2009 ("2009 Other Supplemental Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-36, pp. 6 and 11-12 (with copy of the certificates); 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504; 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; India's first written submission, para. 568, and second written submission, para. 278; and United States' first written submission, paras. 248-250.

[799] 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; 2008 Preliminary Results, Exhibit IND-40, p. 9, internal page 1504 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"); United States' first written submission, para. 251, and response to India's question No. 14, para. 30.

programmes at issue in two prior determinations, relating to other proceedings, to determine that such programmes provided countervailable export subsidies.[800]

7.473. We note that the United States accepts that "it is not clear from the record why [the USDOC] examined these particular subsidy programs [with respect to Tata] in the 2008 administrative review."[801] Examining the USDOC's determinations at issue, we are unable to find any indication by the USDOC to the effect that it was relying on prior determinations that Tata had benefited from the subsidy programmes at issue.[802] We therefore conclude that the United States has not referred to any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.7.3 Six sub-programmes of the SEZ Act

7.474. It is undisputed that, in the 2008 administrative review, the GOI stated that Tata did not benefit from the six sub-programmes of the SEZ Act[803] at issue.[804] However, in the absence of cooperation by Tata, and in view of the lack of any supporting documentation from the GOI, the USDOC considered that the GOI's submission did not constitute complete and verifiable evidence that Tata did not benefit from the subsidy programmes at issue.[805] The United States contends that the following facts supported the USDOC's determinations at issue:

> (1) each sub-program was demonstrated to exist; (2) the program was found to be a countervailable subsidy in the 5th Administrative Review (*i.e.*, financial contribution, benefit, and specificity); (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 5th Administrative Review; (4) these sub-programs were available to companies with SEZ units, including hot-rolled steel producers; (5) Tata is a hot-rolled steel producer; (6) Commerce requested, and Tata was given the opportunity to

[800] In its examination of the MDA programme and the MAI programme, the USDOC respectively relied on the administrative review on Iron-Metal Casting from India, and the administrative review on Lined Paper Products from India. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504; United States' first written submission, para. 251, and response to Panel question No. 114, paras. 82-83.

[801] United States' response to Panel question No. 114, para. 89.

[802] Although the USDOC refers respectively to the administrative review on Iron-Metal Casting from India, and the administrative review on Lined Paper Products from India in its determinations, it does not seem to us that such references relate to the USDOC's applications of "facts available" at issue. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; and 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504.

[803] The six sub-programmes of the SEZ Act are: (i) duty free import/domestic procurement of goods and services for development, operation, and maintenance of SEZ Units Programme; (ii) exemption from excise duties on goods machinery and capital goods brought from the domestic tariff area for use by an enterprise in the SEZ; (iii) drawback on goods brought or services provided from the domestic tariff area into a SEZ, or services provided in a SEZ by services providers located outside India; (iv) 100 per cent exemption from income taxes on export income from the first 5 years of operation, 50 per cent for the next 5 years, and a further 50 per cent exemption on export income reinvested in India for an additional 5 years; (v) exemption from the central sales tax (CST); and (vi) exemption from the national service tax. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-19; and 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506. Although India occasionally referred to five sub-programmes of the SEZ Act in its submissions (India's first written submission, paras. 567-568; and second written submission, para. 278), India clarified that its claims refer to all six sub-programmes of the SEZ Act. (India's response to Panel question No. 106)

[804] 2009 Questionnaire Response from the GOI for 2008 AR, Exhibit USA-32a, p. 68; 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506, and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-18; India's first written submission, para. 568, and second written submission, para. 278; and United States' first written submission, para. 248, and response to Panel question No. 114, para. 86.

[805] 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"), and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-18; United States' first written submission, para. 251, and response to Panel question No. 114, para. 86.

> provide, necessary information pertaining to these sub-programs; and (7) Tata refused to provide any information on this subsidy program as requested by Commerce.[806]

7.475. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.8 SDF loans as a "potential" direct transfer of funds

7.476. India challenges one instance of application of "facts available" in the USDOC's determination, in the 2008 administrative review, that the SDF loans provide a financial contribution in the form of a potential direct transfer of funds. India claims that this application of "facts available" is inconsistent with Article 12.7 of the SCM Agreement, because it is contrary to facts on the record.[807]

7.477. We recall our finding that the USDOC applied facts available in order to *confirm* its earlier determinations that SDF loans constitute "direct transfers of funds" in the meaning of Article 1.1(a)(1)(i).[808] Thus, there was no determination by the USDOC in the 2008 administrative review that SDF loans constitute "potential direct transfers of funds". Since there is therefore no factual basis for India's Article 12.7 claim, we reject that claim accordingly.

7.7.5.2.9 2013 sunset review determination

7.478. India challenges 92 instances of application of "facts available" against Essar, ISPAT, SAIL and Tata in the USDOC's determinations, in the 2013 sunset review, that these companies benefited from a number of subsidy programmes. India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC assumed facts and applied "facts available" in a punitive fashion.[809]

7.479. We note that the presentation of India's Article 12.7 claims relating to these 92 instances of alleged improper application of facts available is limited to a single paragraph in its first written submission, with no further development of any substantive argument in subsequent submissions. Moreover, India did not adduce any evidence in support of its claims in its first written submission, or subsequently. India did not even specify the instances of alleged application of "facts available" or the particular subsidy programmes at issue. As a result, we are unable to evaluate India's claims, or to assess the consistency with Article 12.7 of any use of facts available by USDOC in the context of the 2013 sunset review.[810]

7.480. Thus, the Panel concludes that India has failed to establish a *prima facie* case that the USDOC's determinations, in the 2013 sunset review, that Essar, ISPAT, SAIL and Tata benefited from a number of subsidy programmes are inconsistent with Article 12.7 of the SCM Agreement.

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[806] United States' response to Panel question No. 114, para. 85. (footnotes omitted) See also United States' response to Panel question No. 114, para. 88.

[807] India's first written submission, para. 575.

[808] See para. 7.301 above.

[809] India's first written submission, para. 576.

[810] We note that, in its first written submission, the United States submitted a request for preliminary ruling that the Panel find that India's claims of inconsistency with Article 12.7 of the SCM Agreement relating to the 2013 sunset review determination fall outside the Panel's terms of reference. (United States' first written submission, paras. 274-283) However, we recall that in our preliminary ruling (see paras. 1.39-1.42 above), the Panel concluded that the 2013 sunset review claims are within the Panel's terms of reference. Thus, we were prepared to consider the substance of those claims, but India has failed to present evidence and arguments that would allow us to do so.

7.8 Whether new subsidy allegations may be examined in administrative reviews

7.481. India claims that the examination by the United States of new subsidy allegations in administrative reviews related to the imports at issue was inconsistent with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement.[811] The expression "new subsidy" is used by India to refer to subsidy programmes not formally examined in the original investigation, but included and examined in subsequent reviews.

7.8.1 Relevant WTO provisions

7.482. Article 11.1 of the SCM Agreement provides:

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

7.483. Article 11.2 of the SCM Agreement provides in relevant part:

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

7.484. Article 11.9 of the SCM Agreement provides:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

7.485. Article 13.1 of the SCM Agreement provides:

> As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

7.486. Article 21.1 of the SCM Agreement provides:

> A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

7.487. Article 21.2 of the SCM Agreement provides:

> The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has

[811] India's first written submission, paras. 585-623.

elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

7.488. Article 22.1 of the SCM Agreement provides:

When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

7.489. Article 22.2 of the SCM Agreement provides in relevant part:

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

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

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

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

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

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

7.8.2 Main arguments of the parties

7.8.2.1 India

7.490. India submits two sets of arguments seeking to demonstrate that, in investigating a number of new subsidy programmes in annual administrative reviews, the United States circumvented the obligations of Articles 11, 13 and 22 of the SCM Agreement, and inappropriately expanded the scope of a review proceeding under Article 21 of the SCM Agreement.[812]

7.491. First, India argues that new subsidy allegations relating to the imports at issue could not have been examined by the United States in administrative reviews because (i) the United States did not receive a written application pursuant to Articles 11.1, 11.2 and 11.9 of the SCM Agreement[813]; (ii) India was not invited for consultations with the aim of clarifying the existence, amount and nature of the newly alleged subsidies pursuant to Article 13.1 of the SCM Agreement[814]; (iii) the United States did not "initiate" an investigation into the new subsidy allegations under Article 11.1 of the SCM Agreement[815]; and (iv) the United States did not issue a

[812] India's first written submission, paras. 596-597 and 623.
[813] Ibid. paras. 585-595, and 599-604.
[814] Ibid. paras. 585, 593, 595 and 605-607.
[815] Ibid. paras. 588-590, 595, and 608-615.

"public notice" covering the new subsidy allegations pursuant to Articles 22.1 and 22.2 of the SCM Agreement.[816]

7.492. Second, India argues that reviews under Article 21 of the SCM Agreement are aimed at correcting or re-examining determinations relating to subsidization and injury that already exist; they concern the duration of countervailing measures once they have been imposed. India contends that a review "cannot be for something that was not in existence at all" at the time the measure being reviewed was imposed.[817] According to India, Article 21 is not intended to govern the imposition of duties *per se*, and does not cover a new examination into the existence, degree and effect of newly alleged subsidies. India emphasizes that "[t]he scheme of the SCM Agreement clearly suggests that different set[s] of procedural and substantive rules have been made for reviews and original investigations considering the inherent differences between these two proceedings."[818] Conflating original proceedings under Article 11 and review proceedings under Article 21 would "dilut[e] the contextual separation made in the SCM Agreement between both proceedings and upset[] the delicate balance of rights and obligations agreed upon by the Members."[819] Thus, India submits that the United States is not permitted to expand the scope of a review under Articles 21.1 and 21.2 so as to initiate new investigations against new subsidies.[820]

7.8.2.2 United States

7.493. The United States argues that India's claims rely on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programmes that were not examined in the original investigation. According to the United States, India's interpretation of the SCM Agreement "would create an absurd result, whereby multiple investigations, reviews and duty determinations would exist simultaneously with respect to a single product."[821]

7.494. The United States submits that the USDOC only examined newly identified subsidies for which domestic parties submitted reasonably available evidence demonstrating that there is a financial contribution by a government or public body, conferring a benefit. The USDOC also required domestic parties to provide reasonably available evidence demonstrating that the alleged subsidy was specific.[822] The United States argues that Article 21 of the SCM Agreement neither requires that reviews be limited to the specific subsidy programmes in place at the time of the original investigation, nor imports into reviews the requirements of Article 11 of the SCM Agreement, which govern the initiation of an original investigation.[823] The United States recalls that the purpose of subsequent reviews is to examine whether the continued imposition of a duty is necessary to offset subsidization which is causing injury. With this purpose in mind, it is necessary to examine allegations of additional subsidization programmes with respect to the same products and the same companies at issue in the original investigation.[824]

7.495. The United States contends that the text of each relevant provision and the overall structure of the SCM Agreement suggest that an *investigation* and a subsequent *review* of duties imposed pursuant to an investigation are "two separate and distinct processes, governed by separate provisions of the SCM Agreement."[825] The United States argues that were the rules of another provision of the SCM Agreement to be incorporated into Article 21, those rules would be expressly incorporated by cross-reference, as in the case with respect to the evidentiary rules in Article 12, which are incorporated by cross-reference into Article 21.4.[826] Moreover, the United States argues that the text of Articles 11, 13 and 22 of the SCM Agreement expressly limits their application to the original investigation.[827] Finally, the United States refers to findings of

[816] India's first written submission, paras. 594-595 and 616-619.
[817] Ibid. para. 621.
[818] Ibid. para. 622.
[819] Ibid. para. 622.
[820] Ibid. para. 623.
[821] United States' first written submission, paras. 578-579 and 604-607.
[822] Ibid. para. 582.
[823] Ibid. paras. 588 and 608.
[824] Ibid. para. 608.
[825] Ibid. para. 584.
[826] Ibid. para. 589.
[827] Ibid. paras. 590-597.

panels and the Appellate Body confirming that "requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*."[828]

7.8.3 Main arguments of the third parties

7.8.3.1 Canada

7.496. Canada disagrees with India's argument that, where the same subsidized good is concerned, every new subsidy allegation requires initiation of a new investigation under Article 11 of the SCM Agreement. According to Canada, new subsidy allegations should be permitted during review proceedings where appropriate protection of due process rights is provided to interested parties.[829]

7.8.3.2 European Union

7.497. The European Union notes that the United States' administrative reviews combine both a prospective element, *i.e.* the rate of duty to be applied going forward, and a retrospective element, *i.e.* the amount of duty to be finally collected with respect to the past.[830]

7.498. The European Union submits that the prospective element is subject to Article 21 of the SCM Agreement. The European Union does not agree with India that Article 11 of the SCM Agreement applies to reviews initiated pursuant to Article 21.2 of the SCM Agreement. However, the European Union does not agree with the United States that the SCM Agreement is based on an absolute definitional distinction between the term "investigation" and the term "review".[831] The European Union notes that Article 21.1 of the SCM Agreement provides for the duty to remain in force only as long as necessary to counteract injurious subsidization. While the term "recur" in Article 21.2 captures the concept of *subsidization* that recurs or may recur, which supports the view that the review may relate to a new subsidy, the same term also suggests an element of commonality between what occurred previously and what occurred or may occur subsequently.[832] The European Union also notes that the general term "subsidization" used in Articles 21.1, 21.2 and 21.3 does not refer to individual subsidies or subsidy programmes. Finally, the European Union submits that the right of an investigating authority to initiate reviews under Article 21.2 is not unfettered, since such a review may only be initiated where it is "warranted" or if an interested party submits "positive evidence substantiating the need for a review". According to the European Union, whether or not the evidence of the alleged new subsidies amounted to positive evidence warranting the initiation of the review is for panels to decide on a case-by-case basis.[833]

7.499. Turning to the retrospective element, the European Union notes that the SCM Agreement does not contain a provision equivalent to Article 9.3 of the AD Agreement, which deals with final assessment proceedings. Thus, the European Union submits that the retrospective element is subject to the relevant disciplines of Article 19.3 of the SCM Agreement. Nevertheless, the European Union contends that WTO Members are entitled to operate final assessment proceedings of the type used by the United States. Finally, according to the European Union, whether or not new subsidies may be included in such final assessment proceedings depends on the facts of particular cases.[834]

7.8.4 Evaluation

7.500. The US measures at issue are administrative review determinations and the underlying proceedings, which the United States accepts were conducted under Article 21 of the

[828] United States' first written submission, paras. 598-602.
[829] Canada's third-party statement, para. 9.
[830] European Union's third-party statement, para. 1.
[831] Ibid. paras. 1, 4 and 5.
[832] Ibid. paras. 6 and 7.
[833] Ibid. paras. 7-14.
[834] Ibid. paras. 1, 18 and 19.

SCM Agreement.[835] It is undisputed that the examination of the new subsidy allegations involved the same product at issue in the original investigation. India points to no obligation in the text of Article 21 that was breached by the USDOC in its examination of the new subsidy allegations in administrative reviews.[836] Rather, India contends that the new subsidy allegations should have been examined under Articles 11.1[837], 13.1, 22.1 and 22.2 of the SCM Agreement, and that failure to do so was inconsistent with these latter provisions.[838]

7.501. Thus, the issue before the Panel is whether the USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to consider new subsidy allegations – i.e. subsidy programmes not formally examined in the original investigation – in the administrative reviews at issue, or whether, as India argues, new subsidy allegations could only be considered in the context of an investigation initiated under Article 11.1 of the SCM Agreement, and undertaken consistently with Articles 13.1, 22.1, and 22.2 of the SCM Agreement. In other words, we must decide whether the scope of USDOC's administrative reviews was necessarily circumscribed and limited to the particular subsidy programmes that had been formally examined in the original investigation. If the USDOC was authorized to examine new subsidy allegations under Articles 21.1 and 21.2, we need not further consider India's claims. Conversely, if we find that the USDOC was not authorized to consider new subsidy allegations in administrative reviews, we would have to go on to examine whether the USDOC acted consistently with Articles 11.1, 13.1, 22.1 and 22.2 in the investigation and reviews at issue. We understand that this is the first time a panel has been faced with this specific question.

7.502. Article 21.1 provides in pertinent part that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Article 21.2 of the SCM Agreement refers to the "review" of the "need for the continued imposition of the duty" on the initiative of the investigating authority, where warranted, or upon a substantiated request by an interested party. Article 21.2 also sets out that interested parties have the right to request an examination of whether "the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both." Article 21.2 does not provide for a particular methodology with respect to the substantive determinations to be made in this type of review.

7.503. There is nothing in the text of Article 21.1 that could be understood to necessarily relate the term "subsidization" in this provision to specific programmes or limit the meaning of this term to *previously examined* subsidization, *i.e.* subsidization under programmes formally examined and found to constitute countervailable subsidies in the original investigation. In our view, nothing in Article 21.1 suggests that the term "subsidization" may not cover newly alleged subsidy programmes as well. Similarly, nothing in the text of Article 21.2 limits the review of the need for continued imposition of the duty to consideration of *already examined* subsidization. In our view, consideration of the need for the continued imposition of the duty may refer to both consideration in light of subsidy programmes formally examined in the original investigation, and consideration in light of subsidy programmes identified in new allegations in the context of a review. For us, new subsidy allegations are clearly relevant to the investigating authority's consideration of the need for continued imposition of the duty with respect to the particular subsidized imports, as continued imposition of the duty may be necessary in light of new subsidization, even if previously examined subsidization has expired.

7.504. Our reasoning is consistent with the understanding of the panel in *US – Carbon Steel*. In the context of sunset reviews, that panel found that Article 21.3 of the SCM Agreement requires an investigating authority to engage in an inherently prospective analysis of whether subsidisation is

[835] United States' first written submission, para. 582; and response to Panel question No. 66, para. 88.

[836] India does not raise any issue relating to whether the new subsidy allegations involved a financial contribution, which confers a benefit and is considered to be specific.

[837] The reference to Article 11.1 of the SCM Agreement here only relates to India's claim under this provision regarding the alleged failure to initiate an investigation into new subsidies. We recall that the Panel found in its preliminary rulings that India's claims relating to the initiation of an investigation despite the insufficiency of evidence under Articles 11.1, 11.2 and 11.9 of the SCM Agreement fall outside the Panel's terms of reference. (see paras. 1.29-1.38 and 1.42-1.43 above)

[838] See United States' response to Panel question No. 66, para. 87; and India's first written submission, paras. 621-623.

likely to continue or recur should the countervailing duty be revoked. That panel found that such analysis must have an adequate factual basis. In this context, that panel stated that:

> [I]n assessing the likelihood of subsidisation in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidisation, any changes in the original subsidy programmes, **any new subsidy programmes introduced after the imposition of the original CVD**, any changes in governmental policy, and any changes in relevant socio-economic and political circumstances.[839]

7.505. India suggests that "reviews under Article 21 are aimed at correcting or re-examining determinations relating to subsidization and injury that already exist."[840] India argues that a "[r]eview or continuation cannot be for something that was not in existence at all."[841] We find India's argument unclear. India's argument appears to rest on the view that the focus of the review under Article 21 is the original determination. However, Article 21.2 clearly establishes what is to be reviewed – not the original determination, but "the need for the continued imposition of the duty". The investigating authority's review under Article 21.2 concerns the continued imposition of a countervailing duty, which is a measure clearly "in existence" at the time of the review. The question to be answered in the review is whether the continued existence of that measure is justified. There is nothing in the text of Articles 21.1 or 21.2 that would limit an investigating authority to considering only whether the original basis for the measure is sufficient to justify its continued existence.

7.506. We consider that once a countervailing duty measure has been imposed, an investigating authority may review the correct amount of duty as well as the need for the continued imposition of such duty. To us, this is clear from the fact that Article 21.2 refers to consideration of possible continued imposition of the duty if it were varied, that is, if the amount of duty were changed. Therefore, if a subsidy programme, found in the original investigation to be countervailable, is decreased (in terms of the benefit) or is terminated, interested exporting parties may request that the countervailing duty imposed on the basis of that programme be reduced or terminated. In our view, it seems only logical and fair that, if there is an allegation that new subsidy programmes benefit the product that is the subject of the countervailing duty and are countervailable, interested domestic parties may request that the duty level be amended, and possibly increased, to take such subsidies into account. In order to do so, it will, of course, be necessary for the investigating authority to determine that such programmes are in fact countervailable subsidies benefitting imports of the same product, as well as the amount of such subsidies. As we understand it, that is precisely what the USDOC undertook to do with respect to the new subsidy allegations at issue here.[842]

7.507. Thus, we conclude that USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to examine new subsidy allegations in the administrative reviews at issue. Consequently, as mentioned above, we need not further consider India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement.

7.508. Therefore, in light of the above, the Panel rejects India's claims that the examination by the United States of new subsidy allegations in administrative reviews related to the imports at issue was inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1 and 22.2 of the SCM Agreement.

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[839] Panel Report, *US – Carbon Steel*, para. 8.96. (bold added) In its report, the Appellate Body quoted this passage, but stated that it "is *not* called upon, in [the] particular appeal, to review the Panel's [] *interpretation* of Article 21.3 and the obligations it sets forth with respect to the determination to be made in a sunset review." (Appellate Body Report, *US – Carbon Steel*, para. 138))

[840] India's first written submission, para. 621.

[841] Ibid.

[842] We note that, pursuant to Article 21.4 of the SCM Agreement, the evidentiary and procedural requirements of Article 12 of the SCM Agreement apply to reviews carried out under Article 21 of the SCM Agreement. India has not raised any claim under Article 12 in the context of the examination of new subsidy allegations in administrative reviews.

7.9 Alleged inconsistencies with respect to the USDOC's public notice: Article 22.5

7.509. India pursues a number of claims under Article 22.5 of the SCM Agreement. This provision requires investigating authorities to issue public notices explaining the legal and factual basis for their final determinations imposing countervailing duties. In the present case, USDOC gave public notice of its determination by publishing its final determination. India challenges the adequacy of USDOC's final determination. The United States asks the Panel to reject India's claims.

7.9.1 Relevant WTO provision

7.510. Article 22.5 of the SCM Agreement provides in relevant part:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

7.511. Article 22.4, which is referred to in Article 22.5, provides:

> A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
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> (i) the names of the suppliers or, when this is impracticable, the supplying countries involved;
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> (ii) a description of the product which is sufficient for customs purposes;
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> (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
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> (iv) considerations relevant to the injury determination as set out in Article 15;
>
> (v) the main reasons leading to the determination.

7.512. As explained below, we also consider it relevant that the second sentence of Article 22.3, which requires public notice of any preliminary or final determination, provides that such notice shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

7.9.2 Main arguments of the parties

7.9.2.1 India

7.513. India claims that the USDOC's public notice failed to properly explain its findings: (i) that the SDF Loan Programme is financed by mandatory consumer levies, rather than voluntary contributions by steel producers; that certain in-country price benchmarks should not have been used to assess benefit conferred by NMDC's sales of iron ore; (ii) that the GOI provided captive mining rights for coal to Tata; that the Captive Mining for Iron Ore Programme is *de facto* specific; and (iii) that NMDC export prices should have been used as a price benchmark.

7.9.2.1.1 In relation to the SDF programme

7.514. India submits that, during the original investigation, exporters argued that the SDF Loan Programme was similar to the ECSC programme. Exporters made this argument because, in a separate proceeding, the USDOC had found that financial pools created under the ECSC out of producer's own funds were not countervailable.[843] India notes that the USDOC rejected this argument because under the SDF programme "steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers."[844] The USDOC concluded that the SDF levies "are analogous to tax revenues collected from consumers as mandated by the GOI."[845]

7.515. India submits that USDOC's explanation is inadequate for the purpose of Article 22.5, because it fails to adequately clarify the reasons for the rejection of the argument raised by the interested parties, and ignores material facts on the record regarding the similarities between the ECSC and the SDF Loan Programmes. According to India, the exporters' argument was rejected merely on the basis that unlike the ECSC programme, the SDF programme was compulsory and akin to a taxation programme. India contends that the USDOC failed to provide the material facts that led it to differentiate the SDF Loan Programme from the ECSC programme.[846] India submits that the USDOC ignored numerous similarities between the ECSC and the SDF Loan programmes.

7.9.2.1.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.516. This claim pertains to the facts surrounding India's Article 14(d) claim that the USDOC improperly rejected certain in-country price data, and improperly refused to determine price benchmarks for Essar and JSW on the basis of a confidential price quote provided by ISPAT. India submits that the availability of in-country benchmarks is a relevant and material fact that ought to have been taken into account by the USDOC as part of its findings, and should therefore have been reflected in its final determination.[847] India contends that USDOC's failure to do so is in breach of Article 22.5.

7.9.2.1.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.517. This claim pertains to India's claim that the USDOC violated Article 1.1(a)(1) by finding that GOI had provided goods to Tata in the form of rights to (captively) mine coal. India contends that the USDOC failed to explain in sufficient detail the matters of fact and law leading to USDOC's conclusion that the GOI granted captive mining rights to Tata. India also contends that the USDOC failed to respond to the argument that GOI did not grant any mining rights to Tata.[848]

7.9.2.1.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.518. India also submits that the USDOC failed to properly consider Tata's arguments that the Captive Mining of Iron Ore Programme was not *de facto* specific to the four steel producers identified by the USDOC.[849] India contends that the USDOC provided no basis or reasons for its factual determination regarding the existence of a separate governing regulation for mining rights for captive mining of iron ore.[850]

[843] See, Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany, 62 FR 54990, 54993 (October 22, 1997) as cited in 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.
[844] 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.
[845] Ibid.
[846] India's first written submission, para. 630.
[847] Ibid. para. 631.
[848] Ibid. para. 633.
[849] Ibid. para. 635.
[850] Ibid. para. 637.

7.9.2.1.5 In relation to NMDC's export prices

7.519. India submits[851] that the USDOC failed to explain why it rejected Essar's argument, during the 2007 administrative review, that an NMDC price to a foreign buyer could be considered as an appropriate Tier II benchmark since the NMDC would not be interested in subsidizing foreign buyers.[852] India contends that the USDOC determined that such a price is inappropriate because the issue of transnational subsidization is moot[853], and because the price is set by the government provider of the financial contributions under investigation.[854] According to India, USDOC failed to properly explain its rejection of the argument, as required by Article 22.5 of the SCM Agreement.

7.9.2.2 United States

7.9.2.2.1 In relation to the SDF Loan Programme

7.520. The United States submits that the USDOC explained in detail its reasons for rejecting exporters' argument that the SDF Loan Programme was similar to the ECSC Programme because SDF loans were allegedly funded from voluntary steel producer levies.[855] Referring to the USDOC's final determination[856], the United States contends that the USDOC clearly explained its reasons for finding that the SDF levies operated differently than the funds collected under the ECSC programme. The United States refers in this regard to the USDOC's finding that, unlike the ECSC funds, the SDF funds were collected from consumers, through mandatory price increases on certain steel products.

7.521. The United States notes India's reference to alleged similarities between the two programmes, such as the fact that both the SDF and ECSC programmes were initiated pursuant to government action, and that the High Authority of the ECSC was authorized to place levies on the production of steel and coal.[857] According to the United States, neither of these alleged facts rebuts USDOC's explanation that unlike the ECSC levies imposed on producers, the SDF levies were the equivalent of a GOI-mandated tax imposed on and paid by consumers. The United States contends that India's argument (in the context of its Article 22.5 claim) that the SDF funds cannot be characterized as a tax because "the JPC was not controlled by the GOI"[858] demonstrates that India's disagreement is not with the adequacy of Commerce's explanation for its decision, in accordance with Article 22.5 of the SCM Agreement, but rather with the substance of the decision itself.

7.9.2.2.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.522. The United States refers to its arguments regarding the substance of India's Article 14(b) claim to rebut India's Article 22.5 claim that the USDOC failed to take into account material factual information.[859]

7.9.2.2.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.523. The United States refers to its arguments regarding the substance of India's Article 1.1(b) and 14(b) claims to rebut India's Article 22.5 claim that the USDOC failed to explain its determinations with regard to the GOI's grant of mining rights to Tata.[860]

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[851] India's first written submission, para. 638.
[852] 2007 Issues and Decision Memorandum, Exhibit IND-38, Comment 11.
[853] Ibid.
[854] Ibid.
[855] United States' first written submission, paras. 614-616.
[856] 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.
[857] India's first written submission, para. 629. (citations omitted)
[858] Ibid. para. 630.
[859] United States' first written submission, para. 617.
[860] Ibid. para. 618.

7.9.2.2.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.524. The United States refers to its arguments regarding the substance of India's Article 2.1(c) claim to rebut India's Article 22.5 claim that the USDOC failed to take into account material factual information.[861]

7.9.2.2.5 In relation to NMDC's export prices

7.525. The United States refers[862] to its arguments regarding the substance of India's Article 1.1(b) claim to rebut India's Article 22.5 claim that the USDOC failed to explain why it rejected Essar's argument, during the 2007 administrative review, that an NMDC price to a foreign buyer could be considered as an appropriate Tier II benchmark since the NMDC would not be interested in subsidizing foreign buyers.

7.9.3 Evaluation

7.526. Article 22.5 of the SCM Agreement is virtually identical to Article 12.2.2 of the AD Agreement, which was recently addressed by the panel in *China – X-ray Equipment*, with reference to the reports of the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*, in the following terms:

> In interpreting the scope of the obligation set forth in the first sentence of Article 12.2.2, we note that the text of Article 12.2.2 refers to Article 12.2.1. Accordingly, the information described in Article 12.2.1 must be included in public notices issued pursuant to Article 12.2.2. We consider that it is also appropriate to have regard to the contextual guidance afforded by Article 12.2, which applies to public notices of both preliminary and final determinations. Article 12.2 provides that such public notices shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In considering the contextual guidance afforded by Article 12.2, we have regard to the following[] findings made by the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*:
>
> > The chapeau of Article 12.2.2, Article 12.2, requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*" (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are "material" within the meaning of Article 12.2.2. In our view, what is "material" in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty. We note in this regard the views of the panel in *EC – Tube or Pipe Fittings*:
> >
> > > Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material"

[861] United States' first written submission, para. 617.

[862] See fn. 887 to the United States' first written submission, which refers to paras. 638-639 of India's first written submission. These paras. contain India's Article 22.5 claim regarding the USDOC's response to Essar's attempted reliance on NMDC prices to foreign buyers.

> by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".
>
> We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. … contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.

> We cannot conclude that every single decision of an investigating authority in the course of an investigation can be considered as having "led to" the imposition of the final measures, such that it must be described, together with the "information" relevant to the decision, in the published notice of the final determination. Not every question or issue which arises during an investigation, and which is resolved by the investigating authority, is necessarily considered material by the investigating authorities, and may be said to have "led to" the imposition of the anti-dumping duty, even though it may be of interest or significant to one or more interested parties. In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the Dumping Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.

We are in broad agreement with these findings. Consistent therewith, we consider that the first sentence of Article 12.2.2 requires an investigating authority to include in its public notice a description of its findings and conclusions on the issues of fact and law that it considered material to its decision to impose final measures. That description must include "sufficient detail". While the sufficiency of the detail of the description may depend on the precise nature of the findings made by the investigating authority, it should in any event be sufficient to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood by the public. The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of "public" is broad: it includes "interested parties" within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also

consider that the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary. Our approach is consistent with the following findings recently made by the Appellate Body in *China – GOES*:

> Article[] 12.2.2 [...] capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Article[] 12.2.2 ... is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Article[] 12.2.2 ... seek[s] to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* ...
>
> ...
>
> The second sentence of Article 12.2.2 requires the inclusion in the public notice of "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". In light of our interpretation of the first sentence of Article 12.2.2, we consider that "relevant" arguments or claims are those that relate to the issues of fact and law considered material by the investigating authority. Since this provision concerns the arguments and claims made by exporters and importers, whose interests will be adversely affected by an affirmative determination, it is particularly important that the "reasons" for rejecting or accepting such arguments should be set forth in sufficient detail to allow those exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement.[863]

7.527. We agree with these views and shall be guided by them in examining India's Article 22.5 claims.

7.9.3.1 The USDOC's explanation of its treatment of SDF levies

7.528. Concerning India's claim that the USDOC failed to adequately clarify the reasons for the rejection of an argument raised by interested parties, we note the argument made by Indian respondents in the investigation that the USDOC's treatment of SDF loans as countervailable "contradict[s] the Department's precedent in other cases in which it found that loans from a pool of funds administered by an industry association, including those with government involvement, do not constitute countervailable subsidies".[864] In this regard, the respondents referred to the USDOC's finding that "benefits received by producers from financial pools created from contributions of the producers' own funds under the [ECSC] program are not countervailable".

7.529. In response, the USDOC stated:

> we do not agree with respondents' contention that the SDF levies, much like the ECSC program, represented the integrated steel producers' own money and, thus, cannot constitute a government financial contribution. Under the ECSC program, producers make voluntary contributions to a pool of money using their own funds. Under the SDF program steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers. Thus, rather than

[863] Panel Report, *China – X-ray Equipment*, paras. 7.458, 7.459 and 7.472.
[864] 2001 Issues and Decision Memorandum, Exhibit IND-7, p. 8.

> constituting the steel producers' own funds, the SDF levies, as noted by petitioners, are analogous to tax revenues collected from consumers as mandated by the GOI.[865]

7.530. We consider that the USDOC's statement adequately addressed the respondents' argument that SDF levies were derived from producers' own funds. The USDOC's statement was sufficient for respondents to understand why their argument had been rejected, and to assess whether the USDOC's approach was consistent with domestic law and/or the WTO Agreement. We reject India's claim accordingly.

7.531. We also observe that India's claim seems to be more concerned with the substance of the USDOC's determination than the explanation thereof. In this regard, we note India's contention that "[t]he aforesaid determination of United States is misplaced"[866], and that the USDOC "ignored the material facts on record" in making its determination.[867] Since Article 22.5 does not have any bearing on the substance of an investigating authority's determination, we decline to apply Article 22.5 in respect of such substantive matters.

7.9.3.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.532. We recall our finding that, despite the absence of any explanation provided by the USDOC, the United States sought to justify the USDOC's treatment of the relevant domestic price information, using *ex post* rationalizations. As explained above[868], private domestic prices are the "primary benchmark" for assessing benefit under Article 14(d) of the SCM Agreement.[869] The assessment of domestic price information submitted for possible use as price benchmarks is therefore material to a determination imposing final measures. Since the USDOC failed to provide any explanation of any consideration of the relevant domestic price information, the USDOC necessarily failed to provide adequate public notice of its findings on this matter, contrary to the requirements of Article 22.5 of the SCM Agreement.

7.9.3.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.533. We recall that we have upheld India's Article 1.1(a)(i) claim that the USDOC improperly determined that Tata had been provided goods by the GOI in the form of a captive coal mining lease. In light of that finding, we see no need to address India's claim regarding the USDOC's treatment of that issue in its public notice. We therefore exercise judicial economy in respect of this claim.

7.9.3.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.534. Based on our finding that the USDOC's determination of the existence of a Captive Mining of Iron Ore Programme is inconsistent with Article 12.5, we see no need to address India's claim regarding the USDOC's treatment of that issue in its public notice. We therefore exercise judicial economy in respect of this claim.

7.9.3.5 In relation to NMDC export prices

7.535. This claim concerns Essar's argument that the USDOC should use NMDC export prices as a price benchmark because NMDC would not subsidize foreign purchasers. In its Issues and Decision Memorandum, the USDOC explained that it would not use NMDC price quotes as either Tier I or Tier II benchmarks "[b]ecause these price quotes pertain to the very government provider of the goods at issue".[870] The USDOC also explained that, as a result of its decision not to use any NMDC price as a Tier I or II benchmark, the issue of whether or not NMDC would subsidize its export

[865] 2001 Issues and Decision Memorandum, Exhibit IND-7, p. 10.
[866] India's first written submission, para. 629.
[867] Ibid. para. 630.
[868] See para. 7.158 above.
[869] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[870] 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 50 of 58, Comment 11.

customers was "moot". We consider that this explanation by the USDOC is sufficient for the purpose of Article 22.5 of the SCM Agreement. The USDOC's statement makes it clear that the USDOC did not use the NMDC export price quotes as a benchmark because they pertain to the very government provider under investigation. Interested parties could reasonably understand from this that the USDOC would not engage in price comparisons that would necessarily be circular. Interested parties could also reasonably understand that, because of the USDOC's decision not to engage in circular price comparisons using government price benchmarks, there was no need to consider whether or not a government would subsidize its export sales. We reject India's Article 22.5 claim accordingly.

7.10 Consequential claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

7.536. India notes that Articles 19.3 and 19.4 of the SCM Agreement mandate that countervailing duty in respect of any product shall be levied in the appropriate amount and not in excess of the amount of subsidy found to exist. In addition, India notes that Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement require that each WTO Member bring its laws, regulations and administrative procedures into conformity with the SCM Agreement. India submits that, to the extent the Panel finds that the determinations made by the United States in the underlying proceedings are in breach of Articles 1, 2 and 14 of the SCM Agreement or that the United States has failed to ensure conformity of its laws, regulations and administrative procedures identified by India with the SCM Agreement, the Panel should also find, respectively, that the said determinations result in the imposition of countervailing duty in inappropriate amount and in excess of the amount of subsidy found to exist, contrary to Articles 19.3 and 19.4, and that the United States has acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement. India also submits that to the extent the imposition of the countervailing duties at issue is not in accordance with the SCM Agreement, such imposition is *ipso facto* in breach of Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994.

7.537. We note that India's claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement are purely consequential, in the sense that they depend on the outcome of other claims pursued by India under other provisions of the SCM Agreement. Since we have already resolved those claims, we see no need to address India's consequential claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement. We therefore exercise judicial economy in respect of those claims.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. Having considered the United States' request for preliminary rulings regarding the scope of these proceedings, we conclude that:

a. the 2013 sunset review is within the Panel's terms of reference;

b. India's claim that the United States acted inconsistently with Article 11.1 of the SCM Agreement by failing to "initiate" an investigation into new subsidies is within the Panel's terms of reference; and

c. India's claims that the United States acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fall outside the Panel's terms of reference.

8.2. In light of the findings set forth in this Report, the Panel concludes that the United States acted inconsistently with:

a. in connection with the provision of high grade iron ore by the NMDC:

i. Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of *de facto* specificity regarding NMDC; and

ii. Article 14(d) of the SCM Agreement by failing to consider the relevant domestic price information for use as Tier I benchmarks, in respect of which the United States sought to rely on *ex post* rationalization;

b. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:

i. Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information;

ii. Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act; and

iii. Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iron ore;

c. Article 15.3 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with the "cross-cumulation" of the effects of imports that are subject to a CVD investigation with the effects of imports that are not subject to simultaneous CVD investigations;

d. Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with injury assessments based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports;

e. Article 12.7 of the SCM Agreement by applying "facts available" devoid of any factual foundation in connection with the following determinations:

i. JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review;

ii. VMPL used and benefited from the 1993 KIP, 1996 KIP, 2001 KIP and 2006 KIP subsidy programmes;

iii. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP:

(1) capital investment incentive;

(2) feasibility study and project report cost reimbursement;

(3) incentive for quality certification; and

(4) employment incentives;

iv. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes:

(1) 6 programmes at issue administered by the SGOG;

(2) 8 programmes at issue administered by the SGOM;

(3) 10 programmes at issue administered by the SGAP;

(4) 9 programmes at issue administered by the SGOC; and

(5) 22 programmes at issue administered by the SGOK;

v. Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review;

vi. Tata used and benefited from the MDA and MAI subsidy programmes during the period covered by the 2008 administrative review; and

vii. Tata used and benefited from the six sub-programmes of the SEZ Act at issue during the period covered by the 2008 administrative review;

f. Article 22.5 of the SCM Agreement by failing to provide adequate notice of the USDOC's consideration of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore.

8.3. In light of the findings set forth in this Report, the Panel rejects India's claims that the United States acted inconsistently with:

a. Article 14(d) of the SCM Agreement with respect to Section 351.511(a)(2)(i) to (iii) "as such";

b. Articles 14(d), 19.3 and 19.4 of the SCM Agreement with respect to Section 351.511(a)(2)(iv) "as such";

c. in connection with the provision of high grade iron ore by the NMDC:

i. Article 1.1(a)(1) of the SCM Agreement in connection with the USDOC's determination that NMDC is a public body;

ii. Article 2.4 of the SCM Agreement by determining *de facto* specificity without positive evidence;

iii. Articles 1.1(b) and 14(d) of the SCM Agreement by:

(1) failing to determine whether the price charged by NMDC was adequate for NMDC itself, prior to applying the Tier I and II benchmarks to determine benefit to the recipient, in connection with Sections 351.511(a)(2)(i) to (iii) "as applied";

(2) failing to apply the ISPAT Tier I benchmark price to assess sales of iron ore by NMDC to Essar and JSW in the 2006 administrative review;

(3) using benchmark prices adjusted for delivery charges; and

(4) failing to use NMDC's export prices to determine Tier II benchmark prices in the 2006, 2007 and 2008 administrative reviews;

iv. the chapeau of Article 14 of the SCM Agreement by failing to explain why it excluded NMDC's export prices from the 2006, 2007 and 2008 reviews;

d. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:

i. Article 1.1(a)(1)(iii) of the SCM Agreement by determining that the GOI provided goods through the grant of mining rights for iron ore and coal;

ii. Articles 1.1(b) and 14(d) of the SCM Agreement in connection with the USDOC's notional price methodology for purposes of assessing benefit; and

iii. Article 14(d) of the SCM Agreement in connection with the USDOC's use of delivered prices to determine benefit in respect of mining rights for coal;

e. in connection with SDF:

i. Article 1.1(a)(1) of the SCM Agreement in connection with the USDOC's determination that the SDF Managing Committee constitutes a public body;

ii. Article 1.1(a)(1)(i) of the SCM Agreement in connection with:

(1) the USDOC's determination that the SDF Managing Committee provided direct transfers of funds; and

(2) the USDOC's reference to SDF loans as "potential direct transfers of funds" in the 2008 administrative review;

iii. Article 1.1(b), the chapeau of Article 14 and Article 14(b) of the SCM Agreement in connection with the USDOC's determination of benefit conferred by SDF loans in the 2006 and 2008 administrative reviews;

f. Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement in connection with Sections 1675a(a)(7) and 1675b(e)(2) "as such", and in connection with Section 1675a(a)(7) "as applied" in the sunset review at issue;

g. Articles 15.1 and 15.4 of the SCM Agreement in connection with USITC's evaluation of certain economic factors in its injury determination;

h. Article 12.7 of the SCM Agreement in connection with Sections 1677e(b) and 351.308(a), (b) and (c) "as such";

i. Article 12.7 of the SCM Agreement in connection with the application of "facts available" concerning:

i. the USDOC's "rule" to use the highest non-*de minimis* subsidy rate; and

ii. the USDOC's determinations that:

(1) MML is a government or public body, in the context of the 2006 administrative review;

(2) the purchase of iron ore by MML was for more than adequate remuneration, in the context of the 2006 administrative review;

(3) Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP: (a) exemption of electricity duty; (b) offset of Jharkhand sales tax; (c) capital power generating subsidy; (d) interest subsidy; (e) stamp duty and registration; and (f) pollution control equipment subsidy;

(4) Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the infrastructure subsidies to mega projects: (a) tax incentives; (b) grants; and (c) loans;

(5) SDF loans provide a financial contribution in the form of a "potential direct transfer of funds", in the context of 2008 administrative review; and

(6) Essar, ISPAT, SAIL and Tata benefited from a number of subsidy programmes, in the context of the 2013 sunset review;

j. Articles 11.1, 13.1, 21.1, 21.2, 22.1 and 22.2 of the SCM Agreement in connection with the examination of new subsidy allegations in the administrative reviews at issue; and

k. Article 22.5 of the SCM Agreement by failing to properly explain in the public notices the reasons for rejecting:

   i. the interested parties' argument relating to the treatment of SDF levies; and

   ii. the use of NMDC export prices as a price benchmark.

8.4. In light of the findings set forth in paragraphs 8.2 and 8.3 of this Report, the Panel exercises judicial economy in respect of India's claims under:

a. Articles 2.1(c) and 2.4 of the SCM Agreement in connection with the USDOC's determination that the Captive Mining of Iron Ore Programme is *de facto* specific;

b. Articles 2.1(a) and (b) of the SCM Agreement in connection with the USDOC's determination that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific;

c. Article 22.5 of the SCM Agreement in connection with the USDOC's public notice concerning:

   i. the GOI's grant of captive coal mining rights to Tata; and

   ii. the *de facto* specificity of the Captive Mining of Iron Ore Programme.

d. Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement in connection with India's consequential claims.

8.2 Recommendation

8.5. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent the United States has acted inconsistently with certain provisions of the SCM Agreement, we conclude that the United States has nullified or impaired benefits accruing to India under that Agreement.

8.6. Pursuant to Article 19.1 of the DSU, having found that the United States acted inconsistently with certain provisions of the SCM Agreement, we recommend the United States bring its measures into conformity with its obligations under that Agreement. The second sentence of Article 19.1 provides the Panel with the discretion to suggest ways in which the United States might implement this recommendation. In this regard, India has proposed specific suggestions for us to make.[871] Given the complexities to which implementation may give rise, we decline to exercise our discretion under the second sentence of Article 19.1 in the manner proposed by India.

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[871] India's first written submission, para. 642.

WORLD TRADE ORGANIZATION

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UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS436/R.

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WORKING PROCEDURES FOR THE PANEL

ANNEX A-1

UNITED STATES – COUNTERVAILING MEASURES ON
CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(DS436)

WORKING PROCEDURES FOR THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information (Annex 1).

4. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before 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, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If India requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, India shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by India could be numbered IND-1, IND-2, etc. If the last exhibit in connection with the first submission was numbered IND-5, the first exhibit of the next submission thus would be numbered IND-6. The United States' exhibits could be numbered USA-1, USA-2, etc.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

11. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

12. The first substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall invite India to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with India presenting its statement first.

13. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by India. If the respondent chooses not to avail itself of that right, the Panel shall invite India to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

16. The third-party session shall be conducted as follows:

(a) All third parties may be present during the entirety of this session.

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

17. The parties and third parties shall provide the Panel with executive summaries of the facts and arguments as presented to the Panel in each of their written submissions, other than answers to written questions, and in their oral presentations, within one week following the delivery to the Panel of the written version of the submission or oral statement concerned. Each executive summary of the parties shall be limited to no more than ten (10) pages. The executive summaries shall not serve in any way as a substitute for the submissions of the parties in the Panel's examination of the case. Third parties are requested to provide the Panel with executive

summaries of their written submissions and oral statements of no more than five (5) pages each, within one week following the delivery to the Panel of the written version of the relevant submission. Paragraph 22 shall apply to the service of executive summaries.

18. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 17, and these will be annexed as addenda to the report.

Interim review

19. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

20. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

21. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

22. The following procedures regarding service of documents shall apply:

(a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

(b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to XXXXXX; XXXXXX; and XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

UNITED STATES – COUNTERVAILING MEASURES ON
CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(DS436)

ADDITIONAL WORKING PROCEDURES FOR THE PANEL CONCERNING
BUSINESS CONFIDENTIAL INFORMATION

1. The following procedures apply to business confidential information (BCI) submitted in the course of the Panel proceedings. These procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any such BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. For the purposes of these proceedings, business confidential information (BCI) means information previously submitted to the U.S. Department of Commerce as confidential information protected by Administrative Protective Order ("APO") in the course of the countervailing duty investigation and administrative reviews (Investigation No.C-533-821) that is submitted to the Panel by the United States or by India.

3. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the proceedings at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and India to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings.

4. No person shall have access to BCI except a member of the WTO Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings cited in paragraph 2. Where an outside advisor has received BCI under the relevant APO, nothing in these procedures alters that outside advisor's obligations under the APO.

5. A party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 22 of the Working Procedures within three working days after the submission of the confidential version containing the BCI.

7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted no later than the working day following the meeting where the statement was made. Non-confidential versions of both oral and written statements shall be

redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

8. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. The Panel shall not disclose in its report or in any other way, any information designated as BCI under these procedures. The Panel may, however, make statements of conclusion based on such information.

10. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's report.

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ANNEX B

ARGUMENTS OF INDIA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

I. INTRODUCTION

1. This dispute presents fundamental issues regarding the proper interpretation and application of the SCM Agreement, the GATT 1994 and the WTO Agreement. The dispute covers certain 'as such' claims and 'as applied' claims as stated in India's request for establishment of the Panel.[1] The dispute emanates from the countervailing duties imposed by the United States against imports of Certain Hot Rolled Carbon Steel Flat Products from India ("subject goods") in Case No. C-533-821. The United States levied countervailing duties on the subject goods pursuant to the original investigation concluded in 2002. The United States also conducted various administrative reviews (ARs) for the years 2002, 2004, 2006, 2007 and 2008 as well as a sunset reviews in 2007. The second sunset review is ongoing. In each of these proceedings, the United States made findings and conclusions that are inconsistent with the above agreements.

2. In this document, section II covers 'as such' claims and section III covers 'as applied' claims.

II. 'AS SUCH' CLAIMS

A. The United States law contained in 19 CFR § 351.511(a)(2)(i) to (iii) is 'as such' inconsistent with Article 14(d) of the SCM Agreement.

3. The United States follows a three-tiered benchmark approach under 19 CFR § 351.511(a)(2)(i) to (iii), while determining the adequacy of remuneration for the provision of goods or services by the Government. Under Tier-I, the United States considers market determined price resulting from actual transactions in the country in question (referred to as 'in-country' prices) as the benchmark. If a Tier-I price is unavailable, the United States considers a world market price under Tier-II, provided it is reasonable to conclude that such price would be available to purchasers in the country in question. If a Tier-II price is also unavailable, the United States will apply Tier III and measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

4. The ordinary language of the first sentence of Article 14(d) suggests that a determination of 'benefit' cannot be made by way of comparison approach without first ascertaining whether the government remuneration received by the provider is adequate to the provider itself. The hierarchical and comparison based approach in the United States law does not allow for determining whether in every case, the remuneration is adequate to the provider of the goods as required under first sentence of Article 14(d). It directly seeks to measure the extent of benefit to the recipient of the goods by comparing the government price with the benchmark price without assessing the adequacy of the impugned government price.

5. Notwithstanding the above, 19 CFR § 351.511(a)(2)(i)-(iii) is inconsistent with the second sentence of Article 14(d). The provision of goods *cannot* be considered as conferring a 'benefit' merely because it is priced at less than a benchmark price within or outside the country. It may be observed that Article 14(d) is distinctly worded as compared to clause (a), (b) and (c). The hierarchical nature of United States' law would result even a remuneration that is adequate under Article 14(d) (by applying Tier-III method), become inadequate simply because it is less than a certain benchmark price (Tier-I or Tier-II method). The price difference may otherwise be justified by market or commercial considerations and the United States' law precludes such an analysis. The United States' approach causes undue prejudice to the exporting member country as it results in determination of benefit even though the remuneration is 'adequate' under Tier III approach, which on stand-alone basis, is consistent with Article 14(d) of the SCM Agreement. The United States law defeats the object and purpose of SCM Agreement by disturbing the delicate

[1] WT/DS436/3, dated July 13, 2012

balance in SCM Agreement between the rights of those that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures.

6. Also, the comparison approach excludes the government price itself out of the benefit determination, which is contrary to Article 14(d) since the prevailing market conditions includes such government transactions.

7. Further, notwithstanding the above, use of a 'world benchmark price' (Tier II) is permitted only as a matter of last resort, in situations where the market of the exporting country is distorted because of the predominant role of the government in the market as a provider of the same or similar goods. 19 CFR § 351.511(a)(2)(ii) requires the use of a world benchmark price even when this requirement is not satisfied. In addition, the Tier II approach neither requires an assessment as to the market conditions in the country of provision or the country from which the benchmark price has been used nor does the provision contemplate adjustments that would ensure that the benchmark is in relation to the market conditions in the country in question. At the very least, Tier II method cannot be granted preference over the approach that is 'in relation to the prevailing market condition in the country of provision' (Tier III). Accordingly, preference given to 19 CFR § 351.511(a)(2)(ii) over 19 CFR § 351.511(a)(2)(iii) is inconsistent with Article 14(d).

B. The United States law contained in 19 CFR § 351.511(a)(2)(iv) is 'as such' inconsistent with Article 14(d), 19.3 and 19.4 of the SCM Agreement.

8. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under 19 CFR § 351.511(a)(2) (i) or (ii) is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product which includes delivery charges and import duties. However, mandatory use of 'delivered prices' eliminates the possibility of determining the adequacy of remuneration after adjusting the benchmark price *in accordance with prevailing market conditions in the country of provision i.e. the terms and conditions of sale and transportation prevailing in the country of provision* as mandated under Article 14(d) of the SCM Agreement.

9. Further, mandatory use of delivered prices artificially inflates the quantum of benefit and countervails the comparative advantage of the country of provision. Moreover, mandatory use of 'delivered price' prevents the application of the countervailing duty in 'appropriate amount' 'in each case' and results in imposition of countervailing duty 'in excess of the amount of subsidy' in violation of Articles 19.3 and 19.4 of the SCM Agreement.

C. The United States laws contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) are 'as such' inconsistent with Article 15 of the SCM Agreement.

10. 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) provides for the cumulative assessment of volume and effects of subsidized and dumped imports when determining material injury during the original investigation, sunset review investigation and other investigations, respectively. Cumulation is permitted, if any of the following conditions is satisfied: (i) petitions seeking countervailing duty or anti-dumping duty investigations are filed on the same day; (ii) countervailing duty or anti-dumping duty investigations are initiated on the same day; or (iii) both (i) and (ii) are satisfied.

11. Article 15 delineates the requirement for determination of injury in the SCM Agreement. Articles 15.1, 15.2 and 15.4 require the examination of positive evidence and injury based on the volume and effect of *subsidized imports* on the domestic producers. Article 15.3 is the only provision dealing with cumulative assessment of injury that permits cumulation only of imports from countries that are simultaneously subjected to *countervailing duty investigations* and not cross-code cumulation. Article 15.3 also prescribes certain additional conditions – the rate of subsidization in *each* country must be greater than *de minimis* and the volume from *each* country must not be negligible. 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) provide for cumulative assessment even if these conditions are not satisfied.

12. Article 15.5 requires that there should be a causal link between the *subsidized imports* and injury caused. Thus, this provision also requires injury assessment with reference to subsidized imports only.

13. As the United States' provisions under challenge provide for cumulation of non-subsidized imports also, the said provisions are inconsistent with Articles 15.1-15.5 of the SCM Agreement.

D. The United States law contained in 19 USC § 1677e(b) and 19 CFR § 351.308(a), (b) and (c) are 'as such' inconsistent with Article 12.7 of the SCM Agreement.

14. Article 12.7 permits the reliance on 'facts available' when an interested party or member does not co-operate. Various Panel and Appellate Body reports have consistently held that Article 12.7 only permits application of facts that are considered *most fitting and appropriate after engaging in an evaluative and comparative assessment of all available evidence*. Article 12.7 is neither meant to punish non-cooperation nor permit determinations based purely on speculation.

15. In direct contrast to the above requirement, in the event of non-cooperation, the United States' law permits an inference that is adverse to the interests of a party in *selecting from among the facts available* (AFA standard). The United States' law does not require the *evaluative and comparative assessment* of all the evidence available and is not directed to determine the best available fact. Rather, the purpose behind the provision is to penalize non-cooperating parties. In any case, the consistent application of the said provision shows that it is a requirement on the investigating authority to draw the worst possible inference by imposing the highest possible margin against a non-cooperating party without examining all evidence or engaging in a comparative assessment to determine if it was the most fitting and appropriate information. Therefore, the 19 USC § 1677e(b) and 19 CFR § 351.308(a), (b) and (c) are 'as such' inconsistent with Article 12.7 of the SCM Agreement.

E. The United States, as a consequence, has acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

16. As explained above, the United States has failed to ensure consistency of its laws, regulations and administrative procedures with the provisions of the SCM Agreement and has thereby acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

III. 'AS APPLIED' CLAIMS

F. Imposition of countervailing duty in respect of 'Sale of High Grade Iron Ore by NMDC' is inconsistent with Articles 1.1, 1.2, 2 and 14 of the SCM Agreement.

17. The United States has determined that sale of high grade iron ore by National Mineral Development Corporation (NMDC) amounts to a financial contribution under Article 1.1(a)(1)(iii). Firstly, the United States determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. Neither the facts nor the reasoning provided by the United States clarify how this resulted in the Government of India (GOI) exercising meaningful control over NMDC. In any case, there was no determination that NMDC was vested with governmental authority to perform governmental functions or that it was capable of directing or entrusting a private body. Therefore, the United States acted contrary to Article 1.1(a)(1)(iii).

18. Secondly, the United States wrongly determined that sale of iron ore by NMDC was *de facto* specific on the ground that it was limited to users of iron ore. The United States has failed to appreciate that Article 2.1 is only intended to cover *discriminatory* governmental action that provides a benefit to certain enterprises over those that are otherwise capable of receiving it. The United States, however, determined specificity based on the inherent characteristics of the goods in question, a concept alien to Article 2.1. The United States' approach renders the requirement of specificity redundant in respect of Article 1.1(a)(1)(iii).

19. Thirdly, under Article 2.1(c), the phrase 'use of a subsidy program by a limited number *of* certain enterprises' applies only when subsidies are being used by a limited number of those enterprises that are otherwise capable of benefitting from the subsidy in question. The

United States has failed to make such a finding. Further, the United States has also failed to analyze mandatory factors listed in Article 2.1(c) while making a determination of 'de facto' specificity. Furthermore, the United States has not based its determination of specificity on positive evidence as required under Article 2.4.

20. Moreover, in determining that the sale of iron ore by NMDC was for less than adequate remuneration, the United States applied 19 CFR § 351.511(a)(2)(i) to (iv) - provisions that are 'as such' inconsistent with Article 14(d). The United States did not assess whether the remuneration received by NMDC was adequate for NMDC itself. The United States ignored that NMDC operated on 'commercial considerations' and did not distinguish between domestic and foreign buyers.

21. Also, the United States conveniently ignored 'in-country' benchmarks available on record without recording any reasons for the same. Instead, the United States resorted to world market price and failed to make the necessary adjustments to such world market price in order to reflect the prevailing market conditions in India. Further, by including ocean freight and import duties to the benchmark price, the United States countervailed India's comparative advantage of being able to locally source iron ore for its industries. The methodology of the United States would always result in an excess subsidy margin in breach of its obligation to apply Article 14(d) in good faith.

22. Further, the United States rejection of NMDC export prices from Tex Report while adopting a world benchmark price was also inconsistent with Article 14. Article 14(d) does not allow rejection of price charged by government players while determining prevailing market conditions, particularly in the instant case where NMDC was not even a predominant supplier of iron ore and was acting in accordance with market principles. Such a determination is also against the chapeau of Article 14 because the United States acted arbitrarily by accepting the NMDC export prices in one AR and rejecting in another AR.

G. Imposition of countervailing duty on grant of captive mining rights for iron ore and coal is inconsistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement.

23. Firstly, the United States' identification of the program as '*captive* mining rights for iron ore' is inconsistent with Article 12.5 inasmuch as the GOI does not have distinct frameworks of *captive* mining rights of iron ore as distinguished from mining rights for iron ore or mining rights for minerals in general. The United States did not satisfy itself as to the accuracy of the information provided to them.

24. Secondly, the United States wrongly determined the grant of 'mining rights for coal and iron ore' as amounting to provision of iron ore and coal itself. There is no *reasonable proximate nexus* between the grant of the mining rights and the ultimate mined iron ore or coal. Therefore, the grant of mining rights cannot amount to the 'provision' of the extracted mineral itself.

25. Thirdly, the evidence on record also indicates that no 'captive mining rights for coal' were *granted* 'by' GOI to Tata under the provision of Mines and Minerals (Development & Regulation) Act, 1957 (MMDR Act) or any other legislation.

26. Further, the United States' determination of specificity was entirely based on incorrect facts. The United States found that 'captive mining rights of iron ore' was subject to its own governing regulation. This was contrary to the evidence on record. Similarly, the United States found that captive coal mining was open only to 3 industry sectors, whereas coal mining was, in fact, fully open to any public sector undertaking. Thus, the determinations as to specificity are contrary to Articles 1.2 and 2.

27. Moreover, for the calculation of benefit, for the both the programs, the United States failed to determine whether the remuneration actually received by the GOI was adequate. Instead, the United States added the cost of extraction and profit to the royalty charged by the government (which by no stretch of imagination can be termed as remuneration) and compared it with the benchmark price for the extracted mineral. The United States' methodology of calculating *notional remuneration* ensures positive benefit determination in every case and fails to implement its obligation in good faith. Also, the United States applied benchmarks in the manner highlighted above in relation to provision of iron ore by NMDC. Such an assessment of benefit is inconsistent with Article 1.1(b) and Article 14(d) of the SCM Agreement.

H. The United States has acted inconsistently with the Articles 1.1(a)(1), 1.1(b) and Article 14 of the SCM Agreement in relation to the SDF Program.

28. The United States determined that loans granted under SDF program amounted to financial contribution and conferred a benefit. The determination rests on the premise that the Joint Plant Committee (JPC), the governing body for the SDF program, is under the control of GOI. The United States failed to recognize that JPC is not a 'public body' under Article 1.1(a)(1) since majority of the members of JPC are from the industry and mere presence of government officials cannot change the nature of the body.

29. Similarly, the determination that SDF managing committee was a public body also rests on the incorrect understanding of the term 'public body'. The United States never determined that SDF managing committee was given governmental authority to perform governmental functions.

30. Further, the price increase on steel products used for creating the SDF was not in the nature of tax but amounted to producer levies, i.e. voluntary contribution made by the producers, the transfer of which cannot amount to a *direct transfer* of funds under Article 1.1(a)(1)(i). There was neither *a charg*e on the public account nor did the GOI have title to these funds.

31. The United States' subsequent determination that loans granted under SDF program amounted to *potential* direct transfer of funds under Article 1.1(a)(1)(i) is bereft of any evidence or logic and contrary to the ordinary meaning of Article 1.1(a)(1)(i).

32. The United States also acted contrary to the chapeau to Article 14 and Article 14(b), in relation to the SDF program. The United States applied the Prime Lending Rate (PLR) as the benchmark rate, but failed to explain how such a rate could be considered as a 'comparable commercial loan' under Article 14(b) as it only reflected the overall reference rate for the banks taking into account their cost structure. The United States further failed to consider the overall cost incurred by the exporters to participate in the SDF program. The fact that overall impact of the SDF program reduced the income of the steel producers and did not place them in a *better off* position was also ignored by the United States, resulting in an inconsistency with Article 1.1(b).

I. Injury determination by the United States is inconsistent with Article 15 of the SCM Agreement.

33. The injury determination by the United States during the original investigation and the sunset review were inconsistent with Article 15 of the SCM Agreement. In the original investigation, the United States cumulated imports from eleven countries out of which only five countries were subjected to simultaneous countervailing duty investigations. While doing so, the United States did not assess whether the volume of imports from each of the countries was not negligible and whether the subsidization rate was above *de minimis*. Such a determination was inconsistent with Articles 15.3. The United States cumulatively assessed the volume and effects of both subsidized and non-subsidized imports in violation of Articles 15.1, 15.2 and 15.4. Effectively, the United States attributed injury caused by non-subsidized imports to subsidized imports, in breach of its obligations under Article 15.5. Further, the United States also failed to assess certain mandatory injury parameters such as growth, return on investment and ability to raise capital during the original investigation and therefore, failed to fulfill its obligations under Article 15.4.

34. In the first sunset review also, the United States cumulated the imports from countries against which no countervailing duty measures had been imposed. This was inconsistent with its obligations under Articles 15.1 to 15.5.

J. The application of AFA standard by The United States is inconsistent with Article 12.7 of the SCM Agreement.

35. During the ARs, when employing the AFA standard contained in its domestic law, the United States consistently applied the highest above *de minimis* rate of subsidy as determined for identical or similar program, or in absence of it, the highest above *de minimis* rate for any other program involving the same country. Such a rule punishes non-cooperation and hence, is inconsistent with Article 12.7.

36. In addition, the United States acted inconsistently with Article 12.7 of the SCM Agreement by applying AFA standard in the particular instances listed below:

- In the 2006 AR, the United States assumed that NMDC sold iron ore for free to Jindal Steel Works (JSW), which was contrary to the facts available on record.

- In the 2006 AR, the United States determined that the State Government of Karnataka (SGOK) through Mysore Minerals Ltd (MML), provided subsidies attributable to JSW, without any factual foundation.

- In the 2006 AR, the United States determined that JSW, through Vijayanagar Minerals Pvt Ltd (VMPL), received certain benefits from programs administered by the SGOK, without any factual foundation.

- In the 2008 AR, the United States assumed that Tata benefitted from eleven programs administered by the State Government of Jharkhand (SGOJ), even though this was contrary to the 'facts available' and the determination made by the United States in the 2006 AR.

- In the 2008 AR, the United States assumed that Tata benefitted from a total of 55 programs administered by State Governments of Gujarat, Maharashtra, Karnataka, Andhra Pradesh and Chhattisgarh without any factual foundation.

- In the 2008 AR, the United States assumed that Tata benefitted from the Sale of High Grade Iron Ore by NMDC for LTAR, Market Development Assistance Program, Market Access Initiative Program and the Special Economic Zones Act, which was contradictory to the information made available by the GOI.

K. Other inconsistencies.

37. During each AR, except for 2008 AR, the United States included several new subsidies without formally initiating an investigation under Article 11.1, 11.2 of the SCM Agreement and without fulfilling the requirement of public notice under Articles 22.1-22.2 of the SCM Agreement. The United States failed to follow the procedure, which is required for initiation of investigation under its own law and thereby failed to follow the required *customary procedural action, which is essential to formally initiate* an investigation into such new subsidies.

38. The United States also failed to invite India for consultations prior to initiation of investigation into any of these new subsidies. This is inconsistent with Article 13.1 of the SCM Agreement.

39. Notwithstanding the above, amongst the new subsidies, which were included in the administrative review, the United States investigated the 'Sale of High Grade Iron Ore by NMDC for less than adequate remuneration' and 'Target Plus Scheme' even though no such allegations were filed by the petitioner. This is inconsistent with Articles 11.1, 11.2 and 11.9.

40. Further, ARs are conducted under Articles 21.1 - 21.2 of the SCM Agreement. Under Articles 21.1 - 21.2, the United States is only permitted to conduct a '*review*' of previously made determinations and not initiate new investigations into subsidy programs for which no earlier determinations were made. Therefore, the United States has acted inconsistently with Article 21 by expanding the scope of a *review* proceeding.

L. Consequent violation of Articles 19.3 - 19.4 of the SCM Agreement.

41. Consequent to the inconsistencies mentioned above, the United States has violated Articles 19.3 - 19.4 by imposing countervailing duties in excess of the amount of subsidy and in inappropriate amounts, by incorrectly calculating the amount of alleged benefit.

M. Inconsistencies with Article 22.5 of the SCM Agreement.

42. Article 22.5 requires that the investigating country shall provide all relevant information of fact, law and reasons which have lead to the imposition of the final measure and the reasons for acceptance or rejection of the relevant arguments or claims made by interested parties or members. Such instances are listed below:

- The United States failed to record the relevant facts that led to its determination to distinguish between the SDF program and the European Coal and Steel Community (ECSC) program. The United States rejected the argument made by the exporter in this regard by stating that SDF was similar to taxation and was compulsory. In fact, the SDF program and the ECSC program were similar in all aspects except that ECSC was created by way of a treaty whereas the SDF was created by way of a government notification.

- In case of 'Captive Mining Rights for Iron ore and Coal', the United States, in the 2006 AR, failed to note the existence of in-country benchmark prices and also the fact that there was no separate regulation governing 'Captive Mining Rights of Iron Ore'. In relation to 'Captive Mining Rights of Coal', the United States failed to note and rebut the historical fact that mining rights were never granted to Tata by the GOI.

- The United States also did not publish adequate reasons to reject the argument that NMDC's export prices to Japan could be considered as a relevant benchmark, when calculating the alleged benefit from the 'Sale of High Grade Iron Ore by NMDC'. The United States' rejection of the same was not adequately explained.

N. The United States consequently violated Article VI of GATT 1994 and Articles 10, 32.1 of the SCM Agreement.

43. To the extent the imposition of countervailing duties on the subject goods by the United States is not in accordance with the SCM Agreement, such imposition is consequently inconsistent with Article VI of GATT 1994 and Articles 10 and 32.1 of the SCM Agreement.

IV. CONCLUSION

44. India considers that the United States has failed to frame laws, regulations and requirements that are consistent with its obligations under the above referred agreements. Further, the imposition of countervailing duties on the subject goods by the United States is inconsistent with its obligations under the above referred agreements. India requests the panel to recommend that the United States withdraw the countervailing duties and amend its laws to bring them into conformity with the above referred agreements.

ANNEX B-2

EXECUTIVE SUMMARY OF INDIA'S SUBMISSION AGAINST REQUESTS FOR PRELIMINARY RULINGS BY THE UNITED STATES

I. PRELIMINARY SUBMISSION

1. At the outset, India submits that the scope of the request for preliminary ruling sought by the United States is not entirely clear. On one hand, the United States has only asserted that the claims raised by India under Sections XII.C.1 and XII.C.2 of its First Written Submissions (FWS) fall outside the panel's terms of reference.[1] However, at another location in its FWS, the United States appears to have argued that the claim raised by India at Section XII.C.4 of its written submissions is also outside the panel's terms of reference.[2] India submits that the alleged request for preliminary ruling in relation to India's claim at Section XII.C.4 of its FWS has not been properly raised by the United States. Accordingly, India does not respond to the issues raised by the United States with regard to Section XII.C.4 in the instant reply. While clarifying its belief that the submissions presented below anyway address the said preliminary objection, India reserves its right to file an additional reply in this respect, in the event the panel considers the said issue to have been properly raised.

II. REPLY TO THE REQUESTS FOR PRELIMINARY RULINGS

A. Preliminary objections raised by the United States in respect of India's claim in Section XII.C.1 and XII.C.2 of the FWS.

2. Article 6.2 of the DSU prescribes three separate requirements in relation to the contents of a panel request:

- Indicate whether consultations were held;
- Identify the specific measures at issue; and
- Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3. The United States does not state that India's request under challenge fails to fulfill conditions (1) and (2), above. Rather, the United States has only claimed that India's request for establishment of the panel was insufficient to present the problem clearly, with reference to the claims made by India in Section XII.C.1 and Section XII.C.2 of India's FWS. For the sake of convenience, the request under challenge is reproduced herein below:

> Article 11 of ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.

4. For the sake of convenience, the claims referred to in Sections XII.C.1 and XII.C.2 of its FWS are reproduced below:

- The United States violated Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies.

- The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.

[1] See, United States' FWS, paras. 3 and 23.
[2] Ibid, para.22.

5. As identified by the United States, the following disconnect allegedly exists between the panel request and the claims made in Section XII.C.1 and XII.C.2 of India's FWS:

- With reference to both claims raised by India, the United States alleges that

> In its panel request, India not only fails to identify the relevant subparagraph(s) to which its claim might refer, but includes a description of the claim which also fails to identify or reference, even by implication, a specific obligation within Article 11.[3]

- Once again, with respect to both claims raised by India, the United States alleges that

> ...[T]hese claims are nowhere referenced in India's panel request, nor does the panel request list the specific provisions cited in India's FWS. Accordingly these claims are outside the panel's terms of reference - India's panel request failed to reference them or "present the problem clearly".[4]

- Specifically, with reference to the claim raised in Section XII.C.1, the United States alleges that

> ...The description included India's panel request was not only insufficient to clearly present a problem which India now raises its FWS, the description in the panel request would affirmatively lead the reader to believe that the panel request does not include the additional claims raised in its FWS. That is, India's panel request alleges that "no investigation was initiated or conducted" whereas the additional claims raised allege that the United States erred "*by initiating an investigation* into the NMDC program and the TPS program in 2004" despite an insufficient written application. The sufficiency of evidence in an application is a distinct issue and claim than the issue of whether an investigation was initiated. The distinct nature of the sufficiency of the evidence in an application is demonstrated by the fact that it is the topic of a distinct provision of Article 11 from the provision cited by India as the basis for its claim concerning the failure to initiate an investigation.[5]

6. India submits that the aforesaid objections of the United States are misguided, stemming from its overly narrow and hyper-technical interpretation of India's panel request and its failure to appreciate the established legal position on interpretation of panel requests.

1. Contrary to the United States' assertion, the panel request need not be identically worded as the claims raised in the FWS.

7. In paragraph 18 of its FWS, the United States has raised the objection that the identically worded claims were absent in India's panel and therefore, such claims are outside the panel's terms of reference. India fails to understand the source of such a proposition as has been raised by the United States. Not only does the United States fail to support this proposition by the plain words of Article 6.2, but it also fails to support this proposition with any jurisprudence. India submits that this is an incorrect and incomplete understanding of the requirements of Article 6.2.

8. Article 6.2 of the DSU only requires that India provide a "brief summary of the legal basis of the complaint" such that it is "sufficient to present the problem clearly". The latter requirement has been interpreted to mean that it "*plainly connects the challenged measure(s) with the provisions of the covered agreements claimed to have been infringed*".[6] This only requires India to identify the *claims* as opposed to the *arguments supporting those claims.*[7] Further while

[3] United States' FWS, para. 17.
[4] Ibid, para. 18.
[5] See also, United States' FWS, para. 20.
[6] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[7] Appellate Body Report, *EC – Bananas III*, para. 141; See also, Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

attempting to determine whether the panel request satisfies this requirement, one is required to examine the request as a whole and in the light of "attendant circumstances".[8] Therefore, if a proper reading of India's panel request covers the challenged claims raised by India, the said claims are within the panel's terms of reference.

2. United States has misconstrued the term 'initiating', as used in the panel request.

9. It is the understanding of the United States that the problem presented by the relevant claim in India's panel request relates to the issue of whether or not an investigation was initiated or conducted *at all* for new subsidy programs.[9] India submits that this is an extremely narrow and acontextual meaning attributed to India's panel request. The United States fails to appreciate that the term 'initiated' has a specific meaning prescribed under footnote 37 of the SCM Agreement. Footnote 37 of the SCM agreement reads as follows:

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

10. The use of the phrase "*as provided in Article 11*" in footnote 37, clearly suggests that an investigation should commence in a manner provided in Article 11. Considering that the present dispute has been raised by India under the SCM Agreement, the reference to the term 'initiated' in its panel request is to be construed in light of footnote 37 to the SCM Agreement. As a matter of necessary implication, India's panel request is directed to the manner in which investigations into new subsidy programs were initiated and conducted. The United States admits that the panel request must be interpreted as a whole.[10] Therefore, the claims in the request for establishment of panel must be read in their context, wherein the accompanying narrative in the request and the provisions of the relevant covered agreement play a material role in interpreting a panel request.[11] The SCM Agreement pervades through the entire panel request and therefore, the phrases used in the SCM Agreement and the meanings associated therewith provide a relevant context in which India's panel request is to be interpreted. Contrary to the accepted proposition of law, the United States appears to be reading one phrase or sentence in the panel request in isolation[12], rather than paying attention to the context of the entire panel request.

11. Therefore, when India claimed a breach of Article 11 by stating that "*no investigation was initiated or conducted*" in respect of new subsidy programs, India's claim relates to such investigations not being initiated, commenced and performed in a manner "*provided in Article 11*" of the SCM Agreement. This understanding and meaning as employed by India is further confirmed by its FWS inasmuch as the raised claims only focus on the investigations against new subsidies not being initiated, commenced and conducted in a manner as provided in Article 11 of the SCM Agreement.[13]

3. There is no dispute as to the specific measures at issue.

12. As per the panel request, the specific measures at issue are investigations into new subsidy programs. All the relevant determinations covering the instant investigation are identified in India's panel request.[14] Among these, investigations into new subsidies were commenced and conducted in all the ARs, except the 2005 and 2008 AR. Being its own determinations and investigations, the United States is intimately aware of the various new subsidy programs

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[8] Appellate Body Report, *US-Carbon Steel*, para. 127.

[9] This understanding of the United States' claims flows directly from its FWS. See, United States' FWS, para. 17.

> That is, the description of the claim raised by India states that Article 11 was breached "because no investigation was initiated or conducted", suggesting that the United States failed to initiate or conduct an investigation at all with respect to new subsidies programs. Article 11 governs the way in which an investigation must be initiated and performed. But article 11 does not contain an obligation that an *investigation be initiated*.

[10] See, United States' FWS para. 5 citing the Appellate Body Report, *US – Carbon Steel*, para. 127.

[11] See, Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31.

[12] Panel Report, *US – Poultry (China)*, para. 7.39.

[13] See, Appellate Body Report, *Australia – Apples*, paras. 423-425 (confirming that subsequent submissions of a party can be used to confirm the meaning of the words used in the panel request)

[14] See, India's request for the establishment of the panel, para. 3 and Annex 1.

investigated by them and India's panel request directs itself to all such new subsidy programs. It is not in dispute that the NMDC program and the TPS program are two such new subsidy programs, and investigations against them were commenced and conducted in the 2004 AR. It is noteworthy that the United States has not raised an objection in this respect.

4. The panel request clearly connects the challenged measures with the relevant obligations under Article 11.

13. India submits that contrary to the submissions of the United States, there is a clear identification of the obligations that have been violated by the United States. The United States asserts that where a treaty Article contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article does not reveal which one, or more, all those obligations is at issue.[15] The United States' suggests that failing to identify the relevant subparagraphs of Article 11 is fatal to the request filed by India. This is a complete misunderstanding of the relevant legal principles consistently applied by various Panels and Appellate Body Reports.

14. As was noted by the Appellate Body in *Korea – Dairy*[16]:

> There may be situations where the simple listing of the articles of the agreement or agreements involved *may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint....* (Emphasis Supplied)

15. The Appellate Body in *Korea – Dairy*[17] found that questions of this nature need to be examined on a case-by-case basis. The Panel in *EC – Approval and Marketing of Biotech Products* emphasized that there cannot be a general requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph and that each case ought to be analyzed by its own peculiar facts.[18] In fact, as a factual matter, in *US – Lamb*[19], in *EC – Approval and Marketing of Biotech Products*[20] and in *Korea – Dairy*[21], it was ultimately found that the panel request had sufficient clarity in light of the attendant circumstances, even though the request merely listed only the main Article of the relevant treaty.

16. This is where the United States has significantly erred since it has failed to undertake a detailed factual analysis on India's panel request. The United States has failed to appreciate the true scope of India's panel request. India's panel request covers violations of *all* obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand and therefore, the United States' objection simply relates to India's discretion to only claim a sub-set of violations in its FWS.

17. The wordings of India's panel request delineate that the violations are with reference to Article 11 and that the violations relate only to those obligations dealing with the *initiation and conduct of the investigations.* As a further limitation, the panel request clarifies that among the various measures at issue identified in India's panel request[22], only those relating to the investigations into *new subsidy programs* are the specific measures at issue. India submits that these limitations are plainly present in the panel request and result in the following logical conclusions:

- *First*, since none of the measures at issue as identified in India's panel request[23] relate to products imported through an intermediate country, Article 11.8 of the SCM Agreement is obviously inapplicable and not covered within the scope of India's panel request.

[15] See, United States' FWS, para. 16.
[16] Appellate Body, *Korea – Dairy*, para. 124.
[17] Ibid.
[18] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, paras. 78-79.
[19] Panel Report, *US – Lamb*, paras. 5.18-5.31.
[20] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, paras. 78-79.
[21] Appellate Body, *Korea – Dairy*, paras. 129-131.
[22] See, India's request for the establishment of the panel, para. 3.
[23] See, Ibid, para. 1 and Annex 1.

- *Second*, since none of the measures at issue as identified in India's panel request[24] involve the United States initiating a *suo moto* investigation, Article 11.6 of the SCM Agreement is obviously inapplicable and not covered within the scope of India's panel request.

- *Third*, the violations relate only to those obligations governing the initiation and conduct of such specified investigations. Therefore, the panel request excludes Articles 11.10 and 11.11 of the SCM agreement since they do not relate to the initiation and conduct of the investigation.

18. India submits that even if not expressly disclaimed, the above exclusions are not *ex post facto* argumentative constructs; rather, they flow necessarily and directly from the words used in the panel request as a matter of common sense. Barring the above obvious exclusions that flow as a matter of necessary implication, the panel request is intended to cover the violation of all the other sub-paragraphs under Article 11. While in its FWS[25] India chose to elaborate upon only three specific provisions contained in Article 11, i.e. Articles 11.1-11.2, 11.9 of the SCM agreement, the remaining subparagraphs of Article 11, i.e. sub-paragraphs (3), (4), (5), (7) of the SCM agreement have also been breached in the following manner:

- In the 2004 AR, the application of the domestic industry contained no allegation or evidence that NMDC sold iron ore for less than adequate remuneration or that the GOI was granting a subsidy in the form of the TPS program. Yet, the United States initiated investigations in respect of these two programs in its 2004 AR. Consequently, the United States did not review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation into whether NMDC sold iron ore for less than adequate remuneration or whether the GOI was granting a subsidy in the form of the TPS program. This is in breach of Article 11.3 the SCM agreement.

- By the plain words of article 11.4 of the SCM agreement, the United States had an obligation to examine and verify whether the application for investigating into the new subsidy programs was filed "by or on behalf of the domestic industry". In all the ARs, except those conducted in 2005 and 2008, where the United States initiated investigations into new subsidies, it could have done so only if the application was filed by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. Investigation into new subsidy programs could not have been initiated by the United States if the domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry. However, the United States never undertook to make a determination on this requirement before initiating and conducting investigations into new subsidy programs. This is in breach of Article 11.4 of the SCM agreement.

- At the time when investigations were initiated against new subsidies during the administrative reviews, United States did not consider the effects of such new subsidies the alleged injury arising from such subsidies, if any. On the other hand, Article 11.7 of the SCM Agreement mandates that evidence as to subsidy and injury shall be *simultaneously* considered in determining whether or not to initiate an investigation. However, the procedure adopted by the United States as regards new subsidy allegations does not involve the *simultaneous* consideration of both subsidy and injury. This is in breach of Article 11.7 of the SCM Agreement.

- In the procedure followed by the United States as regards new subsidy allegations filed by the domestic industry, said application filed by the domestic industry is made available as part of the public records even before the United States makes a determination as to whether investigations are to be conducted for such new subsidies as well. This is breach of Article 11.5 of the SCM Agreement.

[24] Ibid.
[25] See, India's FWS, Sections XII.C.1 and XII.C.2.

19. Therefore, India submits that in addition to the claims raised in Sections XII.C.1 and XII.C.2 of its FWS, all the aforesaid violations are also covered within the scope of India's panel request. It is again expressly clarified that India chose not to press all these violations in its FWS. The reference to Article 11 in the panel request, duly limited by the phrases 'initiation and conduct of investigation' and 'new subsidy programs', was merely a short hand reference to all the aforesaid obligations. All that Article 6.2 requires is for India to identify all the obligations that have been breached by the United States; this cannot be translated into a semantic requirement of having to refer to specific subparagraphs, if the sum and substance of India's claim in the aforesaid panel request covers all the subparagraphs and the obligations contained therein. The fact that India chose to claim a sub-set of violations as opposed to entire super-set, cannot reasonably be considered as being fatal to the claim itself.

20. Furthermore, as was found by the panel in *EC – Trademarks and Geographical Indications (Australia)*[26]:

> ...However, where the multiple obligations are closely related and interlinked, a reference to a common obligation in the specific listed provisions may be sufficient to meet the standard of Article 6.2 of the DSU under certain circumstances in a particular case.

21. Article 11 is titled 'Initiation and Subsequent Investigation' and all the sub-paragraphs of Article 11 are closely-related and interlinked. For instance, by the plain words used in the SCM Agreement, sub-paragraphs (1), (2) and (6) are interlinked. Similarly, Article 11.3 and 11.9 of the SCM Agreement are interlinked inasmuch as both relate to the sufficiency of the evidence present in the written application. In fact, both Articles 11.3 and 11.9 relate back to Article 11.2 since Article 11.2 mandates that the written application of the domestic industry must contain "sufficient evidence" on certain aspects. Similarly, Article 11.4 of the SCM Agreement once again makes express reference to Article 11.1 of the SCM Agreement and deals with the *locus standi* of the person(s) filing the written application under Article 11.2 of the SCM Agreement. Article 11.5 of the SCM Agreement mandates Members to not publish the written application filed under Article 11.2 of the SCM Agreement, until a decision is made on whether an investigation has been initiated. India admits that all the aforesaid sub-paragraphs of Article 11 may be independent inasmuch as it is possible to be in breach of one of them even when complying with others. However, by no stretch of imagination could anyone dispute that these obligations are closely inter-linked and inter-related and together govern the manner in which investigations are to be initiated and conducted. This is not disputed even by the United States.

22. As clarified in the earlier section of this reply, India's panel request claims that all the sub-paragraphs of Article 11 in relation to initiation and conduct of investigation have been breached when the United States initiated and conducted investigations into new subsidy programs. All the above-identified sub-paragraphs of Article 11 are closely related to one another and determine the manner in which investigations are to be initiated and conducted. Therefore, India's panel request objectively provides sufficient clarity even if it refers only to Article 11 since there is an explicit reference to obligations concerning 'initiating and conduct of investigation'. Admittedly, India chose to claim only a subset of these violations in its FWS. However, neither Article 6.2 nor any other provision in any of the covered agreements can restrict India's right to do so.

23. Therefore, contrary to the United States' preliminary objections, the claims in Sections XII.C.1 and XII.C.2 of India's FWS are fully within the scope of the panel's terms of reference.

5. In addition, the due process rights of United States have not been prejudiced.

24. Moreover, as was noted by the Appellate Body in *Korea – Dairy*, the question as to whether the requirements of Article 6.2 of the DSU have been met, is to be determined taking into account whether the ability of the respondent to defend itself was actually prejudiced.[27] However, the burden of proving that it has actually been prejudiced as a result of an alleged incomplete panel

[26] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.35.
[27] Appellate Body Report, *Korea – Dairy*, para. 127.

request is upon the United States.[28] The United States has failed to substantiate the manner in which it has been prejudiced apart from making conclusory statements. In fact, a perusal of United States' FWS shows that it has been in a position to file detailed responses to the said claims. The claims covered by India in Sections XII.C.1 and XII.C.2 of its FWS only refer to determinations already made by the United States and only refers to documents made publicly available by the United States. Therefore, India is surprised that United States even raises a preliminary objection that its due process rights have been violated.

25. Further, the law is indeed settled that compliance with the requirements of Article 6.2 must be determined on the merits of each case, after considering the panel request as a whole, and in the light of 'attendant circumstances'.[29] The Panel in *US – Lamb* has expressly recognized the consultations held between the parties, including the written questions circulated at that stage, as one of the materially relevant 'attendant circumstances'.[30] After referring to these, the panel in *US – Lamb* was of the view that "*the questions contained in the above lists are quite detailed and thus provide considerable insight into complainants' allegations concerning specific obligations under specific paragraphs and subparagraphs of SG Articles 2, 3 and 4*"[31] and accordingly, dismissed the objection that the panel request in that case failed to fulfill the requirements under Article 6.2. Similarly, a reference to the consultations request filed by India on the instant dispute would show that India was concerned with the manner in which investigations initiated and conducted by the United States, against new subsidies. A reference to the list of questions filed by India during consultations, particularly, questions 148 and 152, would show that India was concerned with whether the written application by the domestic industry contained sufficient evidence for the United States to have initiated and commenced investigation into such new subsidies. Clearly, these events show that the claims raised in Section XII.C.1 and XII.C.2 of India's FWS have always been part of what was covered within India' claims in relation to Article 11. Therefore, it is not the case that the United States was completely unaware that India would raise claims in relation to sufficiency of evidence for commencing investigations into new subsidies.

26. In view of the above, consistent with WTO jurisprudence in this respect, to the extent the United States has actually not suffered any prejudice in terms of its due process rights and its ability to defend itself, the United States' preliminary objection under Article 6.2 ought to be dismissed.

B. Preliminary objections raised by the United States in respect of India's claim in Section XI.A.9 of the FWS

27. The United States argues that the claims regarding 2013 Sunset Review are outside the terms of reference for panel because they were not included in the India's request for consultations or India's request for establishment of panel. India submits that the objections by the United States stem from the failure of United States to appreciate the established jurisprudence in this regard.

28. India submits that its panel request has clearly pre-empted the preliminary objection raised by the United States. Paragraph 5 of India's panel request is unambiguous and states that the panel request *"covers all the amendments, implementing acts, or any other related measure in connection with the measures referred herein".* The measures referred in Paragraph 3 and 4 read with Annex 1 covers not only the provisions of United State's law but also all the determinations and orders issued by the United States. The 2013 Sunset Review determination is clearly a determination by the United States, which amend the determinations expressly under challenge in the panel request.

29. The Panel's attention is invited to *EC – Selected Customs Matters*, wherein the European Communities challenged the Panel's interpretation in respect of "steps and acts of administration that predate or post-date the establishment of a panel".[32] The Appellate Body in the same dispute made the following observations while discussing the exceptions to the general rule that the

[28] Ibid, para. 131.
[29] Appellate Body Reports, *US – Carbon Steel*, paras.125-127 and *Korea-Dairy*, para. 124.
[30] Panel Report, *US - Lamb*, paras. 5.32 - 5.34.
[31] Ibid.
[32] Panel Report, *EC – Selected Customs Matters,* para. 7.37.

measures in a panel's terms of reference must be measures in existence at the time of the establishment of the panel:

> "We begin our analysis by recalling the Appellate Body's statement in *EC – Chicken Cuts:*
>
> The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. (footnote omitted)
>
> This general rule, however, is qualified by at least two exceptions. First, in *Chile – Price Band System*, the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure.
>
> …….

30. In *Chile – Price Band System*, the Appellate Body addressed the issue raised by United States in the present dispute, i.e. whether the amendment of a measure enacted after the Panel had been established may be considered as within the Panel's terms of reference. The Appellate Body determined that "the amendment at issue should be considered as part of the measure at issue since it clarified the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment".[33] The Appellate Body explained as follows[34]:

> [I]f the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measures *as amended* in coming to a decision in a dispute.

31. In *Colombia – Ports of Entry*, the Panel agreed with the Appellate Body's rationale in *Chile – Price Band System* and stated as follows[35]:

> The Panel agrees with the Appellate Body's rationale. In the dispute before the Panel, Colombia enacted the aforementioned Resolutions 11414, 11412 and 11415 after the Panel was established. In the Panel's view, the terms of the Panama's request for establishment include the relevant amendments and replacements. The Panel therefore finds that Resolutions 11414, 11412 and 11415 are properly part of the measure at issue and within the Panel's terms of reference. In the Panel's view, a failure to consider these additional resolutions would inhibit the Panel from securing a positive solution to the dispute.

32. Further, the Panel in *EC – IT Products*, addressed the issue of using the phrase *"any amendments, or extensions and any related or implementing measures"* in a panel request. In addressing this issue, the Panel noted that while the mere incantation of the phrase "any amendments, or extensions and any related or implementing measures" in a panel request does not permit Members to bring in measures that were clearly not contemplated in the panel request, the phrase is a useful tool to include certain amendments and prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. The Panel stated as follows[36]:

> We note that the complainants incorporated the phrase 'any amendments, or extensions and any related or implementing measures' into their joint Panel request. We recall that the complainants, in the joint Panel request, identifies as the specific measure at issue Council Regulation No. 2658/87, *'as amended'* (emphasis added).

[33] Appellate Body Report, *Chile – Price Band System,* paras. 137 and 138.
[34] Ibid.
[35] Panel Reports, *Colombia – Ports of Entry,* paras. 7.53-7.54 and *EC – Fasteners (China),* para. 7.34.
[36] Panel Report, *EC – IT Products,* para. 7.140.

> While we do not consider that the mere incantation of the phrase 'any amendments, or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. This is especially true with the type of measures we have before us, which are amended annually. (Footnotes omitted)

33. The instant case squarely fits the scenario where the sunset review determination is merely a measure that amends the determinations already under challenge in India's panel request. Countervailing duties are reviewed annually by the United States and the SCM Agreement mandates a sunset review every five years and the 2013 Sunset Review is one such review contemplated under the SCM Agreement. The 2013 Sunset Review Determination does not change the nature of the measure under challenge – the imposition of countervailing duties on the subject products from India. Second, it is also not the case that India has raised different violations or claims in relation to the 2013 Sunset Review. Rather, only subsets of the violations alleged against the measures identified in the panel request are reiterated in respect of the 2013 Sunset Review as well. Further, agreeing to the United States' preliminary objection would permit the United States to actively evade review and not allow a positive resolution of the dispute on a purely technical point. This is because even if all the expressly identified determinations imposing countervailing duties in the subject investigation are declared inconsistent by the WTO dispute settlement system, the United States would continue applying these duties through similar annual and sunset reviews. The requirements of Article 6.2 of the DSU cannot be interpreted in such a manner where one can lose sight of the object of the DSU itself, i.e. efficient settlement of disputes.

34. In view of the above, the request for preliminary ruling by the United States is not tenable and liable to be rejected.

35. In addition, India also submits that the Panel is not bound to rule on the preliminary objections raised by the United States at this juncture. The past Panels and Appellate Body have recognized that the "DSU does not expressly envision preliminary rulings by panels, it has become an occurrence in the past few years".[37] However, as the Panel in *Canada – Aircraft* observed, "*there are numerous panel reports where rulings on preliminary issues have been reserved until the final report*" and there "*may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling*".[38] As highlighted above in paragraph 1 of these submissions, the United States' request for preliminary ruling is unclear at certain places, hyper-technical at other places and plainly incorrect with respect to 2013 Sunset Review claims. Further, none of the preliminary objections raised by the United States require any immediate disposal since its due process rights in being able to defend itself has not been prejudiced in anyway. In view of the above, United States has failed to provide substantial justification for seeking an immediate disposal of its objections and India requests the Panel to reserve its findings with respect to preliminary objections raised by the United States until the final report.

[37] Panel Report, *Colombia – Ports of Entry*, para. 7.13.
[38] Panel Report, *Canada – Aircraft,* para. 9.15.

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF INDIA - FIRST MEETING

Mr. Chairman and distinguished members of the Panel

1. The present dispute raises certain serious issues of interpretation of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), the GATT 1994 and the WTO Agreement, having systemic underpinnings. India considers that the manner in which the United States conducts countervailing duty investigations undermine the basic foundation of the SCM Agreement. In India's view, the imposition of WTO inconsistent countervailing duty ("CVD") measures since 2001, have had a significant adverse effect on India's exports of Hot Rolled Carbon Steel Flat Products to United States. The value of exports of the products subjected to CVD measures has drastically come down after imposition of the measures.

2. In this opening statement, I would like to highlight only some of our claims due to paucity of time.

Let me start with the first 'as such' claim: "The hierarchical structure of determining 'adequacy of remuneration"

3. The United States follows a three-tiered benchmark approach under 19 CFR § 351.511(a)(2)(i) to (iii), while determining the adequacy of remuneration for provision of goods or services by the Government. India is of the view that the ordinary language of Article 14(d) suggests that 'adequacy of remuneration' must first be determined in relation to the provider of goods and only when the remuneration is found to be inadequate to the provider of goods, the question of calculating the amount of benefit to the recipient arises. The hierarchical and comparison based approach in the United States law ignores this two-step approach in-built in Article 14(d) and instead, directly seeks to measure the extent of benefit to the recipient of the goods by comparing the government price with the benchmark price, without assessing the adequacy of the impugned price to the provider of the goods.

4. Further, India maintains that the provision of goods *cannot* be considered as conferring a 'benefit' merely because it is priced at less than a benchmark price within or outside the country. The United States' law fails to consider whether such price differences are justified by 'commercial considerations'. The fact that the identical set of factors have been included in Article XVII of the GATT to define 'commercial considerations' and 'prevailing market conditions' in Article 14(d) of the SCM Agreement, cannot be a mere co-incidence having no significance whatsoever.

5. The United States, in its submissions, however, completely misses the point, by mischaracterizing India's claim as simply a reference to the 'cost to government' approach – an approach rejected by the Appellate Body earlier. India maintains that whereas the *benefit* is to be calculated in relation to the recipient, the *adequacy of remuneration* must be determined in relation to the provider of the goods. The United States argues that India's interpretation will result in Article 14(d) not having any method of calculating benefit.[1] The United States appears to assume that Article 14(d) must prescribe a specific method to calculate benefit. A comparison of Article 14(d) with Articles 14(a)-(c) does not support such an assumption. Articles 14(b) and (c) clearly state that the method to calculate benefit is to take a 'comparable' and the difference between the rate in question and the 'comparable' is determined to be the amount of benefit. The last sentence of both Articles 14(b) and (c) ensure this precise calculation method. This is not the case with Article 14(d) or Article 14(a). In fact, even in the context of Article 14(a), the Panel has already ruled that it does not prescribe any specific method to calculate benefit[2], unlike Articles 14(b)-(c).

[1] United States FWS, at para. 47.
[2] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.177, 7.211.

6. Even the United States admits that the term 'remuneration' means something different from 'benefit'.[3] Yet, apart from generally disagreeing with India's submissions, the United States has failed to give the meaning and implications of the term 'remuneration'. The United States has only made a vague statement that the terms 'remuneration' and 'benefit' are related. The United States neglects the fact that the Appellate Body, in *US – Softwood Lumber IV* has explicitly held that "a benefit is conferred when a *government* provides goods to a recipient and, *in return, receives insufficient payment or compensation for those goods*".[4]

7. Second, the United States, incorrectly, one may add, has placed reliance on the findings of the Appellate Body in *US – Softwood Lumber IV*, where in-country prices were considered as benchmarks to calculate benefit under Article 14(d).[5] India clarifies that the present claim raised by India, i.e. the distinction between calculating *benefit* and determining *adequacy of remuneration*, however, was never before the Appellate Body in that case and accordingly, the Panel is being requested to decide upon an argument that has so far not been argued before, or rejected by, the Panel or the Appellate Body. Even if the Panel in this case were to consider the Appellate Body's findings to reflect a proposition of law that applies beyond the issue presented therein, India believes that the Appellate Body merely hinted at the use of in-country private prices as a starting point.

8. In addition, the United States' law permitting the use of world market price as a benchmark in the absence of Tier-I price or in-country price also violates the requirement that the adequacy of remuneration be measured in relation to the market conditions in the *country of provision*. The United States appears to be under the impression that the phrase "*…in the country of provision*" in Article 14(d) can be twisted or ignored.[6] However, the use of the word 'shall' in the chapeau of Article 14 clearly denotes that the United States does not have the freedom to ignore Article 14(d) and this limitation is clearly recognized by the Appellate Body as well.[7]

9. India believes that the United States' rebuttal on the issue of Tier-II prices misquotes the findings of the Appellate Body in *US – Softwood Lumber IV*. First, the Appellate Body has ruled that use of out-of-country prices is permissible *only* in very limited cases where the in-country prices are all influenced by predominant government presence.[8] The Appellate Body did not provide for any other circumstance where out of country benchmarks can be used. The United States' law completely ignores this limitation prescribed by the Appellate Body. The United States' rebuttal seems to be that "world market price reflect prevailing market conditions because world market prices are generally available in any country, particularly when the input at issue is a commodity product like iron ore or coal".[9] This obviously ignores the very fact that use of out-of-country prices is permitted only in the rarest of rare cases. To this extent, the Tier-II pricing followed by the United States violates Article 14(d).

10. Second, the United States has the obligation to make adjustments to reflect prevailing market conditions because there is no presumption that out of country benchmarks reflect prevailing market conditions[10] in the country of provision. The Appellate Body has also ruled that, at a minimum, these adjustments should account for the difference in the market conditions relating to the factors listed in Article 14(d).[11]

11. Worse yet, the United States gives preference to such world market prices over its Tier-III method, which is admittedly grounded on the market conditions prevailing in the country of provision. Even in its FWS, the United States has completely failed to explain why Tier-II has to be placed before Tier-III. On the one hand, the United States admits that Tier-III method is compliant with Article 14(d)[12] and for obvious reasons, the Tier-III method, as explained in detail in the United States' internal domestic documents[13], relates to the market conditions prevailing in the

[3] United States FWS, at paras. 44-45.
[4] Appellate Body Report, *US – Softwood Lumber IV*, para. 84.
[5] United States FWS, at para. 40.
[6] See, United States FWS, para. 38.
[7] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[8] Ibid. paras. 90, 101-102.
[9] United States FWS, para. 34.
[10] Appellate Body Report, *US – Softwood Lumber IV*, paras. 108-109.
[11] Appellate Body Report, *US – Softwood Lumber IV*, paras. 106, 108.
[12] United States FWS, paras. 64-65.
[13] See, India's FWS, paras. 30-32.

country of provision. Yet, on the other hand, the United States' law prefers Tier-II over the Tier-III approach. India is of the view that such an approach is unjustified in terms of Article 14(d) of the SCM agreement.

12. Therefore, the United States law contained in 19 CFR § 351.511(a)(2)(i) to (iii) is inconsistent with Article 14(d) of the SCM Agreement.

Let me now move on to the second 'as such' claim: "Mandating comparison with benchmark at 'delivered prices' level".

13. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under Tier I or Tier II is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product. The adjustment will include delivery charges and import duties. This mandate applies even if the government price in question does not include such delivery charges. India observes and the United States acknowledges that this 'adjustment' is a mandatory requirement on the investigating authority to add, where the price under challenge is *ex works* price, all associated delivery charges to the price to such *ex works* price.[14] In order to effectuate an 'apples-to-apples' comparison, the United States also adds, where absent, all delivery charges to the benchmark price as well. United States applies this approach even for private in-country benchmarks and this is not disputed by the United States.

14. Such mandatory use of 'delivered prices' violates the United States' obligation to consider the 'prevailing market conditions' in the country of provision. Even where the prevailing 'conditions of sale' for the transaction of the goods in question do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis, the United States law mandates its investigating authority to ignore these market conditions. India believes that this method allows the United States to consider something more than the actual *remuneration* received by the provider of the goods, which disregards the plain words of Article 14(d).

15. India further submits that this approach also results in the artificial inflation of the quantum of 'benefit' where the benchmark relates to imported or out-of-country prices, wherein the United States includes ocean freight, local freight and import duties to the benchmark price, while including only domestic freight and local duties to the price under challenge. In effect, the United States ends up finding a 'benefit' to the extent of ocean freight. The 'comparative advantage' of India in using locally available goods without having to bear the risk and expense of international transactions are countervailed in this process. The United States' law is clearly not in good faith compliance with Article 14(d).

16. The United States defends the provision that this approach ensures that the comparison is being made at the same level of the distribution chain.[15] India fails to understand why accurate comparisons cannot be made at *ex works* level itself. The United States also claims that delivered prices reflect the true cost to the producer in obtaining the goods in question.[16] However, the United States cannot choose to engage in a comparison at a delivered prices level in all cases, irrespective of the conditions of sale prevailing in the country of provision.

17. Therefore, the United States' provision in question violates Articles 14(d) and 19.3-19.4.

The third 'as such' claim relates to the "Cumulation of subsidized and non-subsidized imports to determine injury in CVD proceedings".

18. The United States law under challenge provides for the cumulative assessment of volume and effects of imports of the products in question from all countries in the original investigation, sunset reviews and other reviews. India wishes to make it abundantly clear that the cumulation of imports from countries that are subjected to countervailing duty and also antidumping duty investigations simultaneously is not under challenge. India is only challenging cumulation of such imports with imports from countries not subjected to simultaneous countervailing duty investigations.

[14] United States FWS, para. 80.
[15] United States FWS, para. 80.
[16] United States FWS, para. 78.

19. Article 15 of the SCM Agreement governs determination of injury in CVD proceedings and Articles 15.1, 15.2 and 15.4 require the examination of positive evidence and injury based on the volume and effect of *subsidized imports* on the domestic producers. Article 15.3 is the only provision dealing with cumulative assessment of injury, limiting the right of an investigating authority to do so only for imports from countries *simultaneously* subjected to *countervailing duty investigations.* Article 15.3 also prescribes certain additional conditions – the rate of subsidization in *each* country must be greater than *de minimis* and the volume from *each* country must not be negligible.

20. Contrary to this limitation in Article 15.3, the United States law requires that while assessing injury in a CVD investigation, imports even from countries not subject to CVD investigations would be cumulated. In addition, this cumulative assessment is undertaken even if the conditions prescribed under Article 15.3 are not satisfied. This cumulated set of imports is then utilized by the United States in assessing the causal link, which obviously results in the attribution of injury caused from *non-subsidized imports* to subsidized imports.

21. The United States also offers no textual support to substantiate its arguments. *Per contra,* Article 15.1 to 15.5 expressly provides that all injury related determinations are made only in relation to '*subsidized imports*' and nothing more. Therefore, the United States' provisions relating to cumulation of non-subsidized with subsidized imports violate Articles 15.1-15.5 of the SCM Agreement.

The last of the 'as such' claims deals with the US law pertaining to 'Adverse Facts Available'

22. The United States' law permits an inference that is adverse to the interests of a party in *selecting from among the facts available* (AFA standard). The United States' law does not require the *evaluative and comparative assessment* of all the evidence available and is not directed to determine the best available fact. Rather, the purpose behind the provision is to penalize non-cooperating parties which is against the findings of the Appellate Body in *Mexico – Antidumping measures on Rice*. The United States' attempts to take safe harbor in the fact that their provision is worded in a manner that grants discretion in drawing adverse inferences and that such discretionary laws cannot be challenged 'as such'.[17] What the United States fails to realize is that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*[18], has expressly rejected such an argument. India believes that the very grant of discretion with the purpose of penalizing non-cooperation is in violation of Article 12.7 of the SCM Agreement.

23. Further, the United States argues, at one instance, that India may have apparently challenged the *approach* of the United States in applying its AFA provisions[19] and at another instance, that India may be challenging an alleged "practice"[20] of the United States. India wishes to clarify that it is challenging the United States' AFA provisions as such and not the United States' approach or practice. While the United States is correct in referring to the Appellate Body findings in *US – Zeroing (EC)*, which stands for the proposition that a rule or norm having general and prospective application may be challenged 'as such'[21], the United States fails to realize that in the very same case, the Appellate Body has held that evidence to prove the existence of such rule or norm may include proof of the *systematic application of the challenged rule or norm.*[22] The Appellate Body, in other cases, has accepted the use of systematic application of the challenged rule or norm as well. In its FWS, India referred to the systematic application of AFA standard by the United States in every case. In its FWS, the United States affirmatively states that its investigating authority does not follow a consistent practice in the manner asserted by India.[23] This is contrary to the facts. In the 34 other cases in which countervailing duty measures are currently in force in the United States, it made at least 83 determinations that interested parties did not act to the best of their abilities. In every one of those 83 determinations, the United States

[17] United States FWS, paras. 163-166.
[18] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 87-89.
[19] United States FWS, para. 196.
[20] Ibid. paras. 208-211.
[21] Ibid. paras. 200-201.
[22] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[23] United States FWS, para. 206.

applied the AFA Standard.[24] Further, in its FWS, the United States quotes 3 instances in which AFA standard was not applied by it. A perusal of those 3 cases indicates to the contrary.

24. Thus, the AFA provisions contained in the United States' law exceed what is permissible under Article 12.7 of the SCM Agreement.

Let me move on to the 'as applied' claims at this stage. The first 'as applied' claim relates to the imposition of countervailing duty in respect of 'Sale of High Grade Iron Ore by NMDC.

25. The United States has determined that sale of high-grade iron ore by National Mineral Development Corporation (NMDC) amounts to a financial contribution. The United States also determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. Neither the facts nor the reasoning provided by the United States clarify how this resulted in the Government of India (GOI) exercising meaningful control over NMDC. There was also no determination that NMDC was vested with governmental authority to perform governmental functions or that it was capable of directing or entrusting a private body.

26. India is of the view that the Appellate Body's interpretation of the term 'public body' in *US – Anti-Dumping and Countervailing Duties (China)* is indeed dispositive to the case at hand. While cursorily stating that its submissions are in line with the principles enunciated in *US – Anti-Dumping and Countervailing Duties (China)*, it is the United States that has attempted to re-agitate the exact same points rejected by the Appellate Body in that case.

27. The United States' approach in determining 'public body' fundamentally ignores the idea that governments can, and consistently do, operate in realms that are private apart from the public realm or realms that may be a mix of both.[25] The GATT and the SCM Agreement are intended to govern only those governing the public realm and the Appellate Body has evolved the test of 'governmental functions' as a method to determine areas that do not concern the 'public realm'. India believes that setting-up commercial enterprises like NMDC involve the government operating in the private realm and such commercial enterprises are not intended to be 'public bodies'.

28. Secondly, the United States wrongly determined that sale of iron ore by NMDC was *de facto* specific to the steel industry on the ground that it was limited to users of iron ore, including the steel industry. The United States mistakenly believes that this single sentence determination is sufficient to fulfill its obligations under Articles 1.2 and 2.1 of the SCM Agreement. India believes that Article 2.1 is only intended to cover *discriminatory* governmental action that provides a benefit to certain enterprises over a comparative set consisting of entities that are otherwise capable of receiving it. The United States' approach makes it impossible to find the provisions of any good or service (which are not general infrastructure) to be non-specific and to that extent, Articles 2.1 and 1.2 are rendered redundant in context of financial contributions in the form of provision of goods. Therefore, the interpretation given by the United States is incorrect.

29. Finally and most critically, the manner in which the United States determined and calculated the benefit in this case highlights the absurd results flowing from the application of 19 CFR § 351.511(a)(2)(i) to (iv) – provisions that India considers are 'as such' inconsistent with Article 14(d). Starting with the premise that the NMDC prices were anyway tainted, the United States ignored uncontroverted facts on record showing that NMDC operated on 'commercial considerations' offering iron ore at the same price (subject to exchange rate fluctuations) to both domestic and foreign buyers. Evidence also suggested that NMDC was operating at profit levels greater than other private players, clearly proving that NMDC prices were more than adequate to NMDC itself. Yet, the tiered approach forces the United States to turn a blind eye to all of this. Adding further to this incorrect approach, the United States concluded that there were no in-country benchmarks available for Tier-I method to be applicable, even though 'in-country' benchmarks were actually made available on record. It may be noted that the United States has attempted to improve upon its findings in its FWS by citing reasons for not using the available

[24] See, USDOC's determinations in CVD cases C-489-502, C-507-501, C-507-601, C-533-844, C-533-849, C-552-813, C-560-824, C-570-911, C-570-913, C-570-915, C-570-917, C-570-921, C-570-923, C-570-926, C-570-931, C-570-936, C-570-938, C-570-940, C-570-942, C-570-944, C-570-946, C-570-948, C-570-953, C-570-955, C-570-957, C-570-963, C-570-966, C-570-968, C-570-971, C-570-978, C-570-980, C-570-982, C-570-984, C-580-869.

[25] See, Appellate Body Report, *Canada – Feed-In Tariff Program*, para. 5.61.

'in-country' benchmarks, though such reasons were not found in the relevant findings. It may be added that the reasons given at this stage are also flimsy, to say the least.

30. Instead, the United States resorted to world market price, i.e. Tier-II approach, and failed to make necessary adjustments to such world market price in order to reflect the prevailing market conditions in India. In view of their mandate under their domestic law to make the comparison at the delivered price level, the United States also included ocean freight and import duties to the benchmark price (while adding only domestic freight and local taxes to the local domestic price). The methodology of the United States would always result in an excess subsidy margin, in breach of its obligation to apply Article 14(d) in good faith.

31. Since the United States methodology assumes that a government price can never be 'adequate', it even rejected NMDC prices reported in the Tex Report. Article 14(d) does not allow rejection of price charged by government players while determining prevailing market conditions, particularly in the instant case where NMDC was not even a predominant supplier of iron ore and was acting in accordance with market principles. Such a determination is also against the chapeau of Article 14 because the United States acted arbitrarily by accepting the NMDC export prices in one AR and rejecting in another AR.

Let me briefly touch upon the second 'as applied' claim. This claim relates to the imposition of countervailing duty on the alleged grant of captive mining rights for iron ore is inconsistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement.

32. Firstly, the United States' identification of the program as '*captive* mining rights for iron ore' is inconsistent with Article 12.5 inasmuch as India does not have a distinct framework for *captive* mining rights of iron ore as distinguished from that governing mining rights for iron ore or mining rights for minerals in general. India believes that no reasonable and objective investigating authority could have satisfied itself as to the accuracy of the *ex facie* incorrect allegations made by the United States' domestic industry in this case. India believes that the United States failed to consider the entire information on record and conveniently ignored the conclusions cited in the very reports on which the United States relied upon.[26]

33. The United States' entire determination of 'specificity' is premised on this incorrect fact that '*captive* mining rights of iron ore' was subject to its own governing regulation. Thus, the determination as to specificity is contrary to Articles 1.2, 2.1 and 2.4.

34. Secondly, the United States wrongly determined the grant of 'mining rights for coal and iron ore' amounts to provision of iron ore and coal itself. The United States believes that this issue has been foreclosed by the Panel and the Appellate Body in *US – Softwood Lumber (IV)*. The United States has deliberately misinterpreted footnote 99 of the Panel's findings in *US – Softwood Lumber (IV)* by limiting its application only to the 'right to explore a particular site and the chance of finding something'.[27] Further, the Appellate Body in the very same case held that governmental actions can amount to 'provision of goods' only when there is no *reasonable proximate nexus* between the governmental action, and use or enjoyment of the alleged good. The 'nexus' in this case is too remote because mining does not involve an *ex ante* certainty as to the quantity and quality of the ultimate good, and mining is an inherently risky and expensive affair involving substantial investment of time, effort and resources.

35. Moreover, for the calculation of benefit, the United States took a notional price by adding the royalty paid by the exporter, cost of extraction and delivery charges incurred by the exporter from mine to the factory and a reasonable profit margin to the exporter. This notional price was taken as hypothetical remuneration paid to the government and it was compared with the benchmark price based on Tier-I or Tier-II. Such a hypothetical price was not contemplated either in the SCM Agreement or in the municipal laws of the United States. Undoubtedly, the hypothetical price is not the remuneration received by the government. India further believes that royalty rates for the extraction of natural resources has been practiced from times immemorial and was never intended to be countervailed under the SCM Agreement. Such royalty rates cannot be subject to the disciplines underlying the SCM Agreement.

[26] India FWS, para. 354.
[27] United States' FWS, para. 497.

The next 'as applied' claim relates to the injury determination by the United States contrary to Article 15 of the SCM Agreement.

36. In the original investigation, the United States cumulated imports from eleven countries out of which only five countries were subjected to simultaneous countervailing duty investigations. While doing so, the United States did not assess whether the volume of imports from each of the countries was not negligible and whether the subsidization rate was above *de minimis*. Such a determination is inconsistent with Articles 15.3.

37. India is of the view that irrespective of the data, what is germane to the issue is that the United States cumulated subsidized imports from countries subjected to CVD investigation and non-subsidized imports from countries not subjected to CVD investigations.

38. The United States cumulatively assessed the volume and effects of both subsidized and non-subsidized imports in violation of Articles 15.1, 15.2 and 15.4. Effectively, the United States attributed injury caused by non-subsidized imports to subsidized imports, in breach of its obligations under Article 15.5.

39. In the first sunset review also, the United States cumulated the imports from countries against which no countervailing duty measures had been imposed. This is inconsistent with its obligations under Articles 15.1 to 15.5.

Let me now move on to the application of AFA standard and a few miscellaneous issues.

40. During the 2006-2008 ARs, when employing the AFA standard contained in its domestic law, the United States consistently applied the highest above *de minimis* rate of subsidy as determined for an identical or similar program, or in absence of it, the highest above *de minimis* rate for any other program involving the same country. Such a rule punishes non-cooperation by assuming the worst possible consequence against the non-cooperating party and is inconsistent with Article 12.7. In its FWS, India has also provided detailed arguments on several instances of illegal application of the facts available standard permissible under Article 12.7, which are not repeated herein.[28] These effectively cover 18 findings in the 2006 AR, 18 programs in the 2007 AR, 92 findings in 2008 AR and 92 findings in the 2013 sunset review.

41. India observes that in its FWS, the United States has not even attempted to defend the application of the highest above *de minimis* rate. Even in its FWS, the United States has not adequately clarified the manner in which the findings challenged by India are based on facts actually available. For instance, while India's claim covered findings relating to 66 different state programs (and sub-programs) against one of the exporters in the 2008 AR[29], the United States attempts to rebut only one of the said findings and without further explanation, conclusorily states all the other findings are justified in a similar manner.[30] This is representative of the apathetic manner in which findings are made by the United States when applying its domestic AFA standard.

42. The United States has further undermined the due process safeguards crafted into the SCM Agreement in the process of initiating investigations into new subsidies in the course of review proceedings. India believes that the safeguards under Articles 11.2, 11.6, 13 and 22 of the SCM Agreement have to be complied for *every single subsidy* that is to be countervailed. The United States, however, conducts an *investigation* under the garb of a *review* proceeding and this is impermissible.

Conclusion

43. India considers that the United States has failed to frame laws, regulations and requirements that are consistent with its obligations under the above referred agreements.

44. Mr. Chairman and Members of the Panel, thank you for the opportunity to present India's views on this dispute. India would be pleased to provide responses to any questions that the Panel may have.

[28] India's FWS, section XI.A.2-9.
[29] India's FWS, section XI.A.5-6.
[30] United States FWS, paras. 235-246.

ANNEX B-4

ORAL CLOSING STATEMENT OF INDIA – FIRST MEETING

Mr. Chairman and distinguished members of the Panel.

1. India is grateful to the Panel for providing an opportunity to present its views in the present dispute. The proceedings and the submissions thus far highlight that the parties are acutely aware that the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") constitute a delicate balance between two sets of stake-holders. Yet, both parties have taken contrary views on many issues of interpretation. India does not envy the complex task before the Panel in attempting to consider these views in their entirety.

2. India's claims, both 'as such' and 'as applied', are directed to ensure that the SCM Agreement does not become an instrument to bring upon unreasonable hardships on the exporting countries. India sincerely believes that the 'delicate balance' admitted by both the parties in the SCM Agreement is inherent in the text of the Agreement itself. India places the text of the SCM Agreement at a high pedestal in accordance with the customary rules of interpretation and has made a sincere effort in appreciating the meaning and scope of every word used in the SCM Agreement. Illustratively, this may be said of India's interpretation of the term '*remuneration*' in Article 14(d) and the use of the phrase '*subsidized imports*' throughout the scheme of Article 15.

3. It is unfortunate, however, that the United States has actually attempted to transpose the aspirations prevalent in its domestic law as the alleged intention behind various provisions of the SCM Agreement, fundamentally ignoring the text of the SCM Agreement. Illustratively, the United States argues that there is absolutely no restriction in the SCM Agreement to cross-cumulate *non-subsidized* imports with *subsidized* imports. Even in its opening statement, the United States has referred to a hypothetical illustration to substantiate the argument that cumulation of *non-subsidized* imports with *subsidized* imports is permissible simply because both cause injury to its domestic industry. In this process the United States has rendered Article 15.3 completely redundant and desecrated the non-attribution requirement in Article 15.5.

4. The United States disregard for the text of the SCM Agreement is apparent in the context of Article 14(d) of the SCM Agreement on two specific counts: (1) The United States agrees that even though 'remuneration' is a different term from 'benefit' and yet, it proceeds on the basis that the use of these two different words is inconsequential; and (2) By mandating that calculation of 'benefit' be done at the delivered price level in all cases, the United States disregards the mandate to account for the prevailing 'conditions of sale'.

5. What is also rather unfortunate is the United States' attempt to undermine the 'security and predictability' in the dispute settlement system, by consistently disregarding the prior rulings of the Appellate Body. To illustrate, although there is a substantial discussion in *US – Anti-Dumping and Countervailing Duties (China)* on the need to prove the existence of "governmental authority" to perform "governmental function" in order to assess whether an entity is a 'public body', the United States' determinations under challenge as also its submissions, pay no attention to this requirement. It may also be noteworthy that in its opening statement, the United States even claims that the Appellate Body in the said case upheld United States' determination that "*state-owned banks were public bodies based on evidence demonstrating the government's meaningful control over them*". On the contrary, as paragraph 355 of the said Appellate Body decision would highlight, the evidence presented in that case was considered as being sufficient for the United States to justify that "*SOCBs are meaningfully controlled by the government in the exercise of their functions*" and more importantly, that "*SOCBs exercise governmental functions on behalf of the Chinese Government*".

6. Similarly, in its opening statement, the United States also places reliance on the Panel's decision in *Canada – Renewable energy* to argue that just "meaningful control" is sufficient to satisfy the 'public body' requirement. Here again, a reference to paragraph 7.234 of the said decision would highlight that the body in question was admitted to be "*a provincial government organization … to which the government has assigned or delegated authority and responsibility, or*

which otherwise has statutory authority and responsibility to perform a public function or service". As the Panel very clearly notes, this specific factor was particularly dispositive in that case. The concluding remark in paragraph 7.239 of the Panel Report also confirms India's submissions that mere "meaningful control" is *insufficient* to make determinations as to 'public body'. India strongly objects to the dismissive manner in which the United States treats the statements and findings in prior decisions.

7. The United States further undermines the "delicate balance" intended under the SCM Agreement, by choosing to ignore the obligations placed upon it as an investigating authority when making its determinations. The United States never '*initiates*' any investigation into new subsidies, does not fulfil the publication requirement under Article 22 for such new subsidies and completely circumvents the obligation to invite India to consult on the existence, amount and nature of these new subsidies. Instead, the United States takes the flawed stand that all of these requirements can be conveniently circumvented by camouflaging *investigations* into new subsidies as part of the proceedings covering the *review* of prior findings relating to other subsidies.

8. The United States has attempted, through this dispute, to overcome its failings in the determinations under challenge. As an illustration, the United States did not even bother to acknowledge the non-confidential in-country benchmarks supplied by interested parties in its determinations under challenge. Yet, before this Panel, the United States makes an unacceptable attempt to cure this defect by attempting to justify the rejection of such prices. The determination relating to NMDC being a public body is also another such instance. The United States has affirmatively admitted before the Panel in *US – Anti-Dumping and Countervailing Duties (China)* that the findings against NMDC in the subject investigation are solely based on government shareholding. For two years, i.e. the original determination and the 2004 AR, the United States only relied on government shareholding. The 2007 AR is the only instance where a reference has been made to the board of directors of NMDC, and even there, the United States categorically states that this is anyway irrelevant according to its domestic law. None of the determinations even remotely refer to 'governmental authority' or 'governmental functions'. Despite all this, the United States has made an attempt before this Panel to argue as if all of this has been considered by the United States in its determinations. This applies even in the context of the mandatory parameters in the third sentence of Article 2.1(c) and three of the mandatory injury parameters in Article 15.4 of the SCM Agreement.

9. It is India's submission that the dispute settlement system of the WTO cannot be used as a forum by the United States to cure inadequacies and illegalities in its determinations under challenge.

10. Mr. Chairman and Members of the Panel, this concludes India's closing statement. We thank you for your patient listening and the most efficient manner in which the proceedings have been conducted. We are also grateful for accepting India' request to provide an advance copy of the Panel's question. India would be pleased to provide responses to any further questions that the Panel may have.

ANNEX B-5

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

I. INTRODUCTION

1. India notes that during the First Substantive Meeting as well as in its responses to the Panel's questions, India has provided a number of factual and legal rebuttals to the United States' assertions. While reiterating all of them as well as the claims made in its FWS without repeating the same, India takes this opportunity to clarify some important aspects of the claims raised by India in the instant dispute as well the defects in the United States' arguments.

II. REQUEST FOR PRELIMINARY RULING BY THE UNITED STATES

2. With regard to India's claim under Section XII.C.4 of India's FWS, the United States' request for preliminary ruling is deficient and is not in compliance with para. 6 of the Working Procedures. Even if the Panel were to find that the request complies with para. 6, it is no different from those raised with respect to Sections XII.C.1-XII.C.2. Therefore, the same response will apply *mutatis mutandis* in respect of the claim covered in Section XII.C.4 of India's FWS.

III. THE 3 TIER HIERARCHY CONTAINED IN 19 CFR § 351.511(a)(2)(i) TO (iii)

3. India's claim in this respect is based on the words used in the first sentence of Article 14(d). The structure of the first sentence of Article 14(d) clearly suggests that determining whether the *remuneration* is adequate is a threshold question that needs to be answered prior to going into the question of calculating *benefit*. Even the United States in its FWS concedes that the term 'remuneration' is different from 'benefit', though they are related. However, the United States' FWS as well as third party submissions of the European Union remains noticeably vague on what the term *remuneration* actually means.

4. The United States argues that India's approach contravenes the text of Article 14(d) and results in Article 14(d) not containing any language on how to calculate benefit to the recipient. The United States' argument ignores the structure and context of Article 14 as a whole. The last sentence of both Articles 14(b) and (c) ensures a precise calculation method using an external benchmark, which is not the case with Article 14(d). The lack of a specific method to calculate benefit is seen in Article 14(a), which has also been acknowledged by an earlier Panel. The United States offers no textual basis to rebut India's interpretation of the first sentence of Article 14(d) and instead mischaracterized India's claim as an assertion of the cost-to-government approach. As clarified by India in its Opening Statement as well, India only provides meaning and effect to the term *remuneration* and the structure of the first sentence of Article 14(d), without disturbing the meaning to be attributed to the term *benefit*.

5. The tiered approach under the United States' law fails to consider whether the price differences could otherwise be commercially justified such that an alleged lower price of the government as compared to a benchmark can be attributed to the government player behaving as a competitor in the relevant market. Price differences in competitive markets are well known and lower prices of one player can also be commercially justified. The United States fails to provide an adequate justification to ignore the conscious choice of the drafters to include a set of identical factors that are also used to assess whether a price is in accordance with "commercial considerations" under Article XVII, GATT. This very clearly indicates the intent that prices set in accordance with "commercial considerations" would be prices "*reflective of the supply and demand of both sellers and buyers in that market*", which is what is required under Article 14(d).

6. The hierarchical approach of the United States precludes the application of the Tier-III approach under which the government prices that may otherwise be considered as 'adequate remuneration' may still be considered as conferring a benefit under the Tier-I or Tier-II models. The United States submits that India's argument amounts to mandating the use of multiple methods for determining benefit. The United States fails to appreciate the drafters remained very

clear that in no circumstance can an investigating authority determine the existence of a benefit when the remuneration in question is adequate.

7. Not only had India challenged the hierarchy between Tier-I to Tier-III, but also Tier-II *per se* as well as the hierarchy between Tier-II and Tier-III. The United States has failed to address the latter claim in any manner in its FWS. Even as regards the former claim, a feeble attempt has been made to argue that if the United States were not allowed to apply Tier-II prices in the absence of a Tier-I benchmark, it would frustrate the object and purpose of the SCM Agreement. However, the United States fails to answer why it would choose Tier-II prices, i.e. world market prices over Tier-III methodology. The Appellate Body has considered the need for the benchmark to reflect the prevailing market conditions to be more critical than the type of benchmark itself and has also directed investigating authorities to make adjustments necessary to account for differences in "market conditions" and ensure that the method used does not countervail comparative advantages of the country in question. India submits that nothing in the words of the provision under challenge even remotely allows for the possibility of such adjustments. Therefore, contrary to the United States' assertion, the tiered approach prescribed under the United States' law undermines the very text and spirit of Article 14(d).

IV. THE DELIVERED PRICES ARRIVED AT IN ACCORDANCE WITH 19 CFR § 351.511(a)(2)(iv)

8. India had submitted that 19 CFR § 351.511(a)(2)(iv) is 'as such' inconsistent with Articles 14(d), 19.3 and 19.4 of the SCM Agreement because the United States' law by mandatory inclusion of delivery charges and import duties, eliminates the possibility of adjustments for the terms and condition of sale prevailing in the country of provision.

9. The United States appears to focus its submissions solely on the issue of whether "import duties" are added in every case. The United States assumes that the term "delivery charges" covers only import duties. The crucial portion of India's claim is that the law under challenge mandates benefit analysis to be done at a delivered level in all cases, even where the prevailing conditions of sale in the country of provision for the goods provided is only ex-works. In its FWS, the United States defends its law by stating numerous times that it ensures an apples-to-apples comparison. As previously submitted, an alleged apples-to-apples comparison could very well be completed even at the ex-works level, which is usually the case under the AD Agreement also. The critical issue in Article 14(d) is to make an assessment in relation to the prevailing conditions of sale in the market, i.e. whether goods are being transacted on an ex-works basis or delivered basis ought to be considered by the investigating authority.

10. Moreover, as India submitted in India's FWS, wherever the benchmark relates to goods from outside India, the addition of international freight and import duties to the benchmark price while only adding local freight and local taxes to the government price under challenge makes the affirmative determination of 'benefit' a foregone conclusion. This is exactly what the United States law under challenge requires.

11. The United States also argues that its method ensures a proper assessment of the cost to the purchase of the goods. The language of Article 14(d) does not make cost to the purchase a relevant element. Rather, the focus is on the "prevailing market conditions" and India submits that an adjustment on account of transportation (which is also a condition of sale) could only be made if such condition of sale is the prevailing market condition in the country of provision. However, the mandatory nature of the United States' law forecloses such an examination and presumes the delivery charges as a condition of sale *dehors* the actual facts of a case.

V. THE CUMULATION PROVISIONS CONTAINED IN 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) AND 19 USC § 1677b(e)(2)

12. India's challenge in the present dispute is confined to the cumulation of subsidized imports with dumped imports, where all the dumped imports are not subsidized. India notes that the other types of cumulation are not covered in the present dispute and India does not express any opinion on the consistency of such cumulation.

13. The primary argument made by the United States is that Article 15.3 does not expressly prohibit cumulation of dumped and subsidized imports. The United States construes this to imply that Article 15 is silent on subsidized imports being cumulated with dumped (but non-subsidized imports), apparently giving the investigating authority absolute freedom to do so. The United States has analogized this case with *US – Oil Country Tubular Goods Sunset Reviews*, where a similar finding was issued in respect of Article 21. Per *contra* Article 15.3 specifically addresses the issue of cumulation inasmuch as the first sentence restricts cumulation of imports of products only from countries *simultaneously subject to countervailing duty investigations* and the second sentence merely refers to *such* imports. Article 15, therefore, is not silent on the issue of cumulation as was the case with Article 21. The interpretative exercise, therefore, is completely different from that of *US – Oil Country Tubular Goods Sunset Reviews* on which the United States relies on. India reiterates that the text and context of Article 15 as a whole do not permit the United States to cumulatively assess subsidized and dumped (not not-subsidized imports) in a CVD investigation.

14. To the extent the United States argues that Article 15.3 does not prohibit such cumulation, India asserts that the submissions of the United are inherently contradictory. If the United States' interpretation of Article 15.3 of the SCM Agreement is applied in the context of Article VI.6.a, then nothing in the text of Article VI.6.a actually prohibits the United States from cumulating even fairly traded goods. Yet, the United States, quickly realizing the absurdity of this consequence, draws an implied prohibition to cumulate even fairly traded goods. India submits that a more express and stronger prohibition exists in Article 15 to cumulate subsidized with dumped (but not subsidized) imports.

15. The United States also justifies its provision under challenge by relying on the AD Agreement as a relevant context. Even a conjoint reading of both AD and SCM Agreements only suggests that just like subsidized imports are cumulated in a CVD proceeding, dumped imports may be cumulated in an AD proceeding. The AD Agreement does not address the issue of cumulation in a CVD proceeding. India submits that this is a self-inflicted confusion arising only because the United States does a unified injury finding for both AD and CVD and therefore, has misplaced the "non-attribution" obligations mentioned in both agreements.

16. On sunset reviews, the United States primarily submits that Article 15.3 only applies in an original investigation, which requirements are inapplicable in sunset review determinations. India submits that if cumulation in original investigations is limited to only subsidized imports, this limitation should equally apply to sunset reviews as well. The United States further submits that the use of the word 'may' in section 1675a(a)(7) makes cumulation discretionary and therefore, grants a safe harbor to the provision in question. India asserts that it is an established principle that the description of an instrument under domestic law is not determinative under WTO law. As submitted in India's first written submission a careful analysis would show that the discretion not to cumulate has in fact never been exercised.

17. The relevant question before the Panel is whether the United States does not cumulate subsidized imports and dumped (but non-subsidized) imports in sunset reviews even where the imports compete with each other *inter se* and with the domestic like products? The United States does not provide for any instances of sunset review determination in its written submission where the discretion has in fact been exercised. On the other hand, India has studied the sunset reviews of the United States involving CVD proceedings and AD proceedings initiated on the same day and concluded that in every instance where the conditions of competition are met, cumulation is done. The alleged discretion not to cumulate is exercised only to the extent that the conditions of competition are not met. Therefore, the totality of evidence on record shows that even in sunset reviews, where the conditions of competition are met, cumulation is practiced as a rule / norm of general application and hence, is a measure that can be challenged 'as such' before this Panel.

VI. THE AFA PROVISIONS CONTAINED IN 19 USC § 1677e(b) AND 19 CFR § 351.308(a)-(c)

18. Contrary to the United States' assertion India has made it clear both in its FWS and during the First Substantive Meeting that India challenges the AFA provisions, i.e. 19 USC § 1677e(b) and 19 CFR § 351.308 'as such' and not the 'practice' or the 'approach' of the DOC in applying these provisions. India submits that as a matter of rule / norm, the United States applies the AFA provisions to the worst possible inferences in all cases of non-cooperation. India has referred to

the consistent practice as evidence to prove such a rule / norm. The use of such systematic application in order to prove the existence of a rule or norm is consistent with the findings of the Appellate Body in *US – Zeroing (EC)*. It is crucial to note that the Appellate Body in the said case made a definitive distinction between the standards to be applied for an alleged rule or norm that is *written / codified* versus a rule of norm that is *unwritten.* What was before the Appellate Body in the said case was as an *unwritten* rule or norm whereas the case at hand involves the codified AFA provisions. Therefore, India believes that the application of the aforesaid general principle to the facts of the case in *US – Zeroing (EC)* may not be relevant to the instant dispute. Nevertheless, even on facts, India submits that the evidence on record is akin to what was available in *US – Zeroing (EC)* and therefore, satisfies the threshold placed by the Appellate Body in *US – Zeroing (EC)*.

19. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* required the Panel to engage in a proper *qualitative assessment* of the instances where the alleged 'rule' was applied consistently. India has provided similar data on consistent application and seeks the indulgence of the Panel to engage in such *qualitative assessment*. India also invites the Panel's attention to the binding decisions rendered by the Federal Circuit and the Court of International Trade. Based on all the above, India submits that the AFA provisions are a 'measure' that can be "as such" challenged before this Panel and are inconsistent with Article 12.7 of the SCM Agreement.

20. In section VII.A of its FWS, the United States has placed significant emphasis on the fact that the AFA provisions under challenge do not 'require' the use of adverse inferences and instead grants its investigating authority the discretion to apply adverse inferences. The United States argues that such discretionary laws cannot be challenged 'as such' as per well-established GATT and WTO jurisprudence. India finds it surprising that the United States relies on the decision rendered by the Appellate Body Report in *US – Zeroing (EC)* in this respect. In reality, the findings in both *US – Zeroing (EC)* as well as *US – Oil Country Tubular Goods Sunset Reviews* show that even an apparently unwritten or discretionary rule can be considered otherwise through the qualitative assessment of its systematic application. Moreover, this argument of the United States falls flat in the light of the express finding by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Reviews* where the Appellate Body expressly ruled that there is no general principle that only mandatory rules can be challenged 'as such'.

21. India does acknowledge that the provision in question uses discretionary language. However, this grants no safe harbor to the United States. India presents two alternative and without prejudice arguments in this respect. First, India submits that even if the words used in the AFA provisions appear to provide discretion, the very grant of the discretion is inconsistent with Article 12.7 of the SCM Agreement. In this respect, India has provided detailed submissions in its FWS on the Panel ruling in *US – Section 301 Trade Act*, where a legislation that very clearly provided discretion to the investigating authority was still inconsistent with a WTO provision. Second, in the alternative and without prejudice to the aforesaid argument, the United States cannot simply point to the use of the word 'may' in its AFA provisions and India urges the Panel to not end its analysis there. Prior Panel and Appellate Body Report direct otherwise. The Panel Reports in *US – 1916 Act (EC)* and *US – Countervailing Measures on Certain EC Products*, as well as the Appellate Body Reports in *US – Corrosion-Resistant Steel Sunset Reviews*, *US – Zeroing (EC)* and in *US – Oil Country Tubular Goods Sunset Reviews* require this Panel to go beyond the mere text of the provision under challenge, analyze other related domestic instruments, legislative history, domestic judicial decisions and even evidence of systematic application of the provisions. This is exactly what India has done in its FWS and the SWS.

VII. SALE OF HIGH GRADE IRON ORE BY NMDC

22. The United States determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. From a perusal of the determinations under challenge, it is evident that the sole reason in the 2004 and 2006 AR for holding the NMDC to be a public body was government shareholding. In the 2007 AR, the exporter argued that NMDC is not a government authority because of the composition of the Board. The United States categorically rejected the submissions and held that "*majority ownership of an input supplier qualifies it as a government authority within the meaning of [19 USC § 1677(5)(D)(i))]*" and that "*[a]nalyzing additional factors is not necessary absent information that calls into question whether government ownership does not mean government control*.". Further, the United States has previously admitted before the Panel in *US – Anti-Dumping and Countervailing Duties (China)* that in

Hot-Rolled Carbon Steel Flat Products from India, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors. Government shareholding in itself cannot result in the entity becoming a public body and India submits the Appellate Body's ruling on this issue in *US – Anti-Dumping and Countervailing Duties (China)* is dispositive to the case at hand. This ruling forms part of the *acquis* of the WTO and is binding on this Panel. Apart from re-agitating the same issue and arguments already considered by the Appellate Body, the United States fails to provide any 'cogent' reasons for having to differ from this prior adopted Appellate Body Report.

23. Before this Panel, however, the United States attempts to read other factors and evidence that may otherwise justify its finding that NMDC is a public body. None of these other factors and evidence, including the significant reliance placed on the Board composition of NMDC finds place in the measures under challenge. The Panel, under Article 11 is not permitted to consider such *ex-post facto rationalizations* from the United States. Nonetheless, in its SWS, as a matter of abundant caution India, has replied to each such *ex-post facto rationalization.*

24. On the issue of specificity, India had examined the manner in which Articles 2.1(a)-(b) have to be read and understood, in its FWS. The Appellate Body has already ruled that Articles 2.1(a)-(b) are provisions that deal with *discriminatory conduct*, which definitely indicates that *specificity* under the principles of Articles 2.1(a)-(b) is about governmental action that treats similar situated entities in a dissimilar fashion. India also emphasizes that the concept of discriminatory conduct is necessarily implied in the text of Article 2.1(a)-(b) itself. The United States does not dispute any of India's conclusions as it relates to Articles 2.1(a)-(b) and only appears to disagree with this conclusion being applied to Article 2.1(c). India disagrees and submits that contextually, even when making a determination of specificity under Article 2.1(c), the investigating authority is required to engage in a comparative exercise, i.e. examine whether the subsidy / benefit is discriminatorily enjoyed / used by certain similarly placed enterprises over others. Such a comparative exercise would inherently involve comparing like with like.

25. On the issue of determining existence of benefit and calculating the amount of benefit, the submissions on the 'as such' claim covering the tiered approach and 'delivered prices' of the United States law would *mutatis mutandis* apply herein. On the specific issue of availability of in-country benchmarks, India submits that all objections raised by the United States in its FWS against the use of certain in-country benchmarks are to be rejected *in limine* because they amount to *ex-post facto rationalizations*. Even if these objections are relevant, it is equally surprising that the United States did not even attempt to seek further clarification in these respects when they had the opportunity to do so. This failure is quite telling and undermines the due process obligation of the United States. Nonetheless, in its SWS, as a matter of abundant caution India, has replied to each such *ex-post facto rationalization.*

VIII. THE 'CAPTIVE MINING RIGHTS FOR IRON ORE & COAL'

26. India, in its FWS, has explained the features of India's mining rights program all of which remain un-rebutted by the United States. The United States only submits that the record evidence indicated that India has a captive mining program for iron ore. The essence of the claim has been correctly captured by the Panel in Question No. 29 to India. The fact remains that India only grants 'mining leases' for iron-ore. The fact that some of the lessees, in their commercial wisdom, choose to be vertically integrated is inconsequential to grant of the rights by the GOI under the relevant legal regime. There is no separate policy, law or regulation for captive mining and all the lessees pay the same amount of royalty fees and are granted concessions on the same terms and conditions.

27. The United States mischaracterized the program as '*captive* mining rights for *iron ore*' and has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals. This is a fundamental error of fact by the United States, which also vitiates its specificity determination as regards *captive* mining rights for iron-ore.

28. India's submits that granting "mining right for iron-ore and coal" cannot amount to *provision* of iron-ore and coal. India only provides the mining rights against royalty, which constitutes roughly 9.03% of the total cost of extracting iron ore in the relevant period, the other 90.97% being the cost of extraction incurred by the lessee of the mining rights). There is no reasonable

proximate connection between the grant of rights and enjoyment of the mined mineral by the miners. The United States fails to appreciate the need to prove the existence of such reasonable proximate connection as was laid down by the Appellate Body in *US – Softwood Lumber IV*.

29. To the extent the benefit finding for the NMDC programs and the law under which those findings were arrived at are inconsistent with Article 14(d), the benefit findings for mining rights program of iron-ore and coal would also automatically fall. Further, to assume a notional price of the extracted mineral (that includes cost of extraction, royalty rate and a notional reasonable profit) as the remuneration received by the GOI is also erroneous.

IX. THE SDF PROGRAM

30. As was correctly noted even by the Panel, the United States, in its FWS, has not even attempted to respond to India's submissions that the JPC, by no stretch of imagination, could be considered as a public body. The uncontroverted fact remains that JPC was established under a separate legal instrument, has a separate identity and its functions are distinct from that of SDF Managing Committee. It is the JPC and not the SDF Managing Committee, which executes the loan documents, disburses the funds and receives the funds and all of this is not disputed by the United States. India also, reiterates that the SDF Program was nothing but a mechanism for the participating steel plants to specifically channelize their own funds for specified purposes, such as modernization and R&D. Since, the United States has not challenged the assertion that JPC is not a public body, the claim must be decided in India's favor.

31. Even as regards the SDF Managing Committee, the United States determined it to be a public body on the sole basis of governmental control due to composition of the committee. This fails to satisfy the test laid down in *US – Anti-Dumping and Countervailing Duties (China)*. While the United States argues at this stage that the SDF Managing Committee performs a 'governmental function', such a finding is absent in the determination under challenge. Such arguments are merely *ex-post facto* rationalizations that are to be rejected by the Panel.

32. India also reiterates that the domestic notifications issued pertaining to the SDF clearly pointed that the authority to operate the fund vested only with the JPC, which anyway cannot be a public body. The United States' attempt in the determination under challenge as well its FWS to color the SDF levy as tax is also not substantiated by facts since it is the JPC which was empowered to charge the SDF levy and JPC itself is not a public body.

33. India further submits that even if SDF Managing Committee is a public body, in section IX.C.2 of its FWS, India has argued that SDF cannot amount to a 'direct' transfer of funds for the purposes of Article 1.1(a)(1)(iii) since the funds do not *directly* move from the SDF Managing Committee to the alleged beneficiaries. Instead, if at all, it moves indirectly through JPC, which is majority controlled by participating steel plants only. Moreover, as submitted in section IX.C.3 of India's FWS, the SDF is not a direct 'transfer' of funds for the purposes of Article 1.1(a)(1)(i) since the GOI or the SDF Managing Committee (or for that matter, even the JPC) do not own title to the SDF funds. The SDF funds are producer levies and the SDF loans do not involve a charge on the public account. The SDF levy never became part of the consolidated fund of India and therefore, can never be equated to tax revenues.

34. When calculating benefit, the United States also acted contrary to the chapeau to Article 14 and Article 14(b), in relation to the SDF program. The United States applied the Prime Lending Rate (PLR) as the benchmark rate, but failed to explain how such a rate could be considered as a 'comparable commercial loan' under Article 14(b) as it only *reflected* the overall reference rate for the banks taking into account their cost structure. As was highlighted in India's FWS, the SDF loans were conditioned on a number of costs being borne by the participating steel members, including that of having to first deposit amounts into the SDF. Further, the comparability analysis under Article 14(b) necessarily requires the United States to look into the credits or adjustments since from a commercial perspective, such factors would affect the rates at which the loan is granted. The United States argues that benefit is all about how the beneficiary has been made "better off" than the market place and yet, on the other, argues that the costs borne by the participating steel producers need not be accounted for.

X. INJURY INVESTIGATION

35. The United States raises several additional arguments in defense of its original injury determination. India submits that all such analysis never formed part of the injury determination made by the United States. Table V-13 highlights no segregation of data of dumped imports vis-à-vis subsidized imports; it merely tabulates the data for each country without further examination of the data. The narrative portion of the injury determination does not even make the effort to segregate the data based on the dumped imports and subsidized imports.

36. In relation to causal link analysis under Article 15.5 of the SCM Agreement, while it is not in dispute that all subsidized imports were found to be dumped, it is equally undisputed that all dumped imports were not found to be subsidized. It is the cumulation of these unsubsidized imports, which has distorted the injury determination and is inconsistent with Article 15 of the SCM Agreement and especially, Articles 15.3-15.5 of the SCM Agreement.

37. In relation to the evaluation of mandatory injury parameters, the United States observes that even though there is no written record, it has indeed evaluated the mandatory parameters as required under Article 15.4 of the SCM Agreement as interpreted by the Appellate Body in *EC – Pipe and Tube Fittings.* In *EC – Pipe and Tube Fittings*, factually, the Appellate Body found that there was considerable analysis regarding the mandatory parameter in question, which satisfied the requirement under Article 15.4. However, this is not so in the present case.

XI. THE APPLICATION OF AFA PROVISIONS

38. One of the primary arguments in respect of this issue rests on the fact that the United States consistently applies the highest possible rate against non-cooperating parties.[1] India notes that the United States has not even attempted to defend such a stand in its FWS. Applying the highest possible margin in all cases of non-cooperation is contrary to Article 12.7 of the SCM Agreement.

39. In its FWS, India had also raised a number of instances where the AFA provisions "as applied", are inconsistent with Article 12.7 of the SCM Agreement. The United States fails to justify its finding in all the instances and instead, attempts to rebut only one instance and asserts that every other instance falls in the same category. In its SWS, India has established beyond doubt that in all instances identified in the FWS, the determinations were based on speculations / assumptions meant to result in adverse consequences, rather than being based on actual facts.

XII. INCONSISTENCIES WITH ARTICLE 11, 13, 21 AND 22 OF THE SCM AGREEMENT

40. India submits that the United States has failed to rebut India's submission of inconsistency of the measures under challenge with Articles 11, 13, 21 and 22 of the SCM Agreement. The United States' response to India's allegation is basically centered on the understanding that the Articles 11 and 13 are not applicable in a review exercise under Article 21 of the SCM Agreement.[2] The United States' submission, in effect, is that because the exercise of inclusion of new subsidies is carried out in a review under its domestic procedure, the entire consolidated proceeding amounts to a *review* under Article 21 of the SCM Agreement.

41. India submits that when a new subsidy is alleged in an AR, findings that are made qua this new subsidy are findings made for the first time. Qua such new subsidies, it is for the first time that an exercise in the nature of determining the '*existence, degree*' of such new subsidies is being conducted. Such an exercise is clearly an *investigation* contemplated under Article 11 and not a *review*. The United States cannot be allowed to conveniently circumvent the obligations under Articles 11, 13 and 22 by simply conducting such *investigations* within a proceeding that is termed as a '*review*' under its domestic laws.

42. Contrary to the United States' assertion, this does not render Article 21 redundant. What the United States fails to appreciate is that the issue concerns a *newly* alleged subsidy and not the continuation of the already existing program after some modification. India's claim does not

[1] India's FWS, paras. 526-527.
[2] The United States' FWS, Section XII.C.1.

concern the latter case. Secondly, Article 21 is meant to review the existing subsidization. After a newly alleged subsidy is investigated in accordance with Articles 11, 13, and 22 for the first time, subsequent ARs can be performed on such subsidies under Article 21 (without having to fulfill Articles 11, 13 and 22 in such subsequent reviews).

43. The United States submits that India has a disagreement with the substance of the decision itself in relation to the SDF program and not about the adequacy of explanation by Commerce. India's claim under Article 22.5 lies in the United States' failure to account for the factual similarities between the ECSC program and SDF program.

44. With regard to provision of high grade of iron ore by NMDC, the United States submits that the information on domestic prices was not reliable as there was no information on record to show that those were actual transaction between private parties and the data provided did not identify the entities selling the iron ore. Be that as it may, the fact remains that the aforesaid justification occurs for the first time in the present submission and therefore, only proves the violation of Article 22.5 of the SCM Agreement.

45. Similarly with regard to the captive mining rights of iron ore and coal, the United States provides a bare assertion that it has complied with Article 22. India reiterates all its submissions from its FWS.

XIII. REQUEST FOR FINDINGS AND RECOMMENDATIONS

46. In view of the above, India requests the panel to recommend that the United States withdraw the countervailing duties and amend its laws to bring them into conformity with the above referred agreements.

ANNEX B-6

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF INDIA - SECOND MEETING

Mr. Chairman and distinguished members of the Panel

1. India has made extensive factual and legal submissions on the various claims raised in this dispute. In response, the United States has turned to rhetoric rather than refute the claims on a substantive basis. In this second substantive meeting of the Panel, India would like to highlight the substance of its claims and how the United States has failed to refute any of India's claims.

2. India's claims are strongly grounded on the terms used in the SCM Agreement and the United States cannot request this Panel to ignore textually and contextually supported interpretations or arguments simply because the United States may perceive them to be radical. It has been and it continues to be India's submission that India's approach to many of the issues arising in this case is fundamentally supported by the language as well as the spirit of the treaty and mere fact that some of the views expressed by India may not have been raised before a Panel or the Appellate Body on earlier occasions does not make India's approach radical.

3. The United States has resorted to 'confidentiality of information' as an excuse for not addressing India's claims regarding availability of an in-country benchmark. India affirms it has not violated any confidentiality obligations while producing any documents before this Panel. India will cover this in detail, during the later course of its opening statement.

4. I will first deal with the four 'as such' claims and then cover the 'as applied' claims.

Let me start with the first 'as such' claim: "The hierarchical structure of determining 'adequacy of remuneration'".

5. India believes that the United States law under challenge, i.e. 19 CFR 351.511(a)(2), is 'as such' inconsistent with Article 14(d) of the SCM Agreement. India does not wish to repeat the detailed arguments already laid out in its submissions and instead only wishes to highlight certain fallacies in the submissions of the United States.

6. Under Article 14(d), what is being assessed is the adequacy of the 'remuneration', which, India submits, refers to the actual compensation received by the government provider of the goods. The Appellate Body, in *US – Softwood Lumber IV* has explicitly held that "a benefit is conferred when a *government* provides goods to a recipient and, *in return, receives insufficient payment or compensation for those goods*".[1] There is a very clear suggestion by the Appellate Body that the term 'remuneration' covers the payment or compensation actually *received* by the provider of the goods. While the remuneration refers to what is received by the provider of the goods, the conferral of benefit, if any, is on the purchaser of the goods.

7. The United States admits in paragraph 11 of its Second Written Submissions that the language in Article 14(d) "establishes a structure under which an investigating authority, upon the existence of a particular condition, may find that a benefit has been conferred". It is India's claim that the "particular condition" referred to by the United States is the existence of 'less than adequate remuneration' to the provider of the goods. If and when the 'remuneration' is considered as inadequate, the investigating authority may proceed to calculate the amount of benefit. This two-step process is built into Article 14(d) by virtue of its first sentence.

8. The requirement of determining whether the remuneration was adequate to the provider of the goods cannot be termed as applying the "cost to government" approach. The United States has spent considerable time in highlighting prior jurisprudence rejecting the "cost to government" approach in calculating benefit. However, it has never been India's submission that the benefit is

[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 84.

to be determined based on the cost to the government. It is India's submission that whether the goods have been provided by the government for less than adequate remuneration shall be determined taking into account, inter alia, costs, profits and all other relevant market conditions. Once this threshold is crossed, i.e. the remuneration to the provider is determined to be 'less than adequate', the investigating authority may proceed to calculate *benefit to the recipient* in accordance with the relevant provisions of the SCM Agreement.

9. India has pointed out the differences in the text of sub-paragraphs (b) and (c) of Article 14 with the text of sub-paragraphs (a) and (d). It is more than evident that in sub-paragraphs (b) and (c) of Article 14, the difference with reference to a certain benchmark price is deemed to be the amount of benefit. The United States has not explained why the drafters' would choose not to insert a similar sentence in sub-paragraph (d) of Article 14. Rather, in paragraph 14 of its Second Written Submissions, the United States argues that the first sentence of Article 14(d) refers to 'less than', 'more than' and that this envisages a comparative exercise similar to that of sub-paragraphs (b) and (c). The United States also argues that the different manner in which the second sentence of Article 14(d) is drafted suggests a "more involved comparison" compared to the other subparagraphs, without any textual basis. There is nothing in the language of the second sentence that is similar to the other sub-paragraphs of Article 14 and the difference in language must be given due weight. Tier-I and Tier II methodologies of the United States prescribe a mechanical approach and not a 'more involved' approach.

10. The mechanistic application is borne out by the fact that under the Tier-I and Tier-II methodologies, every time the government price is lower than a given benchmark price, a finding of benefit is arrived at. Had the United States really intended to engage in a 'more involved' analysis, it would have explored the reasons behind any such price differences. The prevailing market conditions may permit different competitors in selling similar products at different prices and price differentials could easily be justified by 'commercial considerations'. India submits that this is exactly why the second sentence of Article 14(d) has been structured differently from Article 14 (b) and 14(c). The United States responds to this by arguing that the cross-reference to the term 'commercial considerations' in Article XVII of the GATT is not contextually justified and that this is a disguised attempt by India to substitute the term 'commercial considerations' for 'market conditions' in Article 14(d). India reiterates that the presence of identical factors in Article 14(d) of the SCM Agreement and Article XVII of the SCM Agreement to identify 'market conditions' and 'commercial considerations', respectively, cannot be ignored.

11. India has claimed that the Tier-II method *per se* as well as the hierarchy between Tier-II and Tier-III are inconsistent with Article 14 of the SCM Agreement. There is an inherent presumption in the United States' Tier-II method that world price benchmarks can be applied to assess the adequacy of remuneration irrespective of the prevailing market conditions in the country of provision. The obligations on the investigating authority as noted by the Appellate Body in *US – Softwood Lumber (IV)* are simply ignored by the United States. India believes that the Tier-II method is exactly what the Appellate Body in *US – Softwood Lumber (IV)* directed investigating authorities to avoid. Further, the United States' failure to justify the *inter se* hierarchy between Tier-II and Tier-III methods is apparent on the face of the record and nothing can logically justify the United States' choice of world price benchmarks over a qualitative assessment of the pricing policy under Tier-III.

India's second 'as such' claim is the "mandatory comparison" of the Government prices with the benchmark at the 'delivered prices' level".

12. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under Tier I or Tier II is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product. The adjustment will include delivery charges and import duties. This mandate applies even if the government price in question does not include such delivery charges. Such mandatory use of 'delivered prices' violates the United States' obligation to consider the 'prevailing market conditions' in the country of provision. Even where the prevailing 'conditions of sale' for the transaction of the goods in question do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis, the United States law mandates its investigating authority to ignore these market conditions.

13. The United States argues that the term 'transportation' is mentioned in Article 14(d) and therefore, in every case, transportation will be added to the prices being used. India cannot

imagine a more acontextual and absurd implication of this word. The Panel may observe that 'transportation' is considered as just another 'condition of sale' within the meaning of Article 14(d). Otherwise, the presence of the word 'other' is reduced to redundancy. Further, such 'conditions of sale' need to be accounted for in order to assess the 'prevailing market conditions'. The use of the term 'transportation' does not mean that in every case transportation costs shall be included irrespective of whether the prevailing market conditions for sale of the goods in question include an element towards 'transportation'.

14. A second fundamental error in the United States' approach is that its assumption that measuring adequacy of 'remuneration' involves assessing the cost to the recipient of the goods. The language of Article 14(d) does not make cost to the purchaser a relevant element. In fact, in *EC and Certain Member States – Large Civil Aircraft*, the Appellate Body has expressly ruled that one should not focus solely on the demand side or the supply side of the equation for the purposes of Article 14(d) and the United States' position is contrary to this. Rather, the focus is on the "prevailing market conditions" and India submits that an adjustment on account of transportation (which is also a condition of sale) could only be made if such condition of sale reflects the prevailing market condition in the country of provision. However, the mandatory nature of the United States' law forecloses such an examination and presumes the delivery charges as a condition of sale *dehors* the actual facts of a case.

15. Moreover, as India submitted in India's First Written Submissions, wherever the benchmark relates to goods from outside India, the addition of international freight and import duties to the benchmark price while only adding local freight and local taxes to the government price under challenge makes the affirmative determination of 'benefit' a foregone conclusion.

The third 'as such' claim relates to the "Cumulation of subsidized and non-subsidized imports to determine injury in CVD proceedings".

16. India would like to reiterate that the real issue is whether Article 15.3 of the SCM Agreement contemplates cumulation of imports from countries not subject to 'simultaneous countervailing duty investigations'. The said article does not cover cumulation of 'dumped' and 'subsidized' imports. Article 15.3 only permits cumulation of 'subsidized' imports from more than one country that are subjected to simultaneous countervailing duty investigation.

17. The primary argument of the United States to defend the provision under challenge seems to be that 'disentanglement of dumped and subsidized' injury is not possible. However, the United States while adopting this myopic approach omits the unequivocal requirements of Article 15.5 that injury caused by other known factors must not be attributed to the subsidized imports.

The last of the 'as such' claims deals with the US law pertaining to 'Adverse Facts Available'.

18. Contrary to the United States' assertion, India has made it clear that it is challenging the AFA provisions, i.e. 19 USC § 1677e(b) and 19 CFR § 351.308 'as such' and not the 'practice' or the 'approach' of the DOC in applying these provisions. India submits that as a matter of rule or norm, the United States applies the AFA provisions to draw the worst possible inferences in all cases where the parties have allegedly not cooperated to the best of their abilities. India has referred to the consistent practice as evidence to prove such a rule or norm. The use of such systematic application in order to prove the existence of a rule or norm is consistent with the findings of the Appellate Body in *US – Zeroing (EC)*. Even on facts, India submits that the evidence on record is akin to what was available in *US – Zeroing (EC)* and therefore, satisfies the threshold placed by the Appellate Body in *US – Zeroing (EC)*.

19. The United States' principal objection again is that their legislation is discretionary and India has already acknowledged that fact. However, the United States appears to be under the misunderstanding that this grants a safe harbor to its law. The United States cannot circumvent an actual prohibition under the SCM Agreement merely by couching its provision in discretionary terms. While it is true that India has used the consistent and systematic practice of the investigations to substantiate that the allegedly discretionary norm is actually applied as if it were a mandatory one, the United States has misconceived this to be the only evidence on record.

Rather, India has also referred to binding domestic precedents as well as the policy background behind the AFA provision, which consistently highlight that punishing non-cooperation was the intent behind the AFA provision. These additional evidences have not been rebutted by the United States. Instead, the United States attempts to take the Panel on a tangential course by referring to *US – Export Restraints* and *US – Measures on Steel Plate in India*, where attempts to challenge 'practice' as a measure were dismissed.

20. The United States has completely failed to appreciate the findings from the two Panel reports in *US – 1916 Act (EC)* and *US – Countervailing Measures on Certain EC Products*, as well as the Appellate Body Reports in *US – Corrosion-Resistant Steel Sunset Reviews*, *US – Zeroing (EC)* and in *US – Oil Country Tubular Goods Sunset Reviews*, which direct this Panel to not stop its examination with the plain text of the provision. Qualitative assessment of consistent practice as one evidence to demonstrate the existence of a norm is a mandate from the Appellate Body. India seeks such an assessment from this Panel.

21. Further, India highlights that even if the Panel were to consider the provision to actually provide discretion in a real sense, a discretionary legislation has been held to be inconsistent earlier by the Panel in *US – Section 301 Trade Act*. India submits that the very grant of the discretion to apply the facts available standard to punish non-cooperation is inconsistent with Article 12.7 of the SCM Agreement. The United States fails to provide any rebuttal in this regard.

22. The United States also takes the misconceived argument that since its law refers to the requirement of corroboration it fulfills the obligation of obtaining the best or most fitting information as per the mandate given by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. India believes that the United States has misunderstood the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. What the Appellate Body was referring to was the need to engage in a qualitative assessment of the entire universe of evidence available on record. It is a comparative and evaluative approach where all possible facts that are otherwise available are considered and an objective determination is to be made as to which among them best fits the gap in the record. The fact that secondary information is to be corroborated to the extent practicable does not ensure that all available facts have been evaluated. Furthermore, admittedly, this provision only applies for 'secondary evidence' and not in all cases. If the requirement to corroborate allegedly ensures obtaining the best or most fitting information the mere fact that this is being done only in selective circumstances and not always in itself results in incompatibility with Article 12.7. Moreover, in terms of the United States' law, corroboration as a requirement comes into play only when the decision to apply adverse facts has been reached, whereas the Appellate Body requires the evaluative exercise *prior* to determining which facts are to be applied under Article 12.7. Therefore, the defense raised by the United States is without merit.

Let me now move on to the 'as applied' claims raised by India.

23. Before briefing the Panel on a claim-by-claim basis, India wishes to note one recurring theme in the defense raised by the United States. The United States has attempted to provide *ex-post facto rationalizations* to justify many of their 'as applied' findings before the Panel. Irrespective of what the actual and explicit determinations made upon conclusion of the investigations in question, the United States has claimed in their written submissions that the evidence on record may otherwise justify its determinations. India would refer to such glaring instances appropriately in the following section.

Let me now move on to each of the 'as applied' claims raised by India, starting first with the sale of iron ore by NMDC.

24. In paragraph 104 of Second Written Submissions, the United States asserts that NMDC is a public body for three different reasons-(a) the Government of India owned 98% of NMDC's shares; (b) the Government of India was heavily involved in the selection of the Board of Directors; and (c) NMDC was under the administrative control of the Government of India. The United States even argues in its submissions that NMDC is a governmental authority performing governmental functions. The sale of iron ore by NMDC was countervailed for the first time in 2004 AR and the relevant determination did not refer to anything other than government shareholding as the reason for treating NMDC to be a public body. For the first time, a reference was made to the

composition of the board of NMDC in the determination of 2007 AR. Even in the said determination, the investigating authority stated that as a matter of law where there was significant government ownership of shares, further evidence was unnecessary. It was stated that mere governmental ownership would be sufficient to justify its finding and that in such cases, the burden shifted onto the interested parties to demonstrate that the government did not exercise control despite such significant ownership of shares.

25. In any case, the United States has admitted that it is making *ex post facto rationalization* before this Panel. In its response to the Panel's query 42(b), the United States agreed that it chose to apply a 'simple control test' in its determinations. In fact, their admission that no other factor was considered could be traced back to an entirely different dispute, i.e. *US – Antidumping and Countervailing Duties (China)* wherein the United States admitted before the Panel that in *Hot-Rolled Carbon Steel Flat Products from India*, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors. It would be anomalous today for the United States to say anything to the contrary.

26. Even the composition of the board of directors needs a closer look. As the Panel may observe from India's Second Written Submissions, apart from 2 directors appointed by the Government of India, majority of the directors were all 'independent' and India has placed on record evidence explaining the completely uninfluenced and independent role played by such independent directors. In other words, government involvement is extremely minimal in the appointment of the board of directors. There is no government involvement in the functioning of the board of directors. It is also noteworthy that the grant of 'miniratna' and 'navaratna' status to NMDC is acknowledged by the United States and India has placed the relevant executive notifications on record showing that the Government of India has granted significantly higher degree of autonomy to NMDC. Surprisingly, while the United States so vehemently argues that it has *discussed* other evidence on record, none of these points has been explored or even discussed in the determinations under challenge. Therefore, even the *ex post facto rationalizations* fail on merit.

27. As to the aspect of NMDC being a governmental authority performing governmental functions, India finds the United States' approach startling. Effectively, the United States seeks a ruling that the activity of mining is a "governmental function" simply because mineral resources are owned by the Government of India and it is the Government of India that grants mining rights. This would mean that every mining company is potentially a 'public body'. What the United States fails to appreciate is that there is a close link between the requirement of the entity possessing governmental authority and this entity performing governmental functions. It is clear from the Appellate Body's ruling in *US – Antidumping and Countervailing Duties (China)* that what was intended to be covered were only those entities vested with the authority to perform the function of regulating, restraining, supervising or controlling the conduct of others. It is not as if NMDC issues mining licenses or regulates the mining activities of other.

28. A second significant instance where the United States has placed reliance on such *ex-post facto rationalization* is their defense to the failure to apply certain in-country benchmarks made available by the interested parties in this case. In its First Written Submissions and the Second Written Submissions, a number of objections have been taken by the United States that these prices did not reflect any private party transactions and that the price quotes seem otherwise unreliable. Once again, none of these objections is recorded anywhere in the determinations under challenge and such additional assertions ought not to be considered by the Panel. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* has very clearly laid down that Article 12 represents a due process system of investigation and there is a requirement to at least consider all the evidence placed on record by the interested parties.

29. Apart from the aforesaid, the United States also claims that the above prices did not reflect Tier-I benchmarks as they were not prices in actual transactions but only price lists. However, the United States adopted the price quotes given in the TEX Reports as reflective of Tier-II benchmark and this hypocritical application of Article 14(d) cannot be permitted.

30. An important issue that India would like to comment upon at this stage is the United States' assertion that some of the Exhibits filed by India before this Panel were confidential material. The Panel may observe that none of the Exhibits filed by India carry an endorsement on the top of the

page stating "Proprietary Treatment Requested" and no information or data in the said Exhibits has been bracketed. It seems to be the position of the United States that merely because one of the exporters (e.g. Tata) had filed certain confidential information anything and everything filed by said exporter shall be considered confidential. The Panel may appreciate the absurdity of this stand. If the United States' suggestion were to be accepted, the other documents filed by this exporter, including copies of Indian Law (Customs Tariff Notification No. 21/2002), the Hoda Report extract and the Expert group Report would also become confidential, whereas even the United States cannot dispute that these are all public documents.

31. At issue is Exhibit IND-70, which allegedly contains confidential data. In this respect, India provides the following clarifications:

(i) No. of Licenses Granted by Government of India - The list of all mining concessions granted by Government of India is publicly available at www.mines.nic.in. One can obtain the entire list for all years (state-wise). From that data, the Government of India as well as Tata consolidated the state lists, segregated the data for 2005-06 and provided it to the United States. This was demonstrated to the investigating officer during the verification visit to Tata. The same list is also part of the Government of India Verification Exhibits, which is entirely a public document.

(ii) Sesa Goa & Kudremukh Financial Information - The financials were obtained from the Internet. The new reports are available at their respective websites. Although past reports have now been removed (which were very much available at the time of the investigation), the past reports can be accessed from http://www.mca.gov.in/MCA21/. The above mentioned website (for filings by Listed Companies) can be accessed by anybody after depositing a nominal fee of less than USD 1 (INR 50) per company.

(iii) The third information is a quotation letter from Essel Mining. There is neither bracketing on the information nor a header requesting treatment as Business Confidential Information. It is public for the purposes of law. Even if presumed to be proprietary, the Authorization from Tata is on record and predates India's First Written Submissions. In any event, even if this information is considered proprietary, it must have at least been used for Tata while calculating benefit.

(iv) The fourth information is a price list from Goa Mineral Ore's Exporters Association. The same information is also part of the questionnaire response of the Government of India, filed as Exhibit IND-61 before this Panel. At a minimum, it is non-confidential in the Government of India questionnaire response and therefore, could be filed even without authorization from Tata.

32. To briefly mention about the specificity issue, India submits that before making a 'specificity' determination under sub-paragraph (c) of Article 2, the United States did not examine whether the alleged captive mining policy was non-specific under sub-paragraphs (a) and (b) of Article 2. The plain language of Article 2.1(c) makes it evident that the United States could not have proceeded to an examination of *de facto* specificity without examining specificity under Article 2.1(a) and (b). Even while making the determination under Article 2.1(c), specific conditions mentioned therein i.e. extent of diversification of economic activities and the length of time during which the program in question has been in operation were not examined.

I would now like to address the claims pertaining to alleged 'Captive Mining Rights for Iron Ore & Coal' programs.

33. In its First Written Submissions, India has explained the features of India's mining rights program all of which remain un-rebutted by the United States. The essence of the claim has been correctly captured by the Panel in Question No. 29 to India. The fact remains that India only grants 'mining leases' for iron-ore. The fact that some of the lessees, in their commercial wisdom, choose to be vertically integrated is inconsequential to the grant of rights by the Government of India under the relevant legal regime. There is no separate policy, law or regulation for captive mining and all the lessees pay the same amount of royalty fees and are granted concessions on the same terms and conditions.

34. The United States in its Second Written Submissions also draws the Panel's attention to pages 217-18 of the *Hoda Report.* However, there is not even an iota of evidence on record that the Government of India is facilitating captive mining over stand-alone mining. India reiterates that under Article 11, panels must also examine if the competent authority has assessed all relevant factors, pertinent facts and given adequate explanation to support their determination.[2] India submits that for determining specificity under Article 2 of the SCM Agreement, a panel must examine the broader legal framework pursuant to which a subsidy is granted.[3]

35. Not only has the United States has mischaracterized the program as '*captive* mining rights for *iron ore*', it has also not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals. This is a fundamental error of fact by the United States, which also vitiates its specificity determination as regards *captive* mining rights for iron-ore.

36. India submits that granting "mining right for iron-ore and coal" cannot amount to *provision* of iron-ore and coal. India only provides the mining rights against royalty, which constitutes roughly 9.03% of the total cost of extracting iron ore in the relevant period, the other 90.97% being the cost of extraction incurred by the lessee of the mining rights. There is no reasonable proximate connection between the grant of rights and enjoyment of the mined mineral by the miners. The United States fails to appreciate the need to prove the existence of such reasonable proximate connection as has been laid down by the Appellate Body in *US – Softwood Lumber IV*.

37. It is worthwhile to note that the United States adopted a notional price for the extracted mineral that included cost of extraction, royalty paid and a notional reasonable profit as the remuneration received by the Government of India. There is no legal basis for adopting such a price as the government price under the programs.

38. Further, to the extent the benchmarks adopted for these programs are similar to the one for the sale of high grade iron ore by NMDC, the arguments made in respect of the NMDC program would apply *mutatis mutandis* to these two programs also.

Next, I would like to deal with the SDF program.

39. As has already been observed by this panel, the United States does not appear to dispute that the JPC is not a public body. The uncontroverted fact remains that JPC was established under a separate legal instrument, has a separate identity and its functions are distinct from that of the SDF Managing Committee. Once again, referring to the findings in *US – Anti-Dumping and Countervailing Duties (China)*, there is no finding that the JPC has been vested with governmental authority to perform governmental functions. It is the JPC and not the SDF Managing Committee, which executes the loan documents, disburses the funds and receives the funds.

40. At this stage, in paragraph 111 of the Second Written Submissions, the United States has suggested to this Panel that "*under the direction of the SDF Managing Committee, the JPC determined the amounts to be levied*". A case has been made out by the United States as if it is the SDF Managing Committee that acted as the nodal agency for the SDF program and the JPC as a subordinate agency. It will be a futile attempt to trace any determination that even remotely suggests this. In fact, in the original findings in the year 2000 when the SDF program was first countervailed, the United States made a distinction between collection of funds on the one hand and its disbursement on the other.

41. The United States consistently claims that the SDF levy was 'mandatory'. India requests the Panel to reflect on this point a little further. It is admitted that the JPC directed the SDF levy and it is not in dispute now before this Panel that the JPC is a private body, being majority controlled by the participating steel enterprises. There is also *no finding* that the JPC was directed by the SDF Managing Committee when levying the SDF amounts. Therefore, participating steel enterprises together determined a price hike in their products. Therefore, from the consumer's perspective, the increased price is now the price at which the products are made available in the market and anyone choosing to purchase from these participating steel enterprises could only buy at this increased price. Merely because market players choose to charge a certain price from the

[2] Appellate Body Report, *US – Cotton Yarn*, para. 74.
[3] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint),* para. 757.

consumers does not make the increase in price equivalent to the taxation function of the government in any sense.

42. Since the JPC was involved in the funds collection and JPC was controlled by the steel industry only, the SDF funds were producer levies and the SDF loans did not involve a charge on the public account. The SDF levy never became part of the consolidated fund of India and therefore, can never be equated to tax revenues.

43. India also wishes to submit that the United States cannot, at this stage, dispute facts on record. In paragraph 114 of its Second Written Submissions, the United States impliedly questions the undisputed functioning of the SDF mechanism. The United States seems to believe that competitors cannot cooperate and pool-in money in order to create a common development corpus. India takes strong objection to the United States' stand that this is absurd. The economic and other conditions existing in each country varies and market players are free to choose their best mode of operations. The conditions prevailing in India back in the 1970s may have been such that there was a need for creating such a common corpus and it is not for the United States to comment on the merits of the approach. In any case, the function of the SDF mechanism was never questioned during the investigation phase and India submits that this cannot be questioned at this stage.

44. Even as regards the SDF Managing Committee, the United States determined it to be a public body on the sole basis of governmental control due to composition of the committee. This fails to satisfy the test laid down in *US – Anti-Dumping and Countervailing Duties (China)*. While the United States argues at this stage that the SDF Managing Committee performs a 'governmental function', such a finding is absent in the determination under challenge. Such arguments are merely *ex-post facto rationalizations* that are to be rejected by the Panel. India also reiterates that the domestic notifications issued pertaining to the SDF clearly point out that the authority to operate the fund vested only with the JPC, which is not a public body.

I would briefly address India's claim regarding the injury examination conducted by the United States.

45. The United States raises several additional arguments in defense of its original injury determination. India submits that all such analysis never formed part of the injury determination made by the United States. Table V-13 highlights no segregation of data of dumped imports vis-à-vis subsidized imports; it merely tabulates the data for each country without further examination of the data. The narrative portion of the injury determination does not even make the effort to segregate the data based on the dumped imports and subsidized imports.

46. In relation to the evaluation of mandatory injury parameters, the United States observes that even though there is no written record, it has indeed evaluated the mandatory parameters as required under Article 15.4 of the SCM Agreement as interpreted by the Appellate Body in *EC – Pipe and Tube Fittings.* In *EC – Pipe and Tube Fittings,* the Appellate Body found that there was considerable analysis regarding the mandatory parameters in question, which satisfied the requirement under Article 15.4. However, this is not so in the present case.

Let me now address the claims regarding application of AFA provisions.

47. One of the primary arguments in respect of this issue rests on the fact that the United States consistently applies the highest possible rate against non-cooperating parties.[4] Applying the highest possible margin in all cases of non-cooperation is contrary to Article 12.7 of the SCM Agreement. India notes that the United States does not defend this approach before this Panel.

48. In its First Written Submissions, India had also raised a number of instances where the AFA provisions "as applied", are inconsistent with Article 12.7 of the SCM Agreement. The United States, in its First Written Submissions, fails to justify its finding in all the instances and instead, attempts to rebut only one instance and asserts that every other instance falls in the same category.

[4] India's First Written Submissions, paras. 526-527.

Finally, India would like to deal with the aspect of investigating new subsidies as part of an administrative review.

49. In relation to the requirement to comply with Articles 11, 13 and 22 of the SCM Agreement qua new subsidies in a review proceeding, all that the United States seems to rely upon is that none of these provisions are cross-referred in Article 21. Yet, it fails to realize that Article 21 is for a 'review' proceeding and does not relate to findings being made for the first time. Rather, according to the United States so long as the products in issue are the same and the exporting Member is the same, new subsidies can be added anytime in a review proceeding. To justify this argument, the United States asserts that otherwise, Members could change subsidy programs and circumvent imposition of duties. What the United States fails to appreciate is that there is a distinction between asserting an entirely *newly* alleged subsidy and asserting that there is a continuation of an already existing program after some modification. India's claim does not concern the latter case. The mere fact that this may, because of domestic practice, becomes inconvenient to the United States cannot be an excuse to not comply with the requirements of the SCM Agreement.

50. The plain words of Article 11 direct an examination of *any* alleged subsidy and Article 13 also states that the consultations are to cover each and every such alleged subsidy. It would be evident to the Panel from the plain words that the Articles 11, 13 and 22 would independently apply to each subsidy program and the United States cannot choose to ignore fulfilling these obligations for newly alleged subsidy programs. India's claim is only that Articles 11-13 and 22 represent the due process for investigating into any given subsidy program and in particular, the consultation process under Article 13 may provide crucial facts that may lead to the investigating authority not proceeding with the investigation against any given subsidy.

51. India reiterates its position with regard to all the other claims that are not addressed in this opening statement. Mr. Chairman and Members of the Panel, this concludes our opening statement. India thanks the Panel for the opportunity to present it's views in this dispute. India would be pleased to provide responses to any questions that the Panel may have.

ANNEX B-7

ORAL CLOSING STATEMENT OF INDIA – SECOND MEETING

Mr. Chairman and distinguished members of the Panel

1. We are now at the completion of the second substantive meeting of the panel in this dispute and the Panel has before it, the written submissions of the parties and clarifications provided in response to questions from the Panel. India, therefore, does not feel any need to re-agitate the various arguments already forming part of the record. India believes that it has made out a very strong case in respect of all its claims and all that the United States has to offer in rebuttal are hollow words and repeated efforts to choose convenience over giving effect to the terms of the treaty.

2. One of the major issues contested between the parties is the interpretation and understanding of the terms used in Article 14(d). While India maintains that Article 14(d) envisages a two-step process i.e. determining inadequacy of remuneration first prior to calculating benefit, as India explains below, the United States has taken self-contradictory views on this issue. In paragraph 11 of its Second Written Submissions, the United States acknowledges that benefit may be calculated under Article 14(d) only upon the existence of a "particular condition", which condition could only be a reference to the "remuneration" being "less than adequate". Nonetheless, the United States still prefers to state that calculating benefit and examining whether the "remuneration" is "less than adequate" is one and the same thing. The Panel may observe, upon further reflection, that all of this arises from the failure on the part of the United States to understand the meaning of the term "remuneration". On this aspect, all that the United States has been able to offer the Panel is a vague statement that even though 'remuneration' is a different term from 'benefit', they are related.

3. India submits that the term "remuneration" can only mean actual compensation received by the provider of the goods. The United States rejects this approach and provides no alternative. In paragraph 6 of their opening statement in the second substantive meeting, the United States denies that the term "remuneration" is equal to "cost to beneficiary". Effectively, according to the United States the term "remuneration" means nothing because the United States asserts that it is neither the "cost to beneficiary" nor the compensation received by the government provider. Adding to the confusion further, while denying that "remuneration" is equal to "cost to beneficiary", the United States simultaneously asserts in paragraphs 21, 25 of its opening statement that assessing the "cost to beneficiary" is reflective of the prevailing market conditions for that good. As per the second sentence of Article 14(d), it is the adequacy of the "remuneration" that is to be assessed "in relation to the prevailing market conditions" and hence, the assertion of the United States in paragraph 21 of its opening statement appears to be that "remuneration" is equal to "cost to beneficiary". These mutually contradictory stands only highlight the fact that India's approach is in line with the text and spirit of Article 14(d) and any attempt to deviate from this approach would only result in incorrect result as is seen with the submissions of the United States. Rather than provide meaning to the actual terms used in the treaty, the United States simply chooses to incorrectly hide itself in statements made by the Appellate Body decisions that did not address the meaning of the term 'remuneration' at all. This inability of the United States to interpret and give meaning to the terms used in the treaty is carried forward to the second 'as such' claim as well. The United States argues in paragraph 24 of its opening statement in the second substantive meeting that the term "conditions of sale", as it appears in Article 14(d), does not refer to contractual conditions of sale. The analysis ends there and the United States never explains what else the phrase "conditions of sale" could mean.

4. On most of the other issues, the United States violates fundamental notions of treaty interpretation by creating redundancies in the SCM Agreement. For instance, on the requirement of the assessing 'negligibility' for the purposes of Article 15.3, the United States fails to account for the use of the word 'each' as it appears therein and argues that it is permitted to assess negligibility in any manner it may choose, including by an aggregate analysis. Similarly, Article 1.1(a)(1)(i) relates only to 'direct' transfer of funds and in their ordinary sense, do not cover *indirect* transfer of funds. However, in relation to the SDF program, even though the SDF Managing Committee but momentarily assuming otherwise was not a 'public body', it is

admitted that the actual loan transfer was effectuated by the JPC and this indirect transfer is not covered under Article 1.1(a)(1). A more startling instance is the United States' argument that Article 15 does not prohibit cumulation of subsidized and non-subsidized (but dumped) imports when determining injury in a countervailing duty investigation even though there is an express non-attribution obligation under Article 15.5 of the SCM Agreement.

5. On the other extreme, the United States has gone to the extent of inserting or modifying words into the treaty where it suits its convenience. While defending its AFA provision, the United States has effectively requested this Panel to insert the sentence "the provisions of Annex II of the AD Agreement shall be observed in the application of this paragraph" into Article 12.7 of the SCM Agreement. The United States completely fails to appreciate the subtle difference between using Annex II of the AD Agreement as a contextual reference to interpret Article 12.7 and adding words to the SCM Agreement. Even where Annex II to the AD Agreement refers to the fact that non-cooperation ***could*** lead to inferences that are less favorable to the party concerned, the United States modifies this language to assert that non-cooperation ***would*** lead to inferences that are less favorable to the party concerned. Yet, in defending against India's first "as such" claim, despite the fact that list of factors governing "commercial considerations" in Article XVII GATT and "market conditions" in Article 14(d) of the SCM Agreement are identical, surprisingly the United States requests the Panel to ignore the same.

6. Even on the 'as applied' claims, the United States would have the Panel to allow members to take extremely unreasonable positions. For instance, the United States sought information from the interested parties about prices prevailing in India for iron ore and even where the parties did produce this information, the United States did not consider them at all in its determinations and when questioned, the United States informs the Panel in paragraphs 35 and 37 of its opening statement at the second substantive meeting that this failure is to be attributed to interested parties not requesting the United States to use the said prices. The United States also asserts that such price lists are not good benchmarks because they are not actual transaction prices and yet, the United States was willing to use negotiation prices, that are not actual transaction prices, reflected in the Tex Reports as benchmarks.

7. The determinations under challenge before this Panel reflect several more glaring instances of unreasonable application of the provisions of the SCM Agreement, including those relating to the calculation of benefit and the application of the facts available standard. Particularly on the aspect of calculating benefit, since 2006, the United States has applied prices of iron ore or coal exported from outside India as benchmarks and the comparison of the United States involved adding international ocean freight to the benchmark while domestic freight to the prices under challenge. This would mean that countervailing duty is effectively imposed on ocean freight since international freight could often be more expensive than domestic freight. In other words, the United States countervailed a service which is not even provided by Government of India under the garb of investigating subsidies provided for goods. An even more alarming example is the United States' approach when determining the amount of benefit in the case of mining programs. The United States subtracted the cost of extraction of the ore (including reasonable profits) from the benchmark price of the ore to calculate benefit. If, therefore, the benchmark price is the same for two miners, an inefficient miner would have a lower benefit amount than an efficient miner. Rather than countervailing subsidy, the United States has adopted a method that has countervailed 'efficiency', which, by no stretch of imagination could have been the intent behind Article 14(d).

8. Therefore, India reiterates that irrespective of how the United States may perceive them, India's claims, both 'as such' and 'as applied', are grounded on the text and spirit of the SCM Agreement. India believes that the delicate balance envisaged in the treaty is reflected in its text and India seeks the indulgence of this Panel to interpret and apply the text of the SCM Agreement in accordance with customary rules of interpretation of the international law.

9. Mr. Chairman and Members of the Panel, this brings us to the end of India's closing statement. We once again thank you for your patient listening and the most efficient manner in which the proceedings have been conducted. We are also grateful for accepting India's request to provide an advance copy of the Panel's questions. We also thank the Secretariat for their hard work, and meticulous and effective assistance to the Panel. India would be pleased to provide responses to any further questions that the Panel may have.

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ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a balance between disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies. Applying U.S. laws and regulations consistent with the SCM Agreement, the U.S. Department of Commerce ("Commerce") determined that the Indian government, at both the central and state levels, provided a wide range of subsidies to Indian manufacturers of hot-rolled steel products. The U.S. International Trade Commission ("Commission") further determined that those subsidies resulted in material injury to the industry of the United States.

2. India claims that these determinations, and in some cases, the laws and regulations on which they were based, are inconsistent with the SCM Agreement. The United States will demonstrate in this submission and over the course of the proceedings before the Panel that India is incorrect. The United States believes that India's claims are without merit and that the Panel should find that the U.S. laws, regulations, and determinations that are properly within its terms of reference are not inconsistent with the covered agreements.

II. PRELIMINARY RULING REQUESTS

3. India raises claims in its First Written Submission that are outside the Panel's terms of reference. Specifically, India raises claims under Article 11 of the SCM Agreement that were not included in its panel request pursuant to Article 6.2 of the DSU and which failed to present the problem clearly, and which are therefore outside the Panel's terms of reference. India also raises claims regarding a Sunset Review determination issued by the Department of Commerce on March 14, 2013, which also was not included in India's panel request as required by Article 6.2. Accordingly, the United States respectfully requests that the Panel find that these claims are outside the Panel's terms of reference.

III. THE U.S. REGULATION FOR DETERMINING THE BENEFIT WHEN GOODS ARE PROVIDED BY A GOVERNMENT FOR LESS THAN ADEQUATE REMUNERATION IS CONSISTENT WITH ARTICLE 14(d) OF THE SCM AGREEMENT

4. First, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the first sentence of Article 14(d). India argues for a methodology of calculating benefit based on "cost to government." India's interpretation contravenes the text, particularly the title and *chapeau* of Article 14. The title of Article 14 states that the provision concerns "calculation of the amount of a subsidy in terms of the benefit to the recipient." The *chapeau* of Article 14 makes clear that an investigating authority must provide for a methodology in law or regulation that allows it to calculate "the benefit to the recipient." Moreover, Article 1.1 states that "a subsidy shall be deemed to exist" where there is "a financial contribution by a government or any public body" and "a benefit is thereby conferred;" no additional analysis focused on cost to government is required. Finally, the "cost to government" standard was already considered and rejected by the Appellate Body in *Canada – Aircraft*. In contrast to India's interpretation, Section 351.511(a)(2)(i)-(ii) of the U.S. regulation calculates the benefit from the provision of goods by a government by determining adequacy of remuneration with respect to the recipient.

5. Second, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the second sentence of Article 14(d). Rather than basing its argument on the actual text of Article 14(d), India argues that the U.S. regulation is inconsistent with text taken from Article XVII:1(b) of the GATT 1994. Such an approach should be rejected.

6. Third, India argues that Article 14(d) establishes a right of Members to provide goods for adequate remuneration without facing CVD measures. India misinterprets the text. Article 14 establishes procedural guidelines for Members' investigating authorities to follow when calculating the amount of subsidy in terms of benefit; to the extent the methodology or methodologies employed by an investigating authority are consistent with Article 14, this obligation has been satisfied.

7. Fourth, India argues that the U.S. regulation, by excluding government prices from the benchmark in some circumstances, is inconsistent "as such" with Article 14(d). The calculation of "benefit" requires that the financial contribution at issue must be excluded from the benchmark, and the prices of similar goods sold by private suppliers in the country of provision are to be the primary benchmark for calculating benefit.

8. Fifth, India asserts that Article 14(d) precludes out of country benchmarks. The text of Article 14(d) allows, and the Appellate Body has confirmed, where in-country private prices are not useable, an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision.

9. Finally, India argues that the U.S. regulation requires the countervailing of "comparative advantages." The United States understands India to mean that there may be factors for which a particular out-of-country benchmark needs to be adjusted before determining adequacy of remuneration in a particular market. The U.S. regulation allows for such adjustments and therefore is not inconsistent with Article 14(d).

IV. SECTION 351.511(a)(2)(iv) OF THE U.S. REGULATION PROVIDES FOR ADJUSTMENTS WHEN DETERMINING THE ADEQUACY OF REMUNERATION CONSISTENT WITH ARTICLES 14(d), 19.3, AND 19.4 OF THE SCM AGREEMENT

10. India claims that, by including delivery costs in the benchmark price, the U.S. regulation is inconsistent with Article 14(d), and consequently with Article 19.3 and 19.4. Commerce makes price adjustments for delivery charges for both the benchmark price and the government price. The U.S. regulation therefore ensures that the benchmark and the government prices are compared at the same point in the distribution chain, and is consistent with the adjustments for "transportation" set out in the second sentence of Article 14(d). The U.S. regulation is therefore not inconsistent with Article 19.3 and 19.4.

V. THE CUMULATION PROVISIONS OF THE U.S. STATUTE ARE NOT INCONSISTENT, AS SUCH, WITH ARTICLE 15 OF THE SCM AGREEMENT

11. Despite India's claims to the contrary, the cumulation provisions of the U.S. antidumping and countervailing duty statutes are not inconsistent, as such, with Article 15 of the SCM Agreement. These provisions of the U.S. statute, which permit the Commission to cumulate subsidized and dumped imports in original investigations and sunset reviews, are fully consistent with the text, object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries being injured by unfairly traded imports from a variety of sources. Although India claims that Article 15.3 of the SCM Agreement prohibits such an approach, nothing in the text of Article 15.3 prohibits, explicitly or implicitly, the cumulation of subsidized and dumped imports. Instead, the article only addresses the conditions under which an authority may cumulate imports from multiple countries that are subject to simultaneous countervailing duty investigations.

12. Additionally, with respect to the statutory provisions governing cumulation in sunset reviews, India's claims of inconsistency with Article 15 are premised on the mistaken belief that Article 15 is applicable to an authority's likely injury determination in sunset reviews. The Appellate Body has consistently rejected the view that the injury provisions of Article 15 of the SCM Agreement and Article 3 of the AD Agreement are directly applicable to an authority's likely injury determination in sunset reviews. Furthermore, India's as such challenge to the sunset provisions of the statute necessarily fails because the U.S. statute does not mandate cumulation in sunset reviews. Instead, the statute explicitly gives the Commission discretion not to cumulate any subject imports, whether dumped or subsidized, in a sunset review, even if the statutory

standards are met. As a result, India cannot establish that, in the sunset context, the U.S. statute mandates that action by the Commission that is inconsistent with the SCM Agreement.

VI. THE COMMISSION'S CUMULATION DETERMINATIONS FOR HOT-ROLLED STEEL IMPORTS FROM INDIA ARE NOT INCONSISTENT, AS APPLIED, WITH ARTICLE 15 OF THE SCM AGREEMENT

13. India also has no basis for the argument that the Commission's cumulation of subsidized imports of hot-rolled steel from India with dumped hot-rolled steel imports in its injury and sunset determinations was inconsistent, as applied, with Article 15 of the SCM Agreement. The SCM Agreement does not prohibit the cumulation of subsidized and dumped imports in original investigations or sunset reviews, as India claims. Again, cumulating all unfairly traded imports, whether dumped or subsidized, is consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by simultaneous unfairly traded imports from a variety of sources.

14. Furthermore, in its injury determination, the Commission did not fail to "evaluate" three factors (that is, growth, return on investment, and ability to raise capital), as contemplated by Article 15.4 of the SCM Agreement, as India claims. The Appellate Body has made clear that an authority is not required to make specific findings for each specified impact factor as part of its overall injury analysis. Instead, the Commission's report shows that it obtained and evaluated the data pertaining to the industry's condition, including the factors of growth, return on investment, and ability to raise capital, in the manner contemplated by Article 15.4.

VII. THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT AS SUCH WITH ARTICLE 12.7 OF THE SCM AGREEMENT

15. The United States submits that nothing in the U.S. statute or regulations regarding the use of facts available is inconsistent with the SCM Agreement. First, the U.S. statute and regulations at issue do not require the use of adverse inferences in selecting among the facts available. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation mandates action that is inconsistent with those obligations or precludes action that is consistent with those obligations. The text of the U.S. laws makes clear through use of the term "may" that Commerce has the discretion either to employ or not employ the use of an adverse inference in selecting from among the facts available. Because these provisions do not mandate the administering authority to take the actions challenged by India, India's "as such" claims must fail at the outset.

16. Notwithstanding the discretionary nature of the U.S. laws, the U.S. measures are consistent with Article 12.7. Article 12.7 enables investigating authorities to make determinations based on the facts otherwise available when interested parties and Members have failed to provide necessary information. India argues that Article 12.7 does not include an express provision concerning "adverse" facts available and therefore prohibits this practice. It further argues that authorities are bound to use the "best" information available, based on the context provided by Annex II to the AD Agreement. India's interpretation of Article 12.7 is wrong. Given the limited investigative powers of an investigating authority, Article 12.7 provides authorities with an essential tool for dealing with uncooperative parties, and ensures that an interested party may not evade the application of countervailing duties, or obtain a more favorable duty margin, through non-cooperation. Nothing in Article 12.7 limits the application of facts available to those facts that are most favorable to the interested party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Annex II of the AD Agreement does provide context regarding the use of facts available, but specifically allows that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

17. The U.S. measures allow Commerce to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" if it determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information". If Commerce relies on secondary information in making its determination, that information must be corroborated to the extent practicable. Other WTO Members have similar laws. Therefore, the

U.S. measures are not inconsistent with a proper interpretation of Article 12.7 of the SCM Agreement.

VIII. COMMERCE'S APPLICATION OF FACTS AVAILABLE WAS CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

18. India also challenges the program-specific subsidy rates that Commerce applied in the 2006, 2007, and 2008 administrative reviews, and claims that Commerce applied the U.S. measures in a punitive manner and made determinations without a factual foundation. In each of the challenged administrative reviews, it is undisputed that necessary information was not provided, as requested, and therefore Commerce properly resorted to the application of facts available under Article 12.7. In each case, Commerce examined the available evidence and, where there was no information to the contrary, Commerce reasonably inferred that the refusing party benefitted from the subsidy program in question, and benefitted at the same rate as a cooperating party was found to benefit in this proceeding, or, if necessary, another proceeding pertaining to India. These determinations were thus based on facts available on the record in the proceeding, and the refusal of these companies to provide *any* necessary information with respect to the benefits they received was properly taken into account in selecting from among the facts available. Therefore, India has failed to demonstrate the Commerce acted inconsistently with Article 12.7 of the SCM Agreement in making its determinations based on facts available.

IX. COMMERCE ACTED CONSISTENTLY WITH ARTICLES 1.1, 1.2, AND 14 WITH RESPECT TO THE PROVISION OF HIGH GRADE IRON ORE BY NMDC

19. First, India claims that Commerce's public body determinations in the challenged investigation are inconsistent with Article 1.1(a)(1) of the SCM Agreement because Commerce based its determinations on "[m]ere majority shareholding by government" or "solely" on "alleged control by a government." India fails to provide the Panel with arguments necessary to support its claims, because India relies on an erroneous interpretation of Article 1.1(a)(1). When interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU, the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. India has not presented any legal argument demonstrating that Commerce's determinations are based on an understanding of the term "public body" contrary to Article 1.1(a)(1) of the SCM Agreement, when properly interpreted.

20. Even if the Panel finds that India's interpretation of Article 1.1(a)(1)(iv) is appropriate, and that Commerce should have applied the test set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the United States respectfully requests the Panel to further find that the record evidence available during the investigation would support a finding that NMDC is a "public body." Specifically, the record evidence indicates that the NMDC is a public body because it is over 98% owned by India and has the authority to perform Indian governmental functions.

21. Second, India claims that Commerce's determination that India's provision of iron ore for less than adequate remuneration was specific to certain enterprises was inconsistent with Article 2. India argues that Commerce failed to establish that the provision of iron ore for less than adequate remuneration was used by a "limited number of certain enterprises." Article 2.1(c) specifically provides that *de facto* specificity may be found in light of the use of a subsidy program by a limited number of certain enterprises, and the *chapeau* of Article 2.1 clarifies that "certain enterprises" includes an "industry" or "group of industries." Therefore, where the recipients of a subsidy constitute an industry, only comparing producers of a similar product would be circular. Rather, under Article 2.1(c), a panel or investigating authority is to decide whether the recipients of the subsidy constitute a discrete segment of the economy and are therefore "certain enterprises." Commerce's determinations demonstrate that Indian users of iron ore constitute a discrete segment of the Indian economy.

22. India also argues that Article 2.1(c) of the SCM Agreement does not permit a *de facto* specificity finding where the inherent characteristics of the product, rather than the program itself, make the product useful only to certain enterprises. There is no basis in the text of Article 2.1(c) for such an assertion, and a WTO panel has already considered and rejected it.

23. India claims that Commerce failed to consider the extent of economic diversification in India, as well as the length of time high-grade iron ore has been sold in India, as required by the third sentence of Article 2.1(c). Commerce did account for the fact that India's economy is highly diverse and that only a limited number of enterprises use iron ore. Commerce also stated that the only industries that could receive the subsidy over time would be defined as part of the original, limited group of beneficiaries – those that use iron ore – and therefore further consideration of the duration of the subsidy was not necessary.

24. Additionally, contrary to India's assertions, Commerce's specificity determination concerning the GOI's provision of iron ore at less than adequate remuneration is substantiated by positive evidence and is consistent with Article 2.4 of the SCM Agreement.

25. Third, India claims that Commerce's benchmarks for determining whether the NMDC's sales of high grade iron ore were for less than adequate remuneration are inconsistent with Article 14. First, India argues that Commerce should have determined whether a benefit was conferred by using a "cost to government" standard. For the same reasons as discussed with respect to India's "as such" claim made on that basis, the argument should be rejected.

26. India also argues that Commerce improperly relied on out-of-country benchmarks because in-country price information was available. Commerce could not rely on this information because it was incomplete and would reveal proprietary data of an Indian respondent.

27. Finally, India argues that the world market prices used by Commerce were improper because they were not identical to the market conditions in the country of provision, that Commerce improperly countervailed India's "comparative advantage, and that including ocean freight and import duties is inconsistent with prevailing market conditions in India. Article 14 requires that world market prices relate or refer to, or is connected with, prevailing market conditions in the country of provision, not that the prices be identical. Second, for the reasons explained above, Commerce can and does make adjustments appropriate for factors India describes as "comparative advantage." Third, India's position that prices must be compared on an ex-mine basis would mean the price comparison would not reflect prevailing market conditions.

X. COMMERCE'S DETERMINATIONS THAT THE PROVISION OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL CONSTITUTES A FINANCIAL CONTRIBUTIONS, ARE SPECIFIC TO CERTAIN ENTERPRISES, AND PROVIDE BENEFITS TO THE RECIPIENTS ARE NOT INCONSISTENT WITH ARTICLES 12.5, 1.1, 1.2, 2, AND 14 OF THE SCM AGREEMENT

28. India claims there is no "captive" mining rights program for iron ore in India and that Commerce's findings of such a program are contrary to Article 12.5 of the SCM Agreement. The record evidence demonstrates that India has a captive mining programs for iron ore and coal, and by relying on that evidence, Commerce met its obligations under Article 12.5.

29. India also argues that the GOI's granting of mineral rights does not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii). As the Appellate Body has found, when a government provides a right to a good, the government "makes available" the good itself. As determined by Commerce, India provided the rights to iron ore and coal to steel producers, and therefore made a financial contribution within the meaning of Article 1.1(a)(1)(iii).

30. India claims that Commerce's specificity determination with regard to the provision of mining rights for iron ore and coal are inconsistent with Article 2 of the SCM Agreement. Record evidence demonstrates that India maintains captive iron ore mining programs that are *de facto* specific to the steel industry, and captive coal mining programs that are *de jure* specific to certain enterprises. As such, Commerce's determination of specificity was consistent with Article 2.

31. Finally, India argues that Commerce's calculation of the benefit for India's leasing of captive mining rights for iron ore and coal are inconsistent with Article 14(d) of the SCM Agreement. For the same reasons as above, India's argument that the calculation of benefit should be determined by reference to the cost to the government of the financial contribution should be rejected. India's argument that Commerce was required to compare the mining rights at issue to a benchmark based on mining rights values sourced in other countries is also incorrect. Commerce properly

relied on the cost of mining rights in the country of provision, comparing recipients' actual mining and delivery costs and profit, and comparing that result to a market benchmark.

XI. THE UNITED STATES COMPLIED WITH ARTICLES 1, 14, AND 22 OF THE SCM AGREEMENT WITH REGARD TO ITS FINDINGS RELATING TO THE SDF PROGRAM IN THE CHALLENGED DETERMINATIONS

32. First, India claims that Commerce's finding with respect to the SDF Managing Committee was inconsistent with Article 1.1(a)(1) of the SCM Agreement because neither the SDF Managing Committee nor the JPC was properly determined to be a public body in accordance with Article 1.1(a)(1). However, based on the record evidence, Commerce found that the SDF Managing Committee made all final decisions on loans, including setting the terms and approving waivers of SDF loans. Because this committee decided whether or not to provide loans to Indian steel companies at advantageous rates, and because this committee was comprised exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, even under the interpretation of "public body" set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, Commerce's determination is consistent with Article 1.1(a)(1), because the SDF Managing Committee performed governmental functions, and because the GOI exercised meaningful control over the SDF Managing Committee. Having made this determination, Commerce did not need to make an additional determination regarding entrustment or direction pursuant to Article 1.1(a)(1)(iv).

33. India also contends that the SDF loans cannot be considered "a direct transfer of funds" within the meaning of Article 1.1(a)(1)(i), because "the SDF levy was not [the GOI's] own fund and is not tax revenue." To the contrary, however, the facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. Consequently, the loans provided using these funds were "made available" to steel producers by the GOI, and therefore constituted a "direct transfer" within the meaning of Article 1.1(a)(1)(i).

34. India also claims that Commerce's benefit calculation in the challenged determinations were inconsistent with Article 14(b). India first challenges Commerce's benchmark calculation as comparing the amount paid for the SDF loans with the amount that Tata would have paid on a "comparable commercial loan" in accordance with Article 14(b) of the SCM Agreement. India's claim is without merit. Commerce properly used as a commercial benchmark interest rate an average of certain Prime Lending Rates, compiled and published by the Reserve Bank of India, for loans similar to the SDF loans in currency, structure and maturity, and this rate was comparable within the meaning of Article 14(b) of the SCM Agreement.

35. India also challenges Commerce's benefit calculation overall, in the challenged proceedings, as not accounting for Indian steel producers allegedly contributing their own funds and incurring certain costs to participate in the SDF program. Commerce acted consistently with Article 14 in not providing a "credit" in its benefit calculations for the funds that were levied on consumers and remitted by steel producers to the SDF fund, or any administrative fees incurred to obtain the SDF loans.

XII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 AND 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDY ALLEGATIONS EXAMINED IN ADMINISTRATIVE REVIEWS

36. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to its review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. In India's view, then, the United States was required to examine new subsidies programs only upon receipt of a complete written application complying with Articles 11.1, 11.2 and 11.9; that it was required to initiate a new investigation into these programs pursuant to Article 11.1; that it was required to invite India for consultations regarding its examination of these new programs pursuant to Article 13.1 as a result of its initiation of a new investigation; and

that it was similarly required to issue a public notice upon "initiation" of a new investigation in compliance with Articles 22.1 and 22.2. As a result of its having examined these subsidies programs instead in the context of administrative reviews, under Article 21, India claims that the United States has additionally violated Articles 21.1 and 21.2 of the SCM Agreement.

37. Because they are all premised on the same erroneous interpretation, each of India's claims under Articles 11, 13, 21 and 22 of the SCM Agreement must fail. Given the language and structure of the SCM Agreement, and the similar language and structure of the AD Agreement, findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*. The terms of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 indicate that their requirements apply to events occurring early on in an "investigation", and the provisions do not contain any reference that would broaden their scope to events or proceedings occurring after the completion of such an investigation. Furthermore, Article 21, which does apply to subsequent "review" proceedings, does not contain a reference incorporating these provisions of Article 11, 13 and 22. Therefore, India's claims regarding to Articles 11, 13 and 22 cannot succeed with respect to actions taken by Commerce in the context of administrative review proceedings. On the other hand, the purpose of subsequent reviews under Article 21 is to "examine whether the continued imposition of a duty is necessary to offset subsidization." By including in its reviews of this countervailing duty order allegations of additional subsidization programs with respect to the same product and the same companies at issue in the original investigation, Commerce acted consistently with that provision. For these reasons, the Panel should reject India's claims under Articles 21.1 and 21.2 of the SCM Agreement.

XIII. COMMERCE'S DETERMINATIONS WERE NOT INCONSISTENT WITH ARTICLE 22.5 OF THE SCM AGREEMENT

38. India argues that Commerce did not adequately explain its rejection of a few specific arguments put forth by the respondents with respect to the SDF program, captive mining rights for iron ore and coal, and the sale of high grade iron ore by the NMDC. Article 22.5 requires that an investigating authority must provide public notice of its determinations, including explanations of the legal and factual bases of the determination, and reasons for the acceptance and rejection of parties' relevant arguments. For each of the parties' arguments cited by India in its submission, Commerce explained the reasons for rejection, as explained in the portions of the U.S. submission corresponding to each of these subsidy programs. Thus, while India may disagree with the reasons provided in Commerce's determinations, the fact remains that Commerce did provide the information required under Article 22.5, and therefore did not act inconsistently with its obligations under that provision.

XIV. CONCLUSION

39. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

ANNEX C-2

ORAL OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. As can be seen from the length of the written submissions thus far, this dispute contains numerous claims and deals with often complex issues. Ultimately, however, this dispute concerns the "delicate balance" attained in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") "between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures."[1]

2. Throughout its first written submission, India has sought to dismantle the rights of Members to address the injurious effects of unfair trading practices, particularly those caused by subsidization, one of the most significant challenges faced by Members today. India has repeatedly asked the Panel to adopt novel – sometimes even radical – and unworkable interpretations of the SCM Agreement. In taking this approach, India seeks to impose restrictions on the application of measures to countervail subsidies in a manner that goes far beyond the agreement.

3. In contrast, the United States asks the Panel, consistent with its mandate from the DSB under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), to interpret the SCM Agreement in accordance with the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties so as to protect and maintain the balance of rights and obligations it contains. The United States appreciates well the balance struck in the SCM Agreement between Members that seek to impose more disciplines on the use of subsidies versus Members that seek to impose more disciplines on the application of countervailing measures. For example, while the United States appears before this Panel as a responding party, over the past year the United States has been a complainant in three disputes involving the imposition of countervailing duties, as well as both a complaining party and a responding party in disputes involving claims of WTO-inconsistent subsidies. The United States, therefore, seeks to maintain the integrity of the SCM Agreement and the balance established by that agreement.

4. We will not repeat here all the points made in the U.S. First Written Submission. Rather, today, we will address five issues, beginning with India's response to the U.S. preliminary ruling request.

I. PRELIMINARY RULING REQUEST

5. As the Panel is aware, the first U.S. submission included a request for a preliminary ruling, which addressed several claims in India's submission that were not contained in its panel request.

6. First, India has raised specific claims under multiple paragraphs of Article 11 of the SCM Agreement that reflect alleged "problems" not identified in India's panel request. As we discuss in our request for a preliminary ruling on this matter, in its request – under the very general heading "[i]n connection with other issues" – India stated that the United States has acted inconsistently with:

> Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.[2]

7. This very general summary – which does not even refer to a specific paragraph of Article 11, much less a specific obligation contained in one of those paragraphs – is not sufficient to present

[1] *US – DRAMS CVD (AB)*, para. 115.

[2] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*: Request for the Establishment of a Panel by India, WT/DS436/3 (13 July 2012).

clearly the claims India went on to raise in its first written submission. Those claims state that the United States breached Articles 11.1 and 11.2, as well as 11.9, "by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies". India's claims refer to specific subsidy programs, a specific administrative review, specific paragraphs of Article 11, and specific obligations contained within those paragraphs.

8. India attempts to argue in its response to the U.S. request for a preliminary ruling that the United States confuses a complainant's obligation under Article 6.2 to clearly present its claims with an obligation for the complainant to present its arguments. But it is India that misinterprets the requirements of Article 6.2. As the Appellate Body has found, where an article of a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to that article in a panel request may not reveal which of those obligations is at issue.[3] Such is the case here.

9. Article 11 of the SCM Agreement deals with "Initiation and Subsequent Investigation." This is a very broad category covering many disparate obligations contained within 11 paragraphs and spread over several pages of the SCM Agreement. Given the variety of claims that may be raised under this Article, India's cursory reference to Article 11 and the brief statement included in its panel request fall far short of India's requirement to "present the problem clearly."[4]

10. India also attempts to shield itself from any failure to meet the requirements of Article 6.2 of the DSU by claiming that the United States was not prejudiced in the preparation of its defense by India's deficient panel request. However, it is not necessary for a panel to find that a party has been prejudiced in order to find that a panel request fails to satisfy Article 6.2 of the DSU. Article 6.2 does not include any qualification or exception indicating that its obligations will only apply under certain circumstances. In particular, Article 6.2 does not provide for an exception in cases where it is not demonstrated that a party or third party has suffered prejudice. Rather, Article 6.2 applies to all panel requests.

11. And while some past panel and Appellate Body reports considered prejudice to be a relevant issue in assessing whether a panel request satisfied Article 6.2, more recently the Appellate Body has been clear: "the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing," and "a party's submissions during panel proceedings cannot cure a defect in a panel request."[5]

12. Second, the U.S. preliminary ruling request addresses the claims in India's first written submission respecting a "2013 sunset review determination." India does not include in its submission any citation or more specific reference to a U.S. measure. We surmise that India may be referring to the Department of Commerce's ("Commerce") final results in the most recent sunset review for *Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, and Thailand*. These results were issued by Commerce on March 14, 2013 – nearly a year after India requested consultations in this dispute, eight months after India submitted its request for the establishment of a panel, and one month after the composition of this Panel.

13. India claims in its response to the U.S. request for a preliminary determination that its panel request extends to this subsequent review, because it has included a reference to "amendments, implementing acts, or any other related measure" in its panel request. The inclusion of such a phrase is not sufficient to cover sunset reviews not included in the consultation or panel request. India's approach is contrary to the requirement in the DSU for requesting consultations on a measure before being able to request the establishment of a panel with respect to that measure. Furthermore, the Appellate Body has specifically found that "successive administrative, changed circumstances, and sunset review determinations… constitute separate and distinct measures, which therefore cannot be properly characterized as mere 'amendments' to those measures."[6]

[3] *Korea – Dairy (AB)*, para. 128.
[4] DSU, Art. 11.
[5] *EC – LCA (AB)*, para. 642; *citing EC – Bananas III (AB)*, para. 143; *US – Carbon Steel (AB)*, para. 127.
[6] *US – Zeroing (EC) (21.5) (AB)*, para. 192.

II. "AS SUCH" CHALLENGE TO THE U.S. BENEFIT REGULATION

14. Next, we turn to India's "as such" claims under Article 14(d) of the SCM Agreement. In particular, we will discuss India's efforts to avoid the result of calculating the amount of the subsidy in terms of the benefit to its steel producers in favor of a cost-to-government standard tailored to exclude India's subsidies programs. As discussed in the U.S. First Written Submission, India's arguments are without basis in the text of the SCM Agreement. India's argument has also been considered by, and rejected by panels and the Appellate Body in prior disputes – and the reasoning in these reports is persuasive.[7] This alone is more than sufficient to require a finding that India's argument must be rejected. Nonetheless, at today's meeting, the United States will add the point that the implications of India's arguments would be to undermine the disciplines on subsidies as set out in the SCM Agreement. Each argument India makes seeks to turn the Panel's attention away from the production inputs Indian steel producers have actually received and the remuneration they have provided for those inputs, in favor of a series of inquiries directed at the provider of the good. If accepted, India's arguments would mean that in situations where a government or public body has unique control over production inputs – in this case iron ore and coal, including mining rights – that government or public body would be able to provide those inputs to domestic producers at less than market value without a finding of "benefit" to the recipient.

15. India argues that benefit should not be determined with respect to the recipient, but rather with respect to whether the government or public body provided the good on the basis of "commercial considerations."[8] This appears to mean, in India's view, that so long as a government or public body is providing a good at cost or higher[9] – or perhaps just that the government entity or public body is profitable overall[10] – there can be no benefit to the recipient.

16. The United States recalls that the preferred benchmark for a benefit analysis is one based on the price for which a good is sold by private suppliers in an arm's-length transaction.[11] The reason for that preference is that a private, profit-maximizing seller will sell its good at the market-clearing price. As the Appellate Body has noted, "the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of *both* buyers and sellers in that market."[12] In contrast, India seeks a standard that ignores the preferred benchmark of a private price in favor of a standard based simply on some minimal level of profit.

17. In making such an argument, India implicitly acknowledges that a government or public body will not necessarily seek to maximize profit, but may be willing to provide the good in question for less than market value. In attempting to reinterpret "adequate remuneration" to constitute only a question of minimal profit, India attempts to carve out an exception from the SCM Agreement and allow its government and public bodies to provide inputs to its steel producers at less than market value.

18. Moreover, the logical conclusion of using a benchmark based on cost to or profit of the provider is that the more the government or public body makes transactions free of market discipline, the less likely a finding of benefit would be. For example, where a government or public body enjoys unique access to a good – such as control over mining rights of iron ore and coal – the result will be that the government or public body would also enjoy lower costs for acquiring those goods. A standard that simply considers whether the government or public body subsequently provides those goods to its producers at or above that artificially lowered cost will necessarily be unlikely to find that the recipient has received a benefit from that transaction, even when the recipient pays less for the goods than it would on the market.

19. In short, India first seeks to carve out a "cost-to-government" loophole in the SCM Agreement, a theory already rejected by the Appellate Body.[13] India then seeks to expand

[7] *See* U.S. First Written Submission, paras. 28-72.
[8] India First Written Submissions, paras. 23-32, 58-63.
[9] India First Written Submission, paras. 59.
[10] India First Written Submission, paras. 282.
[11] *US – Softwood Lumber IV (AB)*, para. 90.
[12] *EC – LCA (AB)*, para. 981 (emphasis added).
[13] *Canada – Aircraft (AB)*, paras. 154-156.

that loophole to allow a government to place goods under government control and, by virtue of that control, pass those goods to favored producers at a lower price without that transaction being considered a subsidy. To do so, India has recycled arguments that have been considered and rejected by panels and the Appellate Body as having no basis in the text of the SCM Agreement. India has gone so far as to attempt to invent a new benefit standard based on the text of an article of the GATT 1994 (namely, Article XVII) which is directed at state trading enterprises. The fact that India must look for support not to the SCM Agreement but to a different agreement demonstrates that India is seeking to alter Members' rights and obligations under the SCM Agreement in order to allow India to subsidize its steel producers by providing goods at less than adequate remuneration. India's efforts to do so should be rejected.

III. CUMULATION

20. India has also challenged U.S. measures permitting the International Trade Commission ("ITC") to cumulate the effects of dumping and subsidization for imports subject to simultaneous trade remedies investigations. As the United States explained in its first submission, however, the provisions of the U.S. statute governing cumulation in injury and sunset proceedings are fully consistent with the text of the SCM Agreement, when read in context and in light of the object and purpose of the Agreement. The text of Article 15.3 of the SCM Agreement does not discuss, let alone prohibit, the cumulation of dumped and subsidized imports, as India asserts. Rather, a full interpretive exercise that considers the context of Article 15.3, including Article 3.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), as well as the object and purpose of the SCM Agreement, demonstrates that the agreement permits the cumulation of dumped and subsidized imports.

21. Both the SCM and the AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury. And the Appellate Body has been clear that the availability of cumulation is meant "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account."[14] Given the aims of the cumulation provisions in both the SCM and AD Agreements, India's claim that Article 15.3 of the SCM Agreement prohibits the cumulation of both dumped and subsidized imports leads to an anomalous result whereby the same injury may be countervailed in some circumstances but not in others.

22. A simple example using some of the facts of these investigations will help to demonstrate this point. Assume that an injury investigation involves imports from five countries that are found to be subsidized. In this investigation, assume one Member, Country A, has a small volume of subsidized imports. Due to the small volume of imports, imports from this country might not themselves be causing material injury to the industry in a manner that would warrant the imposition of countervailing duties under the SCM Agreement. Under Article 15.3, however, an authority may cumulate imports from this country with the subsidized imports from the other four countries. In this circumstance, if the subsidized imports from all five countries are found to be materially injuring the industry, countervailing duties may be applied to each country, including those from Country A.

23. Now let's change the scenario slightly. Assume that the injury investigation involves imports from five countries that are each *dumping* their exports of the product, but only one of which (again, Country A) is found to be *subsidizing* its imports. In this scenario, assume the domestic industry is competing with the exact same volume of unfairly traded imports, and the imports are having the same volume and price effects on the domestic industry. Under this scenario, according to India's interpretation, the imports from Country A may be cumulated with the other dumped imports and made subject to antidumping duties but may not be cumulated with them and subjected to countervailing duties, even though imports from all five countries are unfairly traded and injuring the industry in exactly the same manner outlined in our first scenario.

24. The United States submits that there is no reasonable or logical rationale that can account for the difference in this outcome. A harmonious reading of Article 15.3 must lead the Panel to find against India on its claims with respect to cumulation.

[14] *US – OCTG from Argentina (AB)*, para. 297.

IV. PUBLIC BODY

25. India also claims that Commerce erred in applying Article 1.1(a)(1) of the SCM Agreement when it found subsidies to exist based on the activities of the National Mineral Development Company ("NMDC") and the Steel Development Fund ("SDF") Managing Committee. We have responded to India's arguments fully in our first written submission. In particular, we have explained that the proper interpretation of Article 1.1(a)(1) requires that a public body be an entity controlled by the government such that the government can use that entity's resources as its own. Despite our disagreement with the Appellate Body's interpretation of public body in *US – AD/CVD*, however, we think it bears repeating that India has not presented the findings in that case accurately.

26. India attempts to reframe the Appellate Body's findings in *US – AD/CVD* to mean that public bodies must not only exist within a "government framework," but that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[15] The basis for India's position appears to be that, because the Appellate Body relied on the definition of government in *Canada – Dairy*, and because the Appellate Body likened the role of a public body to that of a government, the definition of "public body" must therefore be limited to only those entities sharing the characteristics of the Dairy Boards at issue in *Canada – Dairy*.

27. India has misinterpreted the findings of the Appellate Body in *US – AD/CVD* in a way that results in a far more limited definition of public body. We recall that in *US – AD/CVD*, the Appellate Body was clear that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[16] Therefore, the Appellate Body itself did not intend to create an all-purpose, bright-line test. India's interpretation on the other hand would lead to a highly formulaic application of the SCM Agreement, and would allow Members to circumvent their obligations merely by foregoing an "express delegation" of governmental authority to an entity that would otherwise constitute a "public body."

28. In fact, the Appellate Body's findings in *US – AD/CVD*, with respect to state-owned commercial banks, directly refute India's proposed interpretation. With respect to China's state-owned banks, the Appellate Body found neither an "express delegation" of governmental authority, nor any evidence demonstrating that the banks had "the power to regulate, control, or supervise individuals, or otherwise restrain conduct." Rather, the Appellate Body upheld Commerce's finding that the state-owned banks were public bodies based on evidence demonstrating the government's *meaningful control* over them. The Appellate Body's interpretation was applied in a similar way in *Canada – Renewable Energy*, where the panel found that "the Government of Ontario has 'meaningful control' over Hydro One's activities in a way that confirms it is a 'public body.'"[17]

29. Therefore, while the Appellate Body did discuss "governmental authority" and the ways in which this authority may manifest itself, it did not, as India has argued, find that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[18] Rather, the Appellate Body focused on the meaningful control exercised by the government over state-owned banks. The United States urges this Panel also to focus its review in this case on the issue of control, and to find that an entity can be considered a public body where the government's control over the entity is such that it can use the entity's resources as its own.

V. USE OF FACTS AVAILABLE

30. India also challenges U.S. measures governing the use of facts available in countervailing duties investigations. In doing so, however, India not only misinterprets and misrepresents U.S. law, but wholly misunderstands the obligations of the SCM Agreement with respect to the application of facts available.

[15] India First Written Submission, para. 225.
[16] *US – AD/CVD (AB)*, para. 317.
[17] *Canada – Renewable Energy (Panel)*, para. 7.235.
[18] India First Written Submission, para. 225.

31. India argues that the U.S. measures "authorize using certain information simply because it may be adverse to the allegedly non-cooperating party."[19] This contention, however, is not supported by the text of the U.S. measures. To the contrary, as discussed in the U.S. First Written Submission, the U.S. measures set out specific requirements for and limitations on the use of facts available.[20] It is not the case that Commerce may use information "simply because it may be adverse"[21] to the interests of a responding party.

32. India also ignores other provisions, specifically within Annex II of the AD Agreement, that provide relevant context for understanding the meaning of the term "facts available." Most notably, Paragraph 7 of Annex II states, in relevant part, that "[i]t is clear … that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." Given that the respondent's non-cooperation has made *un*available the precise facts sought by the authority, inferences are a necessary and unavoidable element in selecting from, and applying, the *available* facts. In such a situation, Annex II confirms that the inferences drawn in such cases can lead to results less favorable to a party than if the party did cooperate. Such inferences are no different in the context of the SCM Agreement than they are in the context of the AD Agreement as confirmed by Annex II.

33. India also seems to understand Article 12.7 of the SCM Agreement, as well as Annex II to the AD Agreement, to require that when a responding party refuses to cooperate in a countervailing duty investigation, the responding party must in fact *benefit* from the *best* information available – from the responding party's perspective.

34. However, India takes the term "best information available" out of context. In doing so, India seeks to turn the right given to an investigating authority to rely on facts available into an obligation to put a responding party into a better position than they might have been in had they cooperated fully with the investigation.

35. In context, the term "best" facts available in Annex II refers to the most probative, relevant and verifiable facts which are timely submitted in the proceedings, and not to those facts which are most favorable to the respondent. This interpretation is supported by the substantive provisions of the Annex. Those provisions require an authority to take into account all information submitted that is verifiable and timely, and that can be used in the investigation without undue difficulty. It also prevents an authority from disregarding information that "may not be ideal in all respects", "provided the interested party has acted to the best of its ability".[22]

36. Therefore, the title of Annex II of the AD Agreement must be interpreted in light of all the safeguards contained in the Annex itself. In other words, the best information available is obtained through the application of the provisions of Annex II. India would turn these provisions on their head, and require an investigating authority to use certain information even if it cannot be verified, and even if has not been submitted at all. For example, as can be seen from India's "as applied" claims, India believes that the SCM Agreement would allow a responding party to submit responses to questionnaires during an initial proceeding, and then require the same information serve as the basis for all subsequent reviews. Commerce would therefore be required to *assume* that a party's circumstances have not and will not change, rather than to verify that such is the case.

37. Such an interpretation is clearly unworkable and would tie the hands of investigating authorities to the point of undermining countervailing duty investigations altogether. India's interpretation would further provide an incentive to producers and exporters to withhold unfavorable information to achieve more favorable countervailing duty rates, and simultaneously frustrate the efforts of the investigating authority to calculate the amount of subsidy accurately. We therefore urge the Panel to examine the U.S. measures *on their face*, and to apply to them a proper interpretation of the SCM Agreement, based on its text, in context, and in light of the object and purpose of the SCM Agreement.

[19] India First Written Submission, para. 178.
[20] U.S. First Written Submission, paras. 171-175.
[21] India First Written Submission, para. 178.
[22] AD Agreement, Annex II, para. 5.

VI. CONCLUSION

38. Mr. Chairman and members of the Panel, this concludes the opening statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. As has been found by panels and the Appellate Body on numerous occasions, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a "delicate balance" between disciplining the use of subsidies and countervailing measures while, at the same time, enabling Members whose domestic industries are harmed by subsidized imports to use such remedies. India's claims, and its submissions throughout this proceeding, have revealed India's intention to skew this delicate balance in its own favor, by asking the Panel to adopt novel - sometimes even radical – interpretations of the SCM Agreement. Consistent with its obligations under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the United States asks the Panel to deny India's claims, and to protect and maintain the balance of rights and obligations attained by the negotiators of the SCM Agreement.

II. INDIA HAS NO BASIS FOR ITS CLAIMS THAT SECTION 351.511(a)(2) OF THE U.S. REGULATION IS INCONSISTENT "AS SUCH" WITH ARTICLE 14(d) OF THE SCM AGREEMENT

2. In this dispute, India makes several claims with respect to the consistency of Section 351.511(a)(2) – the U.S. regulation for determining the benefit when goods or services are provided by a government for less than adequate remuneration – with the guidelines contained in Article 14(d) of the SCM Agreement.

3. The text of Article 14 does not support calculating the benefit based on a cost-to-government analysis. India offers several flawed textual interpretations to advance its argument that Section 351.511(a)(2) is "as such" inconsistent with the Article 14(d) guidelines. In its responses to the Panel's first set of written questions, for example, India remains steadfast in advancing – incorrectly – a cost-to-government test in determining whether a government provides a good or service at less than adequate remuneration within the meaning of Article 14(d); an argument which is clearly incorrect based on the text of the Agreement as well as prior panel and Appellate Body reports. In response to Panel Question 4, India further provides a matrix – purporting to divide the benefit calculation for goods or services into a two-step process – in an attempt to support its argument.

4. These claims are premised on its misinterpretation of the text of Article 14(d). For example, in response to Panel Question 4 India claims that, in some instances, an investigating authority may not be entitled to find a benefit even where remuneration is determined to be inadequate. Under a proper interpretation of the Article 14(d) guidelines, however, where an investigating authority determines that a financial contribution by a government has been conferred and that the adequacy of remuneration is insufficient, an investigating authority *may* find that the amount by which the private, arm's-length benchmark price exceeds the government price is a benefit under the SCM Agreement.

5. India also attempts to support its interpretation of Article 14(d) through a flawed textual distinction between Articles 14(b)-(c) and 14(d), by erroneously arguing that the term "in relation to" contained in Article 14(d) means that the benchmark analysis under Article 14(d) is somehow fundamentally different from that under Articles 14(b) or (c). In making this argument, India ignores the parallel structure of paragraphs 14(b), (c) and (d). India also argues that while under paragraphs 14(b) and (c) the investigating authority will find the existence of a benefit "the moment there is a difference in the amounts being compared," Article 14(d), on the other hand, employs a "much broader and more comprehensive framework." Contrary to India's assertions, in a manner equivalent to 14(b) and (c), the text of the Article 14(d) guidelines provided that where the government price is more favorable than the benchmark, a benefit has been conferred.

6. There is furthermore no support for equating the phrase "commercial considerations" in Article XVII of the GATT 1994 with "prevailing market conditions" in Article 14(d). India's position that the phrase "in relation to prevailing market conditions" – the terms actually contained in Article 14(d) – really means "in accordance with commercial considerations" reflects India's mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. In particular, India again incorrectly asserts that the Panel's findings in *Canada – Wheat* support the substitution of these terms.

7. In the United States view, Section 351.511(a)(2) is consistent with Article 14's preference for using private prices for the benchmark when determining whether a good is provided at less than adequate remuneration. India has no basis for challenging the hierarchical structure of Section 351.511(a)(2). With respect to India's arguments that an import price actually paid by a producer in the Indian market is an out-of-country price, and that the inclusion of delivery charges is somehow improper, India argues that "prices emanating from countries other than the country in question represent 'out of country' prices." Prices for imported goods, which are paid by domestic purchasers, however, are in fact in-country prices; it is for this reason that under the U.S. regulation an actual import price is considered a Tier I price – a price, which emanates in the "country in question." India's contention that import prices automatically are Tier II or out-of-country prices (referring to the language in *US – Softwood Lumber IV (AB)*) is both factually incorrect and inconsistent with the realities of domestic markets.

8. Moreover, India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. Under the SCM Agreement, the adequacy of remuneration is assessed with respect to the *recipient,* and the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation. India likewise argues that if the government price is an ex-mine price, any charges associated with the delivery of goods should not be considered in the benefit calculation. However, this argument fails because an ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the factory in setting the market negotiated price. India's interpretation would not be in accordance with the purpose of the Article 14(d) benchmark comparison – which is to assess whether the recipient is better off than it would have been absent that financial contribution. Commerce's benefit regulation is consistent with the guidelines contained in Article 14(d) of the SCM Agreement.

III. INDIA'S ARGUMENTS REGARDING COMPARATIVE ADVANTAGE HAVE NO MERIT

9. In its response to Panel Question 13, India continues to assert an alleged "comparative advantage" that must be accounted for in both the use of a Tier II analysis under Section 351.511(a)(2)(ii) and the use of "delivered prices" under Section 351.511(a)(2)(iv). India, however, does not provide any evidence of an alleged comparative advantage, misuses the term "comparative advantage", and inappropriately relies on the Appellate Body report in *US – Softwood Lumber IV* throughout its first written submission and in response to question 13 of the Panel's first set of written questions.

IV. COMMERCE DID NOT ERR IN FINDING THAT NMDC PROVIDES IRON ORE FOR LESS THAN ADEQUATE REMUNERATION

10. In addition to its "as such" challenges to the U.S. regulation, India has made multiple "as applied" claims, including those with respect to: Commerce's determination that NMDC's sales of high grade iron ore conferred a benefit, Commerce's determination that the provision of captive mining rights for iron ore and coal was for less than adequate remuneration, and Commerce's benefit calculations in the challenged proceedings. As discussed in the U.S. first written submission, many of these claims echo the flawed arguments put forward by India in its "as such" challenge.

11. With respect to India's claims that the NMDC's sale of high grade iron ore did not confer a benefit consistent with Article 14(d) of the SCM Agreement, India's objections lack basis. Commerce appropriately calculated the benefit for the NMDC's provision of iron ore at less than adequate remuneration in the 2004, 2006, 2007 and 2008 administrative reviews. In each of these reviews, there were no private, arm's-length prices ("Tier I" prices) for high grade iron ore and lumps in the Indian market in the record evidence submitted to Commerce. With respect to the DR-CLO ore benchmarks, on the other hand, private arm's-length prices were available and on record, which meant that Commerce was able to use such actual "Tier I" BCI prices. For all of the above, Commerce compared the respective private benchmark prices to the NMDC prices on an apples-to-apples basis in order determine whether and to what extent NMDC prices were less than adequate remuneration.

12. The United States did not, as India argues in its response to questions 17 and 19, artificially inflate the benchmark by adding in unnecessary delivery costs or, as India argues in response to question 20, by ignoring evidence on the record of private arm's-lengths transactions. In response to question 20, India further argues that the explanations offered by the United States in its first written submission are "ex-post facto rationalizations". But it is India and not the United States that is trying to add new arguments to the matters considered during the administrative proceeding. During the administrative proceedings at issue, none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks. India raises this argument only now. With regard to the price quote from Tata, the second piece of evidence cited by India, the United States notes that 22 of the 24 pages of the exhibit relied on by India – Exhibit IND-70 – are not, as India asserts, public documents. Rather, they are business confidential documents subject to administrative protective order (APO). Accordingly, the pricing data in the document was confidential and could not be used as a benchmark for any other party's transactions.

13. Further, not only is the data confidential but the data cannot be used as benchmarks because they do not reflect actual private, arm's-length transactions. Instead, these documents merely contain a price quote and not a completed transaction. Therefore their contents have no bearing, as India would purport, on the availability of a public in-country arm's length private price in India with respect to the challenged determinations.

14. Finally, with respect to the application of Section 351.511(2)(a)(iv), the U.S. provision which adjusts for delivered prices, the guidelines contained in Article 14(d) contemplate an apples-to-apples comparison by directing Members to account for prevailing market conditions - including transportation – in assessing the adequacy of remuneration. These charges are an integral and inseparable part of determining a benchmark price that reflects prevailing market conditions in the country of provision.

V. COMMERCE'S FINDINGS WITH RESPECT TO SPECIFICITY WERE CONSISTENT WITH THE SCM AGREEMENT

15. India makes a series of challenges under Articles 2.1 and 2.4 of the SCM Agreement to Commerce's specificity determinations with respect to the GOI's sale of iron ore and captive mining programs. With respect to Commerce's finding that the NMDC iron ore program was used by a limited number of certain enterprises, the record evidence demonstrates that almost all of the iron ore consumed in India is used for the production of steel, by steel and pig and sponge iron producers. Article 2.1 provides that specificity may be found if a subsidy program is "use[d] by a limited number of certain enterprises." The question before an investigating authority is whether the enterprises or industries are "a sufficiently discrete segment" of the "economy in order to qualify as 'specific' within the meaning of Article 2 of the SCM Agreement." In the 2004, 2006, 2007, and 2008 administrative reviews, Commerce found that the GOI's provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore. Further, the record evidence showed that 76 percent of the iron ore was used by steel producers. Therefore, positive evidence demonstrates that a limited number of certain enterprises, when compared to the diverse economy of India, use the NMDC iron ore program.

16. India also incorrectly argues that if the "inherent characteristics" of a good limit its use to a limited number of certain enterprises, the provision of that good cannot be found to be specific. Yet there simply is no basis in the text of Article 2 for prohibiting findings of specificity based on the good's "inherent characteristics." Rather, as previous panels have correctly found, when the

good provided by the government is of limited utility, it is more likely that a subsidy is conferred on certain enterprises. Finally, with respect to India's arguments that the last sentence of Article 2.1(c) required Commerce to specifically address the diversification of the Indian economy and the duration of the program, India's assertions are incorrect and contrary to the findings of previous panels with respect to this provision. Commerce in fact did take account of these factors but, in the context of a *de facto* specificity analysis, was not required to address them explicitly in its determinations.

17. India repeatedly denies the existence of a captive mining program for iron ore despite record evidence. India further argues that absent a "captive" mining program for iron ore, mining rights are generally available under India's mining lease laws and thus not specific under Article 2 of the SCM Agreement. This argument has no merit. The record is replete with evidence confirming the existence of a captive iron ore mining policy for four of India's largest steel makers; in particular, two extensive reports regarding the Indian steel industry, which were commissioned by the GOI: the *Dang Report* and the *Hoda Report*, as well as newspaper reports identifying the four steel companies who have been granted captive mining rights pursuant to India's captive mine policy. Commerce's finding that India does have a captive mining program for iron ore was based on record evidence, and Commerce thus has a sound basis for finding that the program is *de facto* limited to a few steel companies.

18. Moreover, contrary to India's assertions, record evidence demonstrates that Tata Steel's captive mining rights for coal are subject to India's law on captive mining of coal. In its response to question 25 of the Panel's first set of written questions, for example, India avoids answering the Panel's yes or no question regarding whether record evidence demonstrates the existence of a captive mining program for coal. As explained in the U.S. first written submission, the GOI's provision of a captive mining lease to Tata was specific, as defined by Article 2.1(a) of the SCM Agreement.

VI. U.S. CUMULATION MEASURES ARE NOT INCONSISTENT AS SUCH, OR AS APPLIED IN THE UNDERLYING HOT-ROLLED STEEL PROCEEDINGS, WITH ARTICLE 15 OF THE SCM AGREEMENT

19. In its submissions to the Panel, India has presented "as such" and "as applied" claims under Article 15 of the SCM Agreement with respect to cumulation in original investigations and sunset reviews. As demonstrated in the U.S. first written submission and in the U.S. answers to the Panel's questions, India's claims are unfounded.

20. India's as such and as applied claims under Article 15 of the SCM agreement with respect to the cumulation of subsidized and dumped imports in sunset reviews must fail because Article 15 does not apply to sunset reviews. India included in its Panel Request a challenge to the U.S. statute and the Commission's sunset determination under Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement to the U.S. statute and the Commission's sunset determination. These provisions, however, only govern injury determinations in original investigations, and do not apply in the context of sunset reviews. The SCM Agreement does contain obligations with respect to sunset reviews; those obligations, however, are set out in Article 21 of the SCM Agreement. India's panel request does not raise any Article 21 claims with respect to sunset determinations, and therefore any such issues are not within the Panel's terms of reference.

21. In addition to the key difference between the SCM Agreement articles applicable to investigations and those applicable to sunset reviews, the United States notes that India misunderstands important factual differences between investigations and sunset reviews. Relying on *EU – Footwear from China*, India asserts that the determination in the sunset review relied on the determination in the original injury investigation, and therefore is "tainted" by the allegedly WTO-inconsistent original injury investigation. India's argument is illogical for two reasons. First, the sunset determinations for hot-rolled steel examined a different legal issue than that considered in the original investigation. The original investigation entailed an examination of whether subject imports during the original period of investigation materially injured the domestic industry or threatened it with material injury, while the sunset review involved an assessment of data during the period of the sunset review to determine whether the likely volume, price and impact of subject imports were likely to lead to continuation or recurrence of material injury to the domestic industry if the orders were revoked. Second, the Commission's determination in the sunset reviews

was based on a very different set of imports than was its original injury determination. In short, the original investigation and sunset review were distinct processes with different purposes.

22. With respect to the consistency of the U.S. cumulation measures in the context of original investigations, the United States submits that the text of Article 15.3 does not prohibit cumulation of dumped and subsidized imports in original investigations. Moreover, it is not possible, as a practical matter, for an authority to disentangle the effects of dumped imports from those of subsidized imports. The difficulty presented by India's interpretation of Article 15 can be seen from the fact that in many investigations, significant volumes of subject imports are both dumped and subsidized, as was the case in the hot-rolled steel investigations and reviews. In this situation, other investigating authorities, such as the Canadian International Trade Tribunal and the Australian Customs and Border Protection Service, have expressed the view that it is not possible to "disentangle" the injurious effects of the dumped and subsidized imports. Indeed, India acknowledges that it is not arguing that an authority must disentangle the effects of imports that are both dumped and subsidized. By taking such a position, India implicitly acknowledges the validity of the positions expressed by the United States in this dispute.

23. Therefore, India is incorrect in asserting that the United States in this dispute has stated or implied that disentanglement is possible. India's assertion is based on a misunderstanding of a discussion in the U.S. first written submission of volume trends and underselling levels of the subject imports in the steel investigations at issue in this dispute. In this portion of the U.S. submission, the United States was responding to India's partial portrayal of the record. In particular, the United States pointed out that the record of its original investigations showed the volume of subject imports found to be both dumped and subsidized represented 40% of all cumulated subject imports; that they represented nearly half of import growth during the period; and that they undersold the domestic like product in the same percentage of comparisons as the subject imports that were only found to be dumped. The United States further explained that the record data showed that the volumes of imports that were both dumped and subsidized, such as those from India, exacerbated the adverse effect on the domestic industry during the period of investigation. Nothing in this explanation, however, suggests that it was possible to disentangle the effects of these imports.

24. Based on the foregoing, the United States requests that the Panel find that the U.S. measures "as such", and "as applied" in the underlying countervailing duty proceedings, are not inconsistent with Article 15 of the SCM Agreement.

VII. THE UNITED STATES COMPLIED WITH ARTICLE 1 OF THE SCM AGREEMENT IN FINDING THAT THE SDF MANAGING COMMITTEE AND NMDC WERE PUBLIC BODIES

25. We have set out in the U.S. first written submission an interpretation of the term "public body" in Article 1.1(a)(1), based on a proper interpretation of that provision given its text, and in light of its context and the object and purpose of the SCM Agreement. Specifically, we have explained that the term public body refers to any entity controlled by the government such that the government can use the entity's resources as its own. The evidence on record in this dispute with respect to the NMDC and the SDF Managing Committee satisfies not only this interpretation of the term public body, but would satisfy any interpretation of that term, given the GOI's extensive involvement in and control over each entity, as well as the nature of the functions that each entity performs in India.

26. With respect to the SDF Managing Committee, the relevant facts with regard to the SDF Program are clear. The GOI established the SDF Program and its constituent committees to modernize the steel sector, and to ensure that there was a steady supply of certain types of iron and steel in line with government goals. Under the program, steel producers could only sell at the prices set by the JPC, and the JPC increased the prices for certain steel products and mandated that the additional funds "be remitted to the SDF." Companies that contributed to the fund were eligible to take out long-term loans at advantageous rates, and the terms and availability of these loans were approved by the SDF Managing Committee. In its final determination, Commerce found that the SDF Managing Committee was composed entirely of senior GOI officials, including the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. Because the SDF Managing Committee made all financial decisions with respect to SDF loans, and because this committee was composed exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the

SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, Commerce's determination is consistent with a finding that the SDF Managing Committee is a public body even under the standard set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties* because the SDF Managing Committee took actions that constituted governmental functions, and because the GOI exerted meaningful control over the SDF.

27. With respect to NMDC, India continues to misrepresent Commerce's determination that the NMDC is a public body by erroneously claiming that the determination is solely based on the fact that the GOI owns the NMDC. As was demonstrated in the U.S. first written submission, Commerce analyzed evidence regarding both ownership and control in making its finding that the NMDC was a public body, including evidence that the GOI was heavily involved in the selection of directors of the NMDC, and NMDC's own statement that the "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India." Therefore, India cannot deny that Commerce made its "public body" determination based on a finding of government control as well as government ownership. Moreover, even in the event that this Panel relies on the "government function" test enunciated by the Appellate Body in *US – Antidumping and Countervailing Duties*, the evidence clearly demonstrates that the NMDC performs a government function in India. In addition to the evidence of ownership and control discussed above, record evidence indicated that the Indian government, *i.e.,* the state and federal governments, owns all the mineral resources on behalf of the Indian public, and that the federal government has the final approval of the granting of mining leases for iron ore. Therefore, it is a government function in India to arrange for the exploitation of public assets, in this case iron ore, and the GOI specifically established the NMDC to perform part of this function.

28. Therefore, the Panel should reject India's claim that Commerce acted inconsistently with Article 1.1(a)(1) in finding that the SDF Managing Committee and the NMDC were public bodies.

VIII. THE SDF LOANS CONSTITUTED "A DIRECT TRANSFER OF FUNDS" WITHIN THE MEANING OF ARTICLE 1.1(A)(1)(I)

29. The facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers over which the GOI, through the SDF Managing Committee, had complete control. India has attempted to call this finding into question by presenting the transfer of funds to steel companies as a discrete and isolated action performed by the JPC, wholly divorced from the decision by the SDF Managing Committee that the funds should be transferred. India's argument draws artificial distinctions between the constituent committees of the SDF program, and would lead to a situation in which the managers of a company, for example, should be considered one entity, and the directors another. There is no basis in the SCM Agreement for drawing such artificial distinctions and no basis in the record evidence before Commerce for it to have made such a finding.

30. India attempts to obscure the straightforward facts, and has presented inconsistent arguments regarding whether the funds collected from steel consumers were "consumer funds" or "producer funds." Most recently, in its response to the Panel's questions, India has argued that the extra SDF price element collected from steel consumers constituted steel producers' "profits," and became part of the Indian steel producers' own funds when the purchase price was paid by consumers – and therefore was not analogous to a tax, as Commerce determined. However, this *GOI-mandated* levy can no more constitute a profit for steel producers than a government-determined sales tax collected on the sale of those goods could constitute profit. As explained above, the GOI required a levy to be added to the price of certain steel products, and also mandated that this levy be deposited in the SDF Fund after it had been collected by the producers. Thus, this levy, although it was collected as an extra price element, was never an extra *profit* amount determined by steel producers and intended for their use as they deemed necessary. Rather, it was a tax-like element mandated by the GOI and earmarked for the government-controlled SDF Fund. Based on the foregoing, India has not shown that Commerce acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement in making its determination.

IX. THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT "AS SUCH" WITH ARTICLE 12.7 OF THE SCM AGREEMENT

31. India's claim that the U.S. measures governing facts available are inconsistent "as such" with Article 12.7 of the SCM Agreement is in error. India has cited several of Commerce's determinations in an effort to show the United States takes the approach of "systematically drawing adverse inferences in all cases of non-cooperation". Despite these arguments, however, India has clarified that "it is not challenging the 'systematic application' as a measure", but rather is challenging the statutory and regulatory provisions themselves. Indeed, India cannot argue otherwise, given that its panel request does not include a challenge to Commerce's "practice", but to the U.S. statute and regulation. Therefore, India bears the burden to demonstrate that section 1677e(b) of the U.S. statute, and section 351.308(c) of Commerce's regulations, on their face, are inconsistent with Article 12.7 of the SCM Agreement. India has not done so, and its claims therefore must fail.

32. As an initial matter, the United States has demonstrated that Commerce holds discretionary authority with respect to the use of adverse inferences in selecting from among the facts available. India ignores the statements made by Commerce in promulgating the regulation at issue, dismisses the cited cases out of hand without explanation, and continues to insist that Commerce has drawn adverse inferences "in all cases of non-cooperation." Contrary to India's assertions, however, the cases cited by the United States document Commerce's exercise of discretion, and thereby demonstrate that Commerce holds discretionary authority under U.S. law. Indeed, India acknowledges that the language of these provisions is "discretionary". Therefore, India's cannot sustain its "as such" claims against these measures.

33. In any event, India has not demonstrated that the discretionary authority provided by the U.S. measures violates Article 12.7 of the SCM Agreement, as interpreted in its context, including Article 6.8 and Annex II of the AD Agreement. In this respect, we draw the Panel's attention to India's response to Panel Question 75, where India expressly recognizes that Article 12.7 permits authorities to apply what it terms "adverse facts," provided it is "demonstrated that those 'adverse facts' are the 'most fitting and appropriate' ones." India fails to explain, however, why the discretion to apply so-called "adverse facts" provided for in the U.S. measures breaches Article 12.7. The application of facts available occurs where certain necessary facts are *not available*. Other facts, therefore, as well as certain inferences, must be used in filling in the gap in the record before the investigating authority. Without the discretion to use an adverse inference, it is unclear how an authority would otherwise reach a determination in which "the most fitting and appropriate" "adverse facts" are applied.

34. Lastly, the United States reiterates its submission that Article 6.8 and Annex II of the AD Agreement provide relevant context to interpret Article 12.7 of the SCM Agreement, as recognized by the Appellate Body in *Mexico – Rice*. India agrees with this interpretation, but argues that "use of the word 'could' [in paragraph 7 of Annex II] only acknowledges that in cases of non-cooperation, the inferences / conclusions *may* result in findings that are less favourable to the party concerned." India fails, however, to recognize the logical extension of this statement: that inferences or conclusions that *may* result in such findings therefore can properly be reflected in an authority's legislation, as is the case here. For the foregoing reasons, India has no valid basis for its claims under Article 12.7 of the SCM Agreement.

X. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 OR 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDIES EXAMINED IN ADMINISTRATIVE REVIEWS

35. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to Commerce's review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. India's claims have no merit.

36. As explained in the U.S. first written submission, the SCM Agreement sets out a process by which Members may investigate instances of subsidization affecting its domestic producers and,

where appropriate, impose duties to countervail those effects. Once duties have been imposed, the SCM Agreement separately allows interested parties to request a "review" of those duties to determine whether they are still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, establishes that an "investigation" and a subsequent "review" of duties imposed pursuant to an investigation are two separate and distinct processes governed by separate provisions of the SCM Agreement. Indeed, panels and the Appellate Body have found this to be the case.

37. India has recognized the distinction between "investigations" and "reviews" under the SCM Agreement, and acknowledged that there are "categorical distinctions between an original investigation and a review proceeding under Article 21" and that "obligations applicable to original investigations will not necessarily apply to review proceedings." Nonetheless, India glosses over these distinctions – and ignores the text of the SCM Agreement – when it suggests, in response to Panel questions, that "[t]he United States may initiate and conduct the investigation against new subsidies alongside or part of review proceedings covering the old subsidies, while ensuring that the obligations under Articles 11 and 13 are complied with *qua* the new subsidies." While India states that it "is not concerned as to whether a separate docket is created for such new subsidy allegations," that is the practical result of India's claims. Even in its response to a direct question from the Panel, however, India has not explained how its novel interpretation of the SCM Agreement can be supported by the text, much less how it could work in practice.

XI. CONCLUSION

38. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF THE UNITED STATES - SECOND MEETING

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. In this statement, we will seek to clarify further some of the issues in this dispute. In particular, we will focus on India's arguments regarding the U.S. measures governing benefit both "as such" and "as applied", Commerce's specificity determinations, SDF loans as "direct transfers", cumulation of dumped and subsidized imports, and the interpretation and application of the U.S. "facts available" measures.

I. THE U.S. REGULATION, 19 CFR 351.511(a)(2), IS 'AS SUCH' CONSISTENT WITH ARTICLE 14(d)

2. For the reasons described extensively in the U.S. first written submission, responses to Panel's questions, and in the U.S. second written submission, India's position that Tiers-I and II of the U.S. regulation are 'as such' inconsistent with Article 14(d) of the SCM Agreement has no basis in the text of the SCM Agreement and is not supported by the findings in prior panel or Appellate Body reports. In short, India's entire mode of analysis is premised on a step that simply does not exist in the text of Article 14.

3. In its second written submission, India focuses its arguments on three textual points. First, India argues that structural differences between subparagraphs (b)-(c) and (d) of Article 14 contemplate a threshold step in Article 14(d) distinct from the "precise calculation method using an external benchmark" contained in subparagraphs (b) and (c). India has no basis for this distinction, and the United States would refer the Panel to the U.S. second written submission on this point.

4. Second, in noting that the terms "remuneration" and "benefit" are different words, India asks the Panel to accord separate "meaning to . . . the term *remuneration* and the fact that the U.S. law under challenge fails to look into the question of the *adequacy of remuneration* prior to calculating benefit." This argument has no merit. As already explained in the U.S. first written submission, while remuneration and benefit are distinct terms, they are related. The fact that the first sentence of Article 14(d) uses both terms does not mean that they are assessed from the perspective of different entities. Rather, the title to Article 14 make clear that when the financial contribution at issue is the provision of goods by a government, "benefit" is defined by the concept of "benefit to the recipient."

5. Third, in paragraph 15 of its second written submission, India notes that Article 14(d) relates to two different subsidy programs—both the purchase and provision of goods or services. India argues that the U.S. approach to assessing the adequacy of remuneration where the government is the purchaser of goods, is somehow inconsistent with the U.S. approach when the government acts as the seller. India is incorrect. With respect to government purchases of goods, the United States does not interpret Article 14(d) to require a cost to beneficiary analysis. Rather, where the government is the purchaser of goods, the comparison would be between the price the government paid for the product, and the price for which the recipient (of the benefit) could have sold the same product to another purchaser.

6. Moreover, in its second written submission, India adopts a new argument: that an assessment of prevailing market conditions requires an assessment of whether the behavior of the provider in some undefined sense can be commercially justified. This argument has no merit and, if India's position were adopted, would amount to a radical departure from the text of the Agreement for the following reasons:

7. First, India's argument assumes that for the purposes of the SCM Agreement, governments and private bodies should be treated equally. However, Members (acting through government, public bodies, funding mechanisms, or entrusted or directed private bodies) are bound by the disciplines of the SCM Agreement, and private entities are not. Moreover, Members may confer economic resources that result in negative impacts on other Members, and it is for this very reason that certain Member actions in the economic sphere are subject to the disciplines of the SCM Agreement. With respect to Article 14 specifically, the SCM Agreement ensures that the government prices are at least equivalent to market prices between private parties.

8. Second, in proposing that the price-setting behavior of governments be justified by undefined economic considerations, India seeks to carve out an unprecedented exception in the SCM Agreement. In India's view, governments have a sovereign right to set prices for goods or services as far below the market rate as they choose, provided this price-setting behavior can be justified on some sort of basis. But India's interpretation would seemingly allow a government to justify a less-than-market-price which results in driving private entities out of business on the basis that "commercial considerations" led the government to desire to expand its market share.

9. Third, India refers to this carve out from the disciplines of the SCM Agreement as an "inherent right" of governments to subsidize in any manner that they choose. The simple answer to India's argument is that this dispute is not about what types of subsidies governments may or may not, under whatever authority, determine to provide. India exercised its inherent sovereign right in agreeing to the disciplines of the SCM Agreement, and thus has agreed that other WTO Members may countervail subsidies it provides that cause injury to another Member's industry.

10. The United States offers the following additional comments on the structure of its regulation: Both the United States and India agree that the benefit calculations performed under Tier-III of the U.S. regulation are consistent with Article 14(d) of the SCM Agreement. India, however, argues that the regulation's preference for the application of a Tier-I or Tier-II analysis for the calculation of benefit is inconsistent with Article 14(d) insofar as it precludes the application of a Tier-III analysis. India's objections are without merit; they are based on India's flawed interpretation of the first sentence of Article 14(d), and India's oft-repeated, and unsupportable, insistence that the adequacy of remuneration must be assessed from the perspective of the provider of the benefit. Under the Article 14(d) guidelines, the adequacy of remuneration is assessed from the perspective of the recipient of the financial contribution and the hierarchical structure of the U.S. regulation is fully-consistent with this principle. The U.S. regulation appropriately begins with Tier-I, a preference for actual arm's length prices between private parties in the market of the economy of provision.

11. The crux of India's concern with the hierarchical structure of the U.S. regulation is its view that a government price that may be adequate under Tier-III should not be countervailed under another method, such as Tier-I or Tier II. However, if remuneration is less than adequate based on a comparison with actual arm's length prices between private parties, then a benefit has been conferred and, in such instances, the government price cannot be consistent with market principles. Application of the U.S. regulation will never lead to a result where remuneration which has been found to be inadequate under Tier-I or Tier-II will somehow be found to be adequate under Tier-III.

II. THE MANDATORY INCLUSION OF DELIVERED PRICES UNDER 19 CFR 351.511(a)(2)(iv) IS "AS SUCH" CONSISTENT WITH ARTICLE 14(d)

12. In paragraphs 36 through 45 of its second written submission, India continues to argue that the mandatory inclusion of delivery charges under subsection (iv) of the U.S. regulation is "as such" inconsistent with Article 14(d) of the SCM Agreement. The United States has addressed India's "as such" challenges to the regulation extensively in its previous submissions. We have the following additional comments:

13. First, in paragraph 38 India states that, "for reasons unknown and unsubstantiated, the United States assumes that the term 'delivery charges' covers only import duties." This statement is factually incorrect. As explained in detail in response to the Panel's questions 44 and 47, the term 'delivery charges' includes not only import duties (where appropriate) but, more specifically,

all of the delivery charges incurred by the producer to physically get the input to the producer's facility for use, which could include freight, import duties, or taxes. Second, India continues to argue in paragraph 39 of its second written submission that an apples-to-apples comparison could be completed at the ex-works level. An ex-works price does not include the costs incurred by the purchaser for getting a purchased input to its factory door and, therefore, is not reflective of the prevailing market conditions for that input from the perspective of the recipient.

14. Third, India states in paragraph 40 that "the 'delivered prices' of a domestic government provider can never be equal to or higher than such a benchmark price that includes international freight and import duties." This simply is not true. Indeed, India provides no evidence to support such a categorical statement. Fourth, India appears to be confused about what the factors listed in Article 14(d) mean. The non-exhaustive list of "prevailing market conditions for the good or service in question in the country of provision" in Article 14(d) includes price, quality, availability, marketability, transportation and, as India correctly points out, other conditions of purchase or sale. Thus, contrary to India's line of argument, the terms "availability" and "marketability", for instance, are not terms typically found in negotiated contracts.

15. Fifth, in both paragraphs 42 and 43 (in addition to others) India mischaracterizes the United States as making a "cost to exporter" (or "cost to producer") analysis. This is incorrect. The United States, consistent with Article 14 of the SCM Agreement, is making a benefit to the recipient analysis by comparing the prices that the recipient actually would pay for the benchmark product and the government product. Sixth, the United States would observe that the term "availability" is specifically included in the non-exhaustive list of prevailing market conditions identified in the second sentence of Article 14(d). For India to argue that adjustments to the benchmark with respect to "availability" are not contemplated in the text of the SCM Agreement is incorrect.

III. THE IMPOSITION OF COUNTERVAILING DUTIES IN RESPECT OF THE SALE OF HIGH GRADE IRON ORE BY NMDC IS FULLY CONSISTENT WITH ARTICLES 1.1, 2.1(c) AND 2.4 OF THE SCM AGREEMENT

16. Turning now to India's claims related to specificity, to recall, India argues that *de facto* specificity may only be determined under Article 2.1(c) where a subsidy is granted or enjoyed by a few enterprises as compared to a larger universe of similarly-situated entities otherwise capable of using that subsidy. This "comparative subset" argument simply is incorrect and India's previous arguments on this point have been adequately addressed in our previous submissions. We offer the following observations:

17. First, as clearly presented in our previous submissions, the United States disagrees with India's interpretation of Article 2.1 of the SCM Agreement. The passages of Appellate Body reports and selected negotiating documents of the SCM Agreement relied on by India to support its positions do not clarify the meaning of Article 2.1(c) do not address *de facto* specificity nor do they address specificity in the context of a financial contribution in the form of a provision of goods or services. Second, India is also incorrect in arguing that the text of Article 2.1(c) somehow mandates an order of analysis whereby an investigating authority is required to first apply the principles under Articles 2.1(a)-(b) before Article 2.1(c).

18. Third, there is no basis in Article 2.1(c) to support India's contention that the inherent characteristics of a good cannot limit its utility. There is no exception in the SCM Agreement allowing governments to provide goods, which, by their nature are of limited use, for less than market value. Fourth, India argues that in a *de facto* specificity analysis under Article 2.1(c), failure to require that a comparative subset of eligible entities be identified would result in "every form of supply of goods to be specific in all cases." Contrary to India's categorical assertions, specificity is assessed on a case-by-case basis and, under Article 2.1(c), will only be found where certain enterprises constitute a discrete segment of the economy of the Member granting the subsidy.[1]

19. India's two specificity arguments, including the one contained in section VII.C.2 of its first written submission effectively are the same: for both, India argues that the text of Article 2.1(c)

[1] *US – Upland Cotton (Panel)*, para. 7.1151.

requires that an investigating authority not only identify certain enterprises which are receiving the subsidy but also those eligible enterprises that are not.

20. In its second written submission, India continues to confuse the obligation of an investigating authority to take account of the factors identified in the second sentence of Article 2.1(c) with some sort of requirement that the authority's determinations must include a separate discussion of each factor. The United States met its obligation under Article 2.1 to take "account" of both the economic diversification of the Indian economy and the duration of the program in determining that the GOI provision of iron ore for less than adequate remuneration was *de facto* specific to a limited number of certain enterprises that used iron ore. Moreover, contrary to India's assertions, a Member does not and cannot "shirk" obligations by, as here, pointing out relevant facts on the record in a dispute.

IV. THE SALE OF IRON ORE BY NMDC CONFERRED A BENEFIT WITHIN THE MEANING ARTICLE 14(d) OF THE SCM AGREEMENT

21. Turning now to India's 'as applied' claims against the U.S. imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC, in its second written submission the United States wishes to highlight the following positions: First, India is incorrect that the explanations of the United States are *ex-post facto* rationalizations of the determination. The determinations on the record in this dispute contain complete and persuasive explanations for why Commerce determined that Indian steel companies received countervailable subsidies. The alleged pricing, party identification, and iron content information contained in these documents was incomplete; this data was therefore insufficient to be used in a Tier-I analysis which, contrary to India's assertions in paragraph 193, very clearly requires that a benchmark price be based on data from actual imports or actual sales. Second, India incorrectly states that the United States starts with the presumption that all government prices (even prices not under challenge) are suspect and ought to be rejected without any examination. India has ignored paragraph 66 of the U.S. first written submission, in which the United States explains that the United States does not always reject the use of government prices as benchmarks if the government prices are determined to be set by the market. For example, a government price set by a competitively run government auction is explicitly included as a possible benchmark under Tier I of the U.S. regulation.

22. Third, the United States takes issue with India's apparent new argument that Article 12.1 of the SCM Agreement requires an investigating authority to affirmatively use all information submitted by interested parties in calculating a benchmark, regardless of that information's veracity or usability. That claim is therefore outside the Panel's terms of reference, even aside from the fact that it would be untimely to raise arguments for the first time in its second written submission.

23. India's 'as applied' challenges to the use of delivered prices in the calculation of benefit for the sale of iron ore by NMDC are identical to the arguments presented in its 'as such' challenges to the U.S. regulation, subsection (iv), the paragraph that mandates adjustments for fully delivered prices. As India's arguments are the same, for the same reasons as explained above, these arguments are without merit and are not based on the text of the SCM Agreement. Therefore, India's 'as applied' claims on the use of delivered prices must also fail.

V. THE IMPOSITION OF COUNTERVAILING DUTIES ON THE GRANT OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL IS CONSISTENT WITH ARTICLES 12.5, 1.1, 1.2, 2 AND 14 OF THE SCM AGREEMENT

24. Article 12.5 of the SCM Agreement requires that "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based." While India has every incentive to deny the existence of a captive mining rights program for iron ore, Commerce satisfied itself as to the accuracy of information contained in the *Hoda* and *Dang* reports and therefore the U.S. actions fully complied with Article 12.5 of the SCM Agreement.

25. Further, India incorrectly argued that the Government of India did not provide iron ore or coal within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because there is no "reasonable proximate relationship" (as articulated by the Appellate Body in *Softwood Lumber IV*)

between the grant of mining rights on the one hand and the availability of the mined iron ore or coal on the other. India now argues that there is no reasonable proximate relationship because the royalty paid for the grant of mining rights is 9.03% of the total costs borne by the miner to enjoy the final minerals. Under Article 1.1(a)(1)(iii), the question regarding financial contribution is whether there was a provision of goods or services by a government or public body. The percentage of total cost represented by the financial contribution is not pertinent to this question. The price that the government charges in providing that exclusive right is not relevant.

26. India also argues that the GOI cannot be said to have provide iron ore or coal to miners if, in addition to royalty payments, miners must bear the costs of exploration, labor, and extraction. This requirement is nowhere in the text of SCM Agreement nor in the *US – Softwood Lumber IV* Appellate Body report. Analogously, making available iron ore and coal is the *raison d'etre* of the GOI's mining leases. India cannot distinguish this dispute on the basis of additional costs that a miner must incur to make the minerals marketable.

27. In paragraphs 218-219 of its second written submission India continues to argue that the GOI has not provided captive mining rights for coal to Tata Steel within the meaning of Article 1.1(a)(1) because the United States has not proven the non-existence of an alleged exemption to the Coal Mines Nationalization Act and the Ministry of Coal's guidelines for the allocation of captive coal blocks. As explained in the U.S. first written submission, Commerce properly determined that the law, as amended, clearly applies to *all coal mining leases*, without exception. It is India that has argued for the existence of an exemption for Tata, but yet has pointed to no evidence on the record of such an exemption.

28. India asks the Panel to apply a novel three-step analysis in examining whether the investigating authority properly determined specificity. India's proposed three-step standard of review is inconsistent with, and unsupported by, the text of the SCM Agreement. It also departs from prior Appellate Body findings. For example, India's third step appears to be taken from a misreading of the Appellate Body report in *US – Large Civil Aircraft*, wherein the Appellate Body's reference to the "broader legal framework" applied to determinations of *de jure* specificity in which there exist a legal framework to evaluate in the first place. Moreover, India's proposed methodology would amount to a *de novo* review of the facts on the record, requiring the Panel to substitute its judgment for that of the regulator.

29. In paragraph 225 of its second written submission, India continues to dispute Commerce's *de facto* specificity determination with respect to a captive mining rights program for iron ore on the basis that "the United States has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals." Here too India confuses the difference between *de jure* and *de facto* specificity under Article 2.1(a)-(b) and 2.1(c). Specificity determinations under Article 2.1(c) do not require that an investigating authority identify a specific piece of legislation, regulations, or guidelines pertaining to eligibility or amount of subsidy.

VI. THE UNITED STATES CORRECTLY CALCULATED THE BENEFIT FOR A PRICE OF EXTRACTED IRON ORE AND COAL, CONSISTENT WITH ARTICLES 1.1(b) AND 14 OF THE SCM AGREEMENT

30. In paragraph 231 of its second written submission, India argues that the GOI did not "provide" extracted iron ore or coal in accordance with Article 1.1(a)(1)(iii) but rather granted mining rights and that, consequently, the costs incurred by the miner in extracting iron ore and coal cannot form part of the benchmark calculation under Article 14(d). For the reasons explained above and consistent with the Appellate Body's findings in *US – Softwood Lumber IV*, by providing the right to extract iron ore and coal, the GOI provided recipients with iron ore and coal consistent with Article 1.1(a)(1)(iii). Commerce properly constructed the cost of the iron ore and coal to Tata and compared this constructed price to a world market price for iron ore and an actual import price for coal in order to determine whether the recipients of the mining rights received something "on terms more favorable than those available in the market." These calculations are fully explained in paragraph 515 of the U.S. first written submission. India's objections to the benefit calculations for mining rights are premised on incorrect interpretations of both Articles 1 and 14 of the SCM Agreement and therefore are without merit.

VII. THE U.S. CUMULATION PROVISIONS ARE CONSISTENT WITH THE SCM AGREEMENT

31. India's arguments regarding cumulation fail because the cumulation of subsidized and dumped imports that are subject to simultaneous injury investigations is consistent with the text and context of Article 15 of the SCM Agreement, read in light of the object and purpose of the SCM Agreement. India argues that the text of Article 15.3 does not permit cumulation of subsidized imports with dumped imports. However, the text of Article 15.3 does not address this type of cumulation at all, much less prohibit it. Both the SCM and AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury, and the Appellate Body has found cumulation to be "a useful tool for investigating authorities to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…" By identifying this policy as a critical rationale underlying the cumulation provisions of these Agreements, the Appellate Body has acknowledged that injury to the domestic industry might come from several sources simultaneously, and has recognized that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."

32. It is telling that India has not challenged the cumulation of imports that are simultaneously subsidized and dumped, even though this circumstance was presented by the underlying determination. If Article 15.3 permits a cumulated analysis of the effects of imports that are both dumped and subsidized in injury investigations, then Article 15.3 must also permit a cumulated analysis of all unfairly traded imports, whether subsidized or dumped. For, as the United States has explained, it is simply not possible, as a practical matter, for an authority to disentangle or unravel the dumping-related effects of dumped and subsidized imports from their subsidies-related effects, because the effects are precisely the same.

33. Finally, India mistakenly claims that the U.S. aggregated "negligibility" analysis is inconsistent with Article 15.3 because it requires the Commission to perform this analysis on an individual country basis. Neither Article 15.3 nor Article 11.9 of the SCM Agreement specifically defines the term "negligibility". Moreover, the parallel provision in the AD Agreement includes the same allegedly country-specific language, but goes on to set parameters for "negligibility" findings that explicitly contemplate an aggregated analysis. Given that there is no level of negligibility specified in the SCM Agreement, the U.S. statute's negligibility test is not inconsistent, as such, with the provisions of Article 15.3.

34. With respect to the U.S. sunset provisions and the Commission's sunset analysis, India's challenges have a simple and fatal problem: they were raised under Article 15 of the SCM Agreement, which does not apply to sunset reviews. As the Appellate Body has consistently found, for example in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Reviews*, the provisions of the Agreements governing dumping, subsidies, and injury findings in original investigations do not apply to an authority's likely injury analysis in sunset reviews. Therefore, India has no basis for either an "as such" or "as applied" challenge to these measures.

VIII. FINANCIAL CONTRIBUTION

35. India argues that the SDF loans are neither "direct," nor even a "transfer" of funds under the SCM Agreement, because the funds do not move "directly" from the SDF Managing Committee and because the SDF Managing Committee does not hold title to the funds such that it can "transfer" that title. However, there is no question that a loan made to an entity by a public body is a "direct transfer". Article 1.1(a)(1) includes "loans" in its illustrative list of direct transfers. Rather, India's arguments relate to which entity *made* the loan, and whether or not that entity was a public body. And as the United States has repeatedly pointed out, the record shows that the SDF Managing Committee, which is comprised exclusively of four government officials, made all the decisions regarding the issuance, terms and waivers of all SDF loans. Thus, while the JPC handled many of the day-to-day operations of the SDF program, the facts demonstrate, and Commerce found, that the SDF Managing Committee controlled the distribution of loans, and was therefore responsible for making the loans available to recipient companies.

IX. U.S. MEASURES REGARDING THE USE OF FACTS AVAILABLE

36. India claims in its second written submission that the United States "provides almost no substantive defense to India' (sic) claims" against the U.S. facts available provisions set out in paragraph 172 of its first written submission, and that we instead use the discretionary nature of the provisions as a "safe harbor". India's claims are patently wrong, as the United States has demonstrated repeatedly throughout its submissions.

37. First, we find it interesting that India refers back to these specific arguments, because two of the three arguments listed there reflect the panel's interpretation of Annex II to the AD Agreement in *Mexico – Rice*. India argues in its most recent submission, however, that the protections included in Annex II should not even apply in the context of the SCM Agreement. In addition to being incorrect, India's argument – if accepted – would mean that the entire legal premise of India's own facts available argument would disappear. This is because Article 12.7 of the SCM Agreement – standing alone and without context – provides no basis for India's facts available claim. It is the context of Annex II which provides the basis for a breach. But India cannot rely on certain elements of Annex II for context, while saying at the same time that paragraph 7 of Annex II – which explicitly notes consequences for non-cooperation – should be ignored. Rather, the United States agrees with other Members and the Appellate Body that Annex II of the AD Agreement is important context for interpreting Article 12.7. As we explained in our opening statement at the first panel meeting, the term "best" facts available – as used in the title of Annex II – refers to the facts that would be derived by an authority in its application of the protections contained in Annex II to the AD Agreement. In the U.S. view, these facts are those most probative, relevant and verifiable. The U.S. measures fully reflect these provisions.

38. Second, with respect to the third of the three bullet points in paragraph 172 of India's first written submission, the United States has consistently disputed India's assertion that the U.S. measures allow the punitive application of facts available, or apply the "worst possible inference". For example, India often refers to examples of application in which Commerce chose the highest subsidy rate found for another cooperating company from the same country, using the same program. The highest rate for a *cooperating* company is far from "the worst possible inference," and far from "punitive." Rather, in those instances, Commerce used a verifiable fact otherwise available – an actual subsidy rate – that reflected circumstances as similar as possible to those of the non-cooperating company. In reality, however, the non-cooperating party might have benefitted from the subsidy program to a *greater* extent than the parties that chose to cooperate and provide the requested information. By basing its determination upon verifiable facts, Commerce limits the extent of the inference it draws in making determinations based on facts available. Therefore, far from drawing the "worst possible inference", Commerce often may put the non-cooperating party in a *better* position than it would have been in had the party cooperated.

X. 2013 SUNSET REVIEW

39. India complains in its second written submission that the United States "offers no substantive response to the findings under challenge from the 2013 sunset review determination". However, in its own submission, India has not raised a single argument as to which findings the Panel should make, has not explained what evidence should be examined, nor described how the WTO Agreement applies. Rather, India simply states: "for substantially the same reasons as enunciated above, the entire set of findings in the 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement". India's claims with respect to the 2013 sunset review are "as applied" claims, which must be demonstrated on the facts. India has raised no arguments, much less informed the Panel and the United States of the findings it wishes to challenge. India has failed to even submit the measure to which it refers to the Panel as an exhibit. As the Appellate Body in *EC – Fasteners (China)* stated: "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel. While the DSU, and Article 11 in particular, require a panel to make an objective assessment of the matters that are before it, the panel must turn its attention to and direct its questions at claims and arguments that the parties have articulated." That is, the party itself must articulate its claims and arguments and cannot simply raise claims for the Panel to substantiate on its own initiative. In these circumstances, India has provided no *prima facie* case for the United States to rebut, and India's claims in this respect therefore must fail.

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ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

I. INTRODUCTION

1. Australia considers that these proceedings initiated by India under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant issues of legal interpretation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this submission, Australia addresses the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

A. THE MEANING OF THE TERM "PUBLIC BODY"

4. A material issue in this matter is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. In *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body reversed the Panel's finding that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means "any entity controlled by a government." The Appellate Body considered that this interpretation of "public body" lacked a proper legal basis.[1]

5. The Appellate Body concluded that a public body is an entity that **possesses**, **exercises** or is **vested** with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts, which may point in different directions.

6. Australia considers that the Appellate Body's conclusion suggests that a public body must meet one of three descriptions – an entity that **possesses** governmental authority, an entity that **exercises** governmental authority, or an entity that is **vested** with governmental authority. In Australia's view, these descriptions are alternatives to one another and are not cumulative. However, Australia acknowledges that the Appellate Body guidance on this is not clear.

7. For example, a statement was made by the Appellate Body that "being **vested** with, **and exercising**, authority to perform governmental functions is a core feature of a public body in the sense of Article 1.1(a)(1)".[2] It is not clear whether **possessing** government authority is included in this description of "a core feature of a public body". This statement also appears to suggest that in order to meet this description, an entity must both **be vested with**, **and exercise**, authority to perform governmental functions, whereas the Appellate Body's conclusion, as noted above, expressed these features as alternatives to each other.

8. In the same paragraph, the Appellate Body also made a statement that "being **vested** with government authority is the key feature of a public body".[3] It is not clear whether **possessing** government authority, or **exercising** government authority are also included in this description of "the key feature of a public body".

9. Another statement made by the Appellate Body in its analysis in forming its conclusion, was that in order for an entity to be able to give responsibility to a private body (entrustment), it must itself be **vested** with such responsibility.[4] This appears to suggest that in order to give

[1] Appellate Body Report, *US – AD/CVDs,* para. 322.
[2] Appellate Body Report, *US – AD/CVDs,* para. 310 (emphasis added).
[3] Appellate Body Report, *US – AD/CVDs,* para. 310 (emphasis added).
[4] Appellate Body Report, *US – AD/CVDs,* para. 294.

responsibility to a private body (entrustment), it may not be sufficient if an entity **possesses** and/or **exercises** such responsibility. Rather, it must be **vested** with it.

10. Australia would not support a view that an entity must be **vested** with governmental authority in order to be regarded as a "public body". This is because Australia considers that public bodies have government authority (without having to be **vested** with it). Australia is concerned to ensure that a focus on the idea of entities being **vested** with government authority is not used to artificially transpose the test for "entrustment or direction" onto the definition of "public body".

11. The discussion does not fully explain what the other features of a public body might be, and whether an entity might be considered a public body if it has other features even if not the core or key feature.

12. Therefore, Australia's view is that the discussion around core and key features is not clear. Australia considers that it may be useful for the Panel in this dispute to carefully examine again the term "public body" in the context of existing jurisprudence. One relevant criteria for examining a "public body" under Article 1.1(a)(1) of the SCM Agreement should be **to what extent** does the government control the entity.

13. India suggests the appropriate test for public body under Article 1.1(a)(1) for an entity is that:

(a) the entity has been vested with the power and authority to perform government functions; and
(b) the entity has the power and authority to direct or entrust a private body; and
(c) the entity is, in fact, exercising governmental functions, i.e. they can regulate control or supervise individuals, or otherwise constrain conduct.[5]

14. Australia considers that India's test does not reflect the jurisprudence on this issue. There is an important distinction between exercising governmental authority and whether an entity is performing governmental functions. In Australia's view, the Appellate Body's test for whether an entity exercises, possesses or is vested with governmental authority, does not require a determination by a competent authority as to whether an alleged public body is carrying out a governmental function for governmental purposes.

15. The Appellate Body has said that "Panel's or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a **proper evaluation of the core features of the entity concerned**, and its relationship with the government in the narrow sense".[6] Australia considers that this principle should frame the pursuit for clarity over the test for public bodies under Article 1.1(a)(1).

III. CONCLUSION

16. Central to this dispute are important issues of legal interpretation concerning aspects of the SCM Agreement, principally the meaning of the term "public body" as used in Article 1.1(a)(1). Australia is of the view that an entity should not be required to be **vested** with governmental authority in order to be regarded as a public body, but notes that the broad conclusion reached by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* can accommodate Australia's view.

[5] India First Written Submission, para. 234.
[6] Appellate Body Report, *US – AD/CVDs,* para. 317 (emphasis added).

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF AUSTRALIA

1. This dispute raises important issues concerning Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Duties* (SCM Agreement) and the definition of "public body".

2. Australia considers that the interpretation of "public body" could benefit from clarification following the Appellate Body's finding in *United States – Anti-Dumping and Countervailing Duties (China)* ("*US – AD/CVD*").

3. In *US – AD/CVD*, the Appellate Body said that a public body must be an entity that "possesses, exercises **or** is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[1] Australia agrees with this statement and considers that the test to establish a public body is not a cumulative three stage test and requires a case-by-case analysis.

4. Australia's interpretation of "public body" differs to that of India's in its First Written Submission, which suggests that the test **is** cumulative and that an entity must therefore possess, exercise **and** be vested with governmental authority to be a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.[2]

5. Australia is concerned that interpreting "public body" as a cumulative test in this manner narrows the meaning of the term in Article 1.1(a)(1) of the SCM Agreement and removes the flexibility for investigating authorities to consider whether a public body exists in a range of different contexts.

6. Australia also considers that government ownership, **in and of itself**, is not enough to establish that an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Rather, when looking to whether a government **possesses or exercises governmental authority**, a key feature for establishing a public body should be the nature and extent of government control over the entity, which is a broad analysis.

7. To date, Australia's position has been, and continues to be, that establishing the nature and extent of government control over a particular entity would require an investigation into a range of factors, including how an entity is managed, whether a government issues instructions to the entity and the degree of governmental oversight.

8. In essence, it should be possible to make a finding that a public body exists in law or in fact, so long as there is evidence to do so.

9. In that regard, the evidence needed to establish a public body will depend on the facts of each case. It will often require an investigating authority to look beyond the formal structure of the entity. For example, an investigating authority could look to evidence such as:

   a. relevant statutes or other legal instruments;

   b. the degree of separation and independence of an entity from a government, including the appointment of Directors; or

   c. the contribution that an entity makes to the pursuit of government policies or interests.

[1] Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 317 (emphasis added).

[2] India's First Written Submission, para. 234.

10. These examples of evidence, which are non-exhaustive, could potentially contribute to demonstrating whether a government has control over the activities and conduct of the entity in the sense of Article 1.1(a)(1) of the SCM Agreement.

11. Australia is not suggesting that these examples should constitute formal criteria to find a public body, whether individually or as a whole. Investigating authorities need flexibility to look at the facts of each individual case, and, based on available evidence, determine whether or not a public body exists.

12. In Australia's view, an approach which looks at the nature and extent of governmental control of an entity is consistent with the object and purpose of Article 1.1, which is to ensure that a subsidy provided by **any** public body within the meaning of Article 1.1(a)(1) is captured by the SCM Agreement.

13. Australia, in providing the Panel with its views on the meaning of "public body", has sought to look at the issue from a viewpoint that is both principled and practical for investigating authorities. Ultimately, investigating authorities within each Member State are the ones that need to apply these rules in the variety of different contexts in which they arise.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules.

II. PUBLIC BODY

2. In the panel and Appellate Body proceedings in *US – Anti-Dumping and Countervailing Duties (China)*, Canada, a third party in that dispute, argued that the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. Such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement.

3. Canada's interpretation gives sense to the reference to "public body" in Article 1.1(a)(1) because it maintains the *effet utile* of the term and distinguishes it from a "private body" entrusted or directed by a government in Article 1.1(a)(1)(iv). This interpretation also ensures that the disciplines of the SCM Agreement are given a sufficiently broad scope in terms of the entities to which they apply and as such prevents the creation of loopholes allowing for the circumvention of the disciplines of the Agreement.

4. The panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*. Regrettably, the Appellate Body reversed the panel's findings. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU.

III. SPECIFICITY

5. In the context of India's claims concerning the provision of high-grade iron ore, Canada disagrees with the interpretation of Article 2.1 of the SCM Agreement suggested by India. The ordinary meaning of the text of Article 2.1 does not require the use of "comparative sets" of "similarly-situated entities" in order to determine specificity. Article 2.1 is not a non-discrimination obligation, as India seems to suggest.

6. The language in the chapeau of Article 2.1 of the SCM Agreement provides that specificity must be determined in relation to "certain enterprises", i.e., an enterprise, industry or group of enterprises or industries, that received the subsidy. The panel in *US – Upland Cotton* found that the term "certain enterprises" refers to a "particular limited group of producers of certain products" and that a subsidy is provided to certain enterprises if the recipients of the subsidy constitute no more than a "sufficiently discrete segment" of the economy of the Member granting the subsidy.

7. Where the granting authority or the legislation pursuant to which the granting authority operates explicitly limits access to the subsidy to certain enterprises, the subsidy is specific under Article 2.1(a). According to Article 2.1(b), where neutral and objective criteria govern eligibility for a subsidy, thus making it broadly available, it is not limited to "certain enterprises" and not specific.

8. What makes a subsidy specific pursuant to Article 2.1(a) of the SCM Agreement is that it is only provided to an enterprise, an industry or group thereof that represents a sufficiently discrete segment of the economy. This determination as to whether a subsidy is limited to a sufficiently discrete group of recipients does not involve or require the establishment of sub-groups or pairs of similarly situated entities, resulting in a comparison of subsidy recipients versus similarly situated eligible companies that do not receive the subsidy, as India seems to suggest. Such an interpretation is not supported by the text of Article 2.1 of the SCM Agreement.

9. The panel's finding in *US – Softwood Lumber IV* when interpreting Article 2.1(c) of the SCM Agreement supports this interpretation.

10. Canada recognizes that a comparison may be required under Article 2.1(c) to determine *de facto* specificity. The second and the third of the four factors listed in the second sentence of Article 2.1(c), 'predominant use' and 'the granting of disproportionately large amounts of subsidy', are based on relational concepts. The application of these factors entails a comparison between sub-groupings of recipients of the same subsidy. This comparison, however, does not involve entities that do not receive the subsidy.

11. The subsidy at issue in this case is the provision of high-grade iron ore by NMDC at less than adequate remuneration to Indian steel companies. Based on the facts in the underlying investigation and reviews, Commerce inquired as to whether a limited number of industries received this subsidy, as required for a determination of *de facto* specificity under the first factor of Article 2.1(c). Contrary to what India argues, Commerce did not need to compare the group of recipient industries to another group of similarly situated industries to come to the conclusion that the number of recipient industries is limited. Thus, Commerce properly carried out the test established by Article 2.1(c) of the SCM Agreement.

12. Regarding India's argument that in its determination of *de facto* specificity, Commerce did not take into account the criteria in the last sentence of Article 2.1(c), Canada considers that the two factors in the third sentence of Article 2.1(c), although they may be of great significance for the determination of *de facto* specificity in some instances, do not warrant individual examination in every case. In particular, where it is well-known that an economy is highly diversified or that a subsidy has been provided over an extended period of time, these facts have likely been "taken into account" by the investigating authority in its analysis of *de facto* specificity under Article 2.1(c), even if they were not explicitly addressed in the determinations.

IV. THE USE OF FACTS AVAILABLE AND ADVERSE FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

13. Canada considers that Article 12.7 of the SCM Agreement allows an investigating authority to make determinations based on "facts available" to it. In some situations, facts available will include facts that are less favourable to a party than the facts that the party would have submitted itself, if it had responded in a timely and complete manner.

14. Reading Article 12.7 in the context of Annex II to the Antidumping Agreement, as suggested by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, confirms that the use of facts that are detrimental to the respondent is permissible.

15. An investigating authority's discretion to choose among the available facts is not unlimited. First, the authority must take into account all the "substantiated facts" provided by a party, even where they constitute an incomplete response to a question. Second, as the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice* stated, facts available may only be used where they "[…] reasonably replace the information that an interested party failed to provide". Most importantly, a determination must have its basis in facts. An investigating authority's determination must therefore always be based on *positive evidence* on the record.

16. An investigating authority should also be permitted to draw adverse conclusions, or inferences, under certain circumstances. Where a party withholds information, a reasonable and objective investigating authority may find that a party should not benefit from a lack of cooperation and use facts on the record in a way that is not favourable to a party.

17. This interpretation of Article 12.7 and Annex II is supported by the findings of the panel in *EC – Countervailing Measures on DRAM Chips*, which found that an investigating authority may be justified in drawing adverse inferences from the failure to cooperate of a party.

18. Canada considers that drawing of adverse inferences should not be in retribution against a party.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CANADA

I. INTRODUCTION

1. Canada thanks the Panel for the opportunity to present its views in this important dispute.

2. In this oral statement, we will discuss three issues: the use of benchmarks other than private prices in the country of provision to calculate an amount of benefit under Article 14(d) of the SCM Agreement, and very briefly, specificity and new subsidy allegations on review.

3. We will not address in our statement today the other issues raised in our written submission – the term "public body" and the use of adverse facts – but we stand ready to respond to any questions that the Panel may have on them.

II. THE USE OF OUT-OF-COUNTRY BENCHMARKS

4. Turning first to the use of out-of-country benchmarks. In establishing the adequacy of remuneration under Article 14(d) where a government provides goods, an investigating authority may, in very limited circumstances, use a benchmark other than private prices in the country of provision to calculate the benefit to the recipient.[1]

5. Prices other than private prices in the country of provision can be used only if it is established that market prices are distorted and the distortion is due to the presence of the government in the domestic market as a provider of the same or similar goods. In *US – Antidumping and Countervailing Duties (China)*, the Appellate Body stated that price distortion must be established on a case-by-case basis and that even where evidence indicates that the government is a predominant supplier of goods, evidence other than government market share must be considered.[2]

6. As to the benchmark used for establishing adequacy of remuneration where private prices are unavailable, the Appellate Body in *US – Softwood Lumber IV* accepted that alternatives may include world market prices or prices constructed on the basis of production costs.[3] The Appellate Body emphasized that where the investigating authority proceeds in that way, it must ensure that the "resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale".[4]

7. Canada considers that the use of an alternative benchmark based on a constructed price, using among other elements, costs of production, may be appropriate in some cases. This would apply where a constructed price reflects the market conditions in the country of provision of the good as set out in Article 14(d) of the SCM Agreement.

III. SPECIFICITY

8. We turn now briefly to the issue of determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement. In its determination of *de facto* specificity, an investigating authority needs to take into account the extent of economic diversification and the length of time the subsidy programme has been in operation. This does not mean that the investigating authority needs to address these issues explicitly in every case. Rather, those issues need to be addressed where they are raised by an interested party or where the facts of the case warrant an investigation.

[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[2] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[3] Appellate Body Report, *US – Softwood Lumber IV*, para. 106.
[4] Ibid.

IV. NEW SUBSIDY ALLEGATIONS ON REVIEW

9. Finally, Canada disagrees with India's argument that, where the same subsidized good is concerned, every new subsidy allegation requires initiation of a new investigation under Article 11 of the SCM Agreement. New subsidy allegations should be permitted during review proceedings where appropriate protection of due process rights is provided to interested parties.

10. Mr. Chairman, distinguished members of the Panel, this concludes Canada's oral statement. We thank you for your attention and would be pleased to answer any questions that you might have.

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. In this submission, China will present its views on the following three issues:

(i) Public body;

(ii) Input specificity; and

(iii) Adverse facts available.

II. PUBLIC BODY

2. In their respective First Written Submissions, India asserts that the United States' determination that National Mineral Development Corporation is a "public body" is contrary to Article 1.1(a)(1) of the *SCM Agreement*, relying principally on the Appellate Body's holdings in *U.S. – Antidumping and Countervailing Duties (China)*. But the United States seeks to reargue the interpretation of the term "public body". In light of the positions of the parties, China would like to submit its views in relation to the issue of "public body" in the following three subsections.

A. The Appellate Body's Definitive Interpretation of The Term "Public Body" in *U.S. – Antidumping and Countervailing Duties (China)*

3. In *U.S. – Antidumping and Countervailing Duties (China)*, the Appellate Body provided definitive interpretation of the term "public body", that is, a public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* "must be an entity that possesses, exercises or is vested with governmental authority".[1]

4. For the application of the above interpretation, the Appellate Body observed that evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function", and accordingly, "such evidence, alone, cannot support a finding that an entity is a public body".[2]

B. Relevance to This Dispute of The Appellate Body's Legal Interpretation

5. As noted by the Appellate Body, legal interpretation embodied in adopted panel and Appellate Body reports "becomes part and parcel of the *acquis* of the WTO dispute settlement system"[3], and as such, "create legitimate expectations among WTO Members" that "should be taken into account where they are relevant to any dispute".[4] Therefore, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[5] The Appellate Body further observed that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[6]

6. In China's view, it should be a non-controversial proposition that, at the very least, to merely advance arguments that the Appellate Body has already considered and rejected cannot justify the extraordinary step of departing from a legal interpretation embodied in a prior adopted Appellate Body report.

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[1] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 317.
[2] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 346.
[3] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[4] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[5] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[6] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.

7. Therefore, China submits that the legal interpretation regarding public body developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)* should be followed by the Panel in this case and should serve as the foundation for any findings regarding the public body determination at issue.

C. The U.S. *Ex Post* Rationalization

8. In its *First Written Submission*, the United States seeks to justify the USDOC's public body determinations on an "alternative" basis[7], which, in China's view, presents a classic definition of *ex post* rationalization and should be rejected by the Panel.

9. China respectfully submits that it is not the Panel's task to speculate on what the USDOC might have concluded had it applied proper interpretations of the *SCM Agreement* to the facts on the record. Nor can the United States seek to defend the USDOC's determinations based on a rationale other than the rationale that the USDOC adopted. The Panel should assess whether the USDOC had based its public body finding on majority ownership in the administrative reviews at issue. If so, the Panel should apply the legal standard provided by the Appellate Body in *U.S. – Anti-Dumping and Countervailing Duties (China)* and conclude that the United States has acted inconsistently with Article 1.1(a)(1) of the *SCM Agreement*.

III. INPUT SPECIFICITY

10. In this regard, China would like to submit its views on certain important aspects of the legal standards under Article 2 of the *SCM Agreement* that it deems relevant to this dispute.

A. The "Other Factors" Under Article 2.1(c) Must Be Evaluated on the Basis of a "Prior Appearance of Non-Specificity" Resulting from the Application of Article 2.1(a) and Article 2.1(b)

11. China submits that Article 2.1 contemplates an analysis in a manner that the assessment of *de facto* specificity under Article 2.1(c) must follow the initial appearance of non-specificity concluded as a result of the analysis under Article 2.1 subparagraphs (a) and (b). Therefore, an investigating authority is obliged first to consider the principles set out in subparagraphs (a) and (b), and may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity.

12. This is not a simple matter of form, but an important issue of substance. As the Appellate Body observed in *U.S. – Anti-Dumping and Countervailing Duties (China)*, "subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle," and "the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific."[8]

B. The First Factor of Article 2.1(c) Operates on the Predicate of A "Subsidy Programme"

13. China holds the view that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c). As explained by the panel in *EC and certain member States – Large Civil Aircraft*, "[i]t is apparent from the text of the first and second specificity factors that 'the subsidy programme' stands for the programme that must be considered when evaluating whether there has been 'use of a subsidy programme by a limited number of certain enterprises' or 'predominant use by certain enterprises'."[9]

14. As a result, in any evaluation of specificity under these two factors, logically, "the starting point should be the identification of the relevant subsidy programme."[10] Without first identifying

[7] United States' First Written Submission, para. 379.
[8] *U.S. – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 366.
[9] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.966.
[10] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.993.

the relevant subsidy programme, including its scope and content, the investigating authority is unable to know who the users of that program are and whether they represent "a limited number of certain enterprises" or "predominant use".

C. Article 2.1(c) Requires Consideration of the Two Factors in The Last Sentence

15. China submits that an investigating authority must take into account the two factors set forth in the third sentence of Article 2.1(c), namely, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation.

16. As the panel held in *U.S. – Large Civil Aircraft (2nd Complaint)*, each of the "other factors" set forth under Article 2.1(c) must be evaluated in light of the two factors described in the third sentence.[11] Therefore, the requirement that the two factors set forth in the third sentence of Article 2.1(c) must be considered is clear and unambiguous. If an investigating authority skips the mandatory consideration, the panel should find that the investigating authority has acted inconsistently with Article 2.1(c).

IV. ADVERSE FACTS AVAILABLE

17. The wording of Article 12.7 of the *SCM Agreement* is clear and unambiguous. What is allowed under Article 12.7 is merely the use of "facts available" when there is non-cooperation by any interested Member or interested party, not the use of "adverse facts available", let alone "adverse inferences".

18. In light of the Appellate Body's analysis in *Mexico – Anti-Dumping Measures on Rice*[12], China submits that, in a countervailing duty investigation, the investigating authority is precluded from using whatever evidence it wishes. Even in a case where the investigating authority deems an interested Member or interested party uncooperative, the authority must evaluate objectively the alternative information on the record to decide which is most fitting and appropriate for filling in the gap in the record. Such information can only be the "best information available" and "those that may reasonably replace the information that an interested party failed to provide", but not simply the "adverse facts". If such information is from secondary sources, the investigating authority should further ascertain its reliability and accuracy.

19. An even more fundamental requirement under Article 12.7 is that the investigating authority's determination must be based on actual facts on the record. As observed by the panel in *China – GOES*, "even when applying facts available, an investigating authority's determination must have a factual foundation."[13] The panel thus concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences."[14]

20. In sum, China submits that the use of "adverse facts available" or "adverse inferences", as opposed to facts available on the record, is inconsistent with Article 12.7 of the *SCM Agreement*.

V. CONCLUSION

21. In conclusion, China is of the following opinion:

(i) To find a "public body" within the meaning of Article 1.1(a)(1) of the *SCM Agreement*, the investigating authority must find "an entity that possesses, exercises or is vested with governmental authority". Evidence of government ownership in itself cannot serve as the basis for establishing a "public body". The legal interpretation regarding "public body" developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)* should be followed and serve as the foundation for any findings on India's claims regarding "public body" determination. Further, the Panel should reject the United States' attempt of *ex post* rationalization and review the

[11] *U.S. – Large Civil Aircraft (2nd Complaint)*, Panel Report, para. 7.747.
[12] *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, paras. 289~298.
[13] *China – GOES*, panel report, para. 7.296.
[14] *China – GOES*, panel report, para. 7.302.

USDOC's determinations in dispute based only on the rationales as set out in those determinations.

(ii) In respect of the interpretation and application of Article 2.1(c) of the *SCM Agreement*, *firstly*, China submits that the "other factors" under Article 2.1(c) must be evaluated on the basis of a "prior appearance of non-specificity" resulting from the application of Article 2.1(a) and Article 2.1(b). Because the USDOC failed to follow the proper order of analysis and to accord appropriate weight to each of the principles under Article 2.1, the United States has acted inconsistently with Article 2.1(c) of the *SCM Agreement* for this reason alone. *Secondly*, China opines that the first factor under Article 2.1(c) operates on the predicate of a "subsidy programme". Because of the failure to properly identify and substantiate a "subsidy programme" in the USDOC's *de facto* specificity finding, the administrative reviews at issue are WTO-inconsistent. *Thirdly*, because Article 2.1(c) explicitly requires consideration of the two factors in the last sentence but the USDOC manifestly failed to do so, the United States has acted inconsistently with Article 2.1(c).

(iii) Article 12.7 of the *SCM Agreement* only permits the use of "facts available", which requires the investigating authority to use the "best information available" and "those that may reasonably replace the information that an interested party failed to provide". Meanwhile, the use of "facts available" prohibits the investigating authority from drawing adverse inferences that could not find factual foundations in the record at all. Thus, the use of "adverse facts available" or "adverse inference" in a countervailing duty investigation is inconsistent with Article 12.7 of the *SCM Agreement*.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF CHINA

1. Mr. Chairman, members of the Panel, it is my honor to appear before you today to present the views of China as a third party. In this oral statement, China will discuss three issues raised in this case, namely, public body, input specificity and adverse facts available.

2. China will first submit its views on the issue of ***public body***. In their respective *First Written Submissions*, India asserts that the USDOC's determination that National Mineral Development Corporation is a "public body" is contrary to Article 1.1(a)(1) of the *SCM Agreement*. India relied principally on the Appellate Body's holdings in *U.S. – Antidumping and Countervailing Duties (China)*. But the United States seeks to reargue the interpretation of the term "public body". In light of the positions of the parties, China would like to submit its views on the issue of "public body" in the following three aspects.

3. ***First***, the Appellate Body has provided a definitive interpretation of the term "public body" in *U.S. – Antidumping and Countervailing Duties (China)*. That is, a public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* "must be an entity that possesses, exercises or is vested with governmental authority".[1]

4. For the application of the above interpretation, the Appellate Body observed that evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function". Accordingly, "evidence [of government ownership], alone, cannot support a finding that an entity is a public body".[2]

5. ***Second***, the Appellate Body's legal interpretation in *U.S. – Antidumping and Countervailing Duties (China)* is decisive in resolving the issue of public body in this dispute. As noted by the Appellate Body, legal interpretation embodied in adopted panel and Appellate Body reports "becomes part and parcel of the *acquis* of the WTO dispute settlement system"[3], and as such, "create legitimate expectations among WTO Members" that such reports "should be taken into account where they are relevant to any dispute".[4] Therefore, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[5] According to the Appellate Body, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[6]

6. In this dispute, the United States merely advances arguments that the Appellate Body has already considered and rejected. In China's view, this clearly cannot justify the extraordinary step of departing from a legal interpretation embodied in an adopted Appellate Body report. Therefore, China submits that the Panel should follow the legal interpretation regarding public body developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)*. That legal interpretation should serve as the foundation for any findings regarding the public body determination at issue.

7. ***Third,*** the United States' attempt of *ex post* rationalization must be rejected by the Panel. In its *First Written Submission*, the United States seeks to justify the USDOC's public body determinations on an "alternative" basis.[7] That attempt, in China's view, is a classic example of *ex post* rationalization and must be rejected by the Panel.

8. China respectfully submits that it is not the Panel's task to speculate on what the USDOC might have concluded had it applied the proper interpretations of the *SCM Agreement* to the facts

[1] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 317.
[2] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 346.
[3] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[4] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[5] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[6] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[7] United States' First Written Submission, para. 379.

on the record. Nor can the United States seek to defend the USDOC's determinations based on a rationale other than the rationale that the USDOC adopted. The Panel should assess whether the USDOC had based its public body finding on majority ownership in the administrative reviews at issue. If so, the Panel should apply the legal standard provided by the Appellate Body in *U.S. - Anti-Dumping and Countervailing Duties (China)* and conclude that the United States has acted inconsistently with Article 1.1(a)(1) of the SCM Agreement.

9. Now I come to the second issue, ***input specificity***. In this regard, China would like to submit its views on certain important aspects of the legal standards under Article 2 of the *SCM Agreement* that it deems relevant to this dispute.

10. ***First of all,*** China submits that Article 2.1 contemplates a sequential analysis. That is, the assessment of *de facto* specificity under Article 2.1(c) must come after the initial appearance of non-specificity concluded by the analysis under Article 2.1 subparagraphs (a) and (b). An investigating authority is obliged first to consider the principles set out in subparagraphs (a) and (b). It may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity.

11. As the Appellate Body has explained, "[t]he inquiry under Article 2.1(c) … focuses on whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure."[8] For this reason, the analysis of the "other factors" under Article 2.1(c) must follow from, and be informed by, the conclusions that led to the initial appearance of non-specificity under subparagraphs (a) and (b).

12. This is not a simple matter of form, but an important issue of substance. As the Appellate Body observed in *U.S. – Anti-Dumping and Countervailing Duties (China)*, "subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle." Also, "the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific."[9]

13. ***Secondly,*** China holds the view that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c). In *EC – Large Civil Aircraft*, the panel read from the text of the first two "other factors" that "'the subsidy programme' stands for the programme that must be considered when evaluating whether there has been 'use of a subsidy programme by a limited number of certain enterprises' or 'predominant use by certain enterprises'."[10]

14. As a result, in any evaluation of specificity under these two factors, logically, "the starting point should be the identification of the relevant subsidy programme."[11] Without first identifying the relevant subsidy programme, including its scope and content, the investigating authority is unable to know who the users of that program are and whether they represent "a limited number of certain enterprises" or "predominant use".

15. In determinations at issue, although the USDOC purported to consider the "sale of high-grade iron ore for less than adequate remuneration" to be a "subsidy programme", it had failed to explain in the one-sentence finding why or how the sales of the input at issue constitutes a "subsidy programme". In China's view, because of the failure properly to identify and substantiate a "subsidy programme" in the USDOC's *de facto* specificity finding under the first factor of Article 2.1(c), the administrative reviews at issue are thus WTO-inconsistent.

16. ***Last but not the least,*** China submits that an investigating authority must take into account in its determination of *de facto* specificity the two factors set forth in the third sentence of Article 2.1(c), namely, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation.

[8] *U.S. – Large Civil Aircraft (2nd Complaint)*, Appellate Body Report, para. 877.
[9] *U.S. – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 366.
[10] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.966.
[11] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.993.

17. In its *First Written Submission*, the United States appears to propose that an investigating authority is not required to "address explicitly" the two factors in the third sentence of Article 2.1(c) if the interested party failed to raise issues regarding those two factors.[12] That China cannot agree.

18. As the panel held in *U.S. – Large Civil Aircraft (2nd Complaint)*, each of the "other factors" set forth under Article 2.1(c) must be evaluated in light of the two factors described in the third sentence.[13] This requirement is clear and unambiguous. If an investigating authority skips the mandatory consideration, a panel should find that the investigating authority has acted inconsistently with Article 2.1(c).

19. In respect of the third issue, ***adverse facts available***, China is of the view that Article 12.7 allows the use of only "facts available" when there is non-cooperation by any interested Member or interested party. It does not contemplate the use of "adverse facts available", let alone "adverse inferences".

20. In light of the Appellate Body's analysis in *Mexico – Anti-Dumping Measures on Rice*[14], China submits that, in a countervailing duty investigation, the investigating authority is precluded from using whatever evidence it wishes. Even in a case where the investigating authority deems an interested party uncooperative, the authority must evaluate objectively the alternative information on the record, in order to decide which is the most fitting and appropriate for filling in the gap in the record. Rather than simply the "adverse facts", such information must be the "best information available" and "those that may reasonably replace the information that an interested party failed to provide". If such information is from secondary sources, the investigating authority shall further ascertain its reliability and accuracy.

21. The United States seems to have distorted what the Appellate Body meant by the "most fitting and appropriate" facts. This is what the United States stated in its own *First Written Submission*, which China quotes from paragraph 215: "the 'adverse' element is introduced when Commerce decides which available facts are appropriate to use when a party has provided no verifiable, substantiated information relevant to the determination at hand." In this manner, using "adverse facts", instead of "most fitting and appropriate" ones, seems to have become the standard adopted by the United States.

22. In China's reading of Article 12.7 and the Appellate Body's interpretation, the rule does not mandate the use of facts that are favorable or adverse to the party. However, it does compel the use of facts that are most fitting and appropriate. Therefore, if there is any exercise of using "adverse facts", it must be demonstrated that those "adverse facts" are the "most fitting and appropriate" ones.

23. An even more fundamental requirement under Article 12.7 is that the investigating authority's determination must be based on actual facts on the record. As observed by the panel in *China – GOES*, "even when applying facts available, an investigating authority's determination must have a factual foundation."[15] The panel thus concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences."[16] This conclusion simply negates the position of the United States that "Commerce 'may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available' if an interested party has failed to cooperate".[17]

24. In sum, China submits that the use of "adverse facts available" or "adverse inferences", as opposed to the most fitting and appropriate facts available on the record, is inconsistent with Article 12.7 of the *SCM Agreement*.

[12] U.S. *First Written Submission*, para. 420.
[13] *U.S. – Large Civil Aircraft (2nd Complaint)*, Panel Report, para. 7.747.
[14] *Mexico –Anti-Dumping Measures on Rice*, Appellate Body Report, paras. 289~298.
[15] *China – GOES*, panel report, para. 7.296.
[16] *China – GOES*, panel report, para. 7.302.
[17] U.S. *First Written Submission*, para. 215.

ANNEX D-7

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 CFR § 351.511(A)(2)(I) TO (III): ADEQUACY OF REMUNERATION FOR THE PROVISION OF GOODS OR SERVICES BY THE GOVERNMENT

1. The EU is of the view that India's claims appear to be based on flawed interpretations of Article 14(d) of the SCM Agreement. The perspective of the provider of the goods or services, in the sense of whether the government makes a reasonable return when providing the goods or services in question, is not dispositive in determining the existence of "benefit" under Article 1.1(b) or its amount in accordance with Article 14(d) of the SCM Agreement. The perspective of the provider advocated by India is similar to the "cost to the government" approach that has already been rejected to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement. The AB Report in *Canada – Aircraft* stands for the proposition that a "benefit" is to be determined, not by reference to whether the transaction imposes a net cost on the government, but rather by reference to whether the terms of the financial contribution are more favourable to what is available to the recipient on the market. Thus, in the EU's view, the perspective of the recipient of the goods provided by the government is the relevant starting point of the benefit analysis. Moreover, the commercial considerations of the government when setting its prices would be relevant to the extent that they reflect those "prevailing market conditions" in the country of provision. However, they cannot be dispositive of whether the provision of goods or services conferred a "benefit" to the recipient. Whether the government sold the good in question with profit or not is not determinative of whether the provision of such good conferred a "benefit" under Article 1.1(b) of the SCM Agreement. The same conclusion should be reached, *mutatis mutandi*, in the context of Article 14(d) of the SCM Agreement. Consequently, the EU submits that India's interpretation of Article 14(d) of the SCM Agreement is incorrect and thus should be rejected.

2. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 CFR § 351.511(A)(2)(IV): ADJUSTMENT TO REFLECT THE PRICE THAT A FIRM ACTUALLY PAID OR WOULD PAY IF IT HAD IMPORTED THE PRODUCT

2. The adequacy of the remuneration under Article 14(d) of the SCM Agreement should start by locating a proper comparator in the marketplace of the country of provision, i.e., the prices at which the same or similar goods are bought by private suppliers in arm's length transactions in the country of provision. If such prices are distorted in that market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular, it may be necessary to have recourse to an external proxy benchmark or to a constructed proxy duly adjusted that somehow relates or refers to, or is connected with, the conditions prevailing in the market of the country of purchase. In other words, in the absence of an actual price that is available on the market for the same product (e.g., because all prices are distorted because of the government intervention or, simply because the government controls prices or is the only provider), the comparison envisaged in the benefit analysis can be made by using a proxy for what *would* have been paid on a comparable purchase of goods that could have been obtained on the market in the absence of the distortion (i.e., by reference to market principles) and, if needed, by making appropriate adjustments in order to avoid in particular the countervailing of genuine comparative advantages.

3. Once the proper benchmark price has been identified, either in-country, outside-country or constructed proxy, the comparison required to determine the existence and amount of benefit has to be made at the same level of trade. Indeed, if the government price was set on an ex-works basis and the benchmark price is established on a Delivered At Place (DAP) basis, an adjustment should be made to make a proper comparison at the same level of trade. Such an adjustment would not seek to reproduce the "conditions of sale" in the country of provision in accordance with Article 14(d); rather, it would pursue that, once the benchmark price has been found, the comparison between the government price and that benchmark price is properly made at the same level of trade. Indeed, the benchmark price would already be established taking into account the "prevailing market conditions" of the country of provision. Thus, the EU is of the view that

adjusting the government price and the benchmark price at the same level of trade (e.g. delivered prices) would not be inconsistent with Article 14(d) or Articles 19.3 and 19.4 of the SCM Agreement.

4. Moreover, the EU observes that, if in-country prices are not available because the product in question is only imported (that is, not produced locally), then it would appear reasonable to adjust the benchmark price taking into account such factor. To illustrate this with an example. Finally, the EU observes that it may be appropriate to compare the government price with a benchmark price on a delivered basis in other situations where in-country prices are not available because e.g. they are distorted. That would be the case, for instance, when import prices are considered to be a proper market benchmark (i.e. reproducing the price that the recipient would have obtained in the country of provision on market terms).

3. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 USC § 1677(7)(G), 19 USC § 1675A(A)(7), AND 19 USC § 1675B(E)(2): CUMULATION OF IMPORTS IN THE INJURY ANALYSIS

5. Article 15.3 of the SCM Agreement permits ("may") cumulating subsidised imports from different countries "only" if three cumulative conditions ("and") are met. *First*, if the amount of subsidisation established in relation to the imports from each country is *de minimis*, i.e., 1 per cent or less *ad valorem*, the investigation must be terminated with respect to those imports, in accordance with Article 11.9 of the SCM Agreement. As a consequence of such termination, imports from such a country cannot be considered as "subsidised imports" within the meaning of those terms in Article 15 of the SCM Agreement. Consequently, in cases where several countervailing investigations against imports of the same product from different countries have been initiated, the volume of imports with respect to the country or countries for which the investigation was terminated in accordance with Article 11.9 of the SCM Agreement cannot be considered as part of the volume of "subsidized imports" within the meaning of that term in Article 15 of the SCM Agreement. Thus, the first condition in Article 15.3 of the SCM Agreement (i.e., cumulation is permitted only if the amount of subsidisation established in relation to the imports from each country is more than *de minimis*) would imply that the volume of imports found to be non-subsidised and thus terminated pursuant to Article 11.9 of the SCM Agreement cannot be cumulated. The same should be concluded in cases where imports of products found to be subsidised are cumulated with imports found to be dumped in a parallel anti-dumping investigation. In the EU's view, the terms "subsidized imports" in Article 15 of the SCM Agreement should be interpreted as referring to imports for which the investigating authority has found subsidisation specifically. The inclusion of dumped imports in the volume of subsidised imports for the purpose of the injury assessment in the context of the countervailing duty investigation would not be based on any provision of the SCM Agreement and would be illogical. *Second*, if the volume of imports from each country is negligible, the investigation must also be terminated with respect to those imports in accordance with Article 11.9 of the SCM Agreement.

6. In the EU's view, Article 15.3 of the SCM Agreement permits the cumulation of subsidised imports for the purpose of the injury analysis only if certain conditions are met. Further, the terms "subsidized imports" in Article 15 of the SCM Agreement should be understood as including imports for which there is a finding of subsidisation in the same period of time and may include imports of several countries.

4. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 USC § 1677E(B) AND THE IMPLEMENTING REGULATIONS CONTAINED IN 19 CFR § 351.308: USE OF "ADVERSE FACTS AVAILABLE"

7. In drawing inferences, an authority is not permitted to identify two different equally possible inferences, and then select the inference that is more adverse to the interests of a particular interested party, solely because it is more adverse (for example, in order to "punish" non-cooperation). Rather, the authority must draw the inference that best fits the facts that have been evidenced. However there are no facts that are *per se* excluded from the set of facts to be taken into consideration for this purpose: so they include such things as the precise question that has been put; the procedural circumstances; the availability of the evidence being sought; and all the circumstances surrounding the absence of the requested information from the record. Thus, in this way, the behaviour of an interested party can colour the inferences that it may or may not be reasonable to draw in any particular instance. The more uncooperative a party is in fact, the more

attenuated and extensive the inferences that it may be reasonable to draw. The EU would tend towards the view that whether or not a WTO Member has acted inconsistently with Article 12.7 of the SCM Agreement might depend less upon the particular label that has been used, and more upon a specific examination of all the surrounding facts and procedural context. Turning to the US law itself, the EU observes that it does not actually state that, in selecting facts and inferences, an investigating authority is entitled to prefer a particular fact or inference *only* because it is more adverse than some other fact or inference to the interests of a particular interested party, in order to *punish* non-cooperation. It merely provides for the use of facts available; introduces the concept of adverse inference; and refers to the process of selecting from the facts otherwise available. On its face, therefore, the US law would appear to be perfectly capable of being applied in a manner consistent with Article 12.7 of the SCM Agreement. Furthermore, the US does not argue that an investigating authority is entitled to prefer a particular fact or inference *only* because it is more adverse than some other fact or inference to the interests of a particular interested party, in order to *punish* non-cooperation. In these circumstances, the EU is not persuaded that India has demonstrated that the cited provisions of US law are "as such" inconsistent with the relevant provisions of the SCM Agreement.

5. INDIA'S CLAIMS "AS APPLIED" AGAINST THE IMPOSITION OF COUNTERVAILING DUTY IN RESPECT OF SALE OF HIGH IRON GRADE IRON ORE BY NMDC

8. With respect to the public body issue, the AB Report in *US – Anti-Dumping and Countervailing Duties on China* had to be unconditionally accepted by the parties to that dispute and is now part of the *acquis* of the WTO dispute settlement system, implying that, absent cogent reasons, the same legal question will be resolved in the same way in a subsequent case. In that case, the AB sought a balance between the US approach, with its emphasis on *ownership and control* in general terms and China's approach, with its emphasis on governmental *authority* and *function*, which approach the AB considered to coincide with and correspond to the *attribution* rules in the ARSIWA. The EU remains of the view that, insofar as the abstract test would be cast only in terms of the possibility of control through whatever means, that would be too broad. Ultimately, through their powers of regulation and taxation, for example, governments have the possibility to control all of the resources subject to their jurisdiction. The EU considers that private bodies cannot be the source of entrustment or direction, but can transmit it. Public bodies *may* be the source of entrustment or direction, but need not necessarily have that capacity.

9. With respect to *de facto* specificity, the EU disagrees with India and agrees with the US on the question of whether or not Article 2.1(c) pre-supposes an appropriate "comparative set" of "similarly situated" firms. Contrary to what India asserts, Article 2.1 is not addressed towards an issue of *discrimination*: rather, it addresses the issue of *specificity*. Furthermore, it is also not correct that the issue of *revenue otherwise due* in Article 1 is the same as, or particularly informs, the issue of *specificity* in Article 2.1. Given the inherent nature of taxation, it is not the case that the fiscal burden in any particular WTO Member falls equally on all firms or economic activities. This does not automatically mean that there are financial contributions. Rather, as the US correctly explains, it is necessary to establish a benchmark, against which to assess whether or not revenue otherwise due has been foregone. The function of Article 2.1 is quite different. It is to reasonably distinguish between measures that are generally applicable in a particular WTO Member, and those that rather apply to certain enterprises, as defined in Article 2.1.

6. INDIA'S CLAIMS "AS APPLIED" AGAINST THE IMPOSITION OF COUNTERVAILING DUTY ON GRANT OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL

10. With respect to the existence of a financial contribution, the EU agrees with the US that, taking into account the facts and circumstances of this case, the grant of mining rights for iron ore and coal does amount to the "provision" of a good within the meaning of Article 1 of the SCM Agreement. In the opinion of the EU, India has not established any meaningful distinction between the facts of *US – Softwood Lumber IV* and the facts of this case.

11. With respect to the question of specificity, the EU refers to its observations above, and notes that the assessment of this issue may depend, in part, on the assessment of the factual matter of whether or not the measures referred to in the measure at issue actually exist. However, we would also point that, as already explained above, we do not consider that a finding of *de facto* specificity under Article 2.1(c) necessarily requires identification of a subsidy programme.

7. INDIA'S CLAIMS "AS APPLIED" AGAINST THE SDF PROGRAM

12. With respect to the issue of public body, the EU respectfully refers to the explanations that it has already provided above, and which it is not necessary to repeat. The EU notes that the US has referred to a number of elements, going beyond government ownership, that could be relevant to a determination of whether or not the relevant entity is a public body. As indicated above, for the purposes of this dispute, the EU takes no position on the conclusions and findings that the Panel should eventually reach when applying the law to the particular facts of this case.

13. With respect to the question of whether or not there is any direct transfer of funds, the EU would point out that Article 1.1(a)(1)(i) begins with the phrase "a government practice involves". This is what is therefore required to meet the requirements of that provision. The text does not provide that the transfer must involve a change in ownership over the funds from the government to the putative beneficiary, as India would have it: merely that "a government practice involves" such a transfer. Thus, even if would be the case that the transfer would be made by the JPC, as India asserts but the US contests, in itself that would not necessary mean that the measure at issue would be inconsistent.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

I. ALLEGED NEW SUBSIDIES IN REVIEW INVESTIGATIONS

1. We address in this Oral Statement an issue that we did not address in our Third Party Written Submission: the issue of alleged "new" subsidies in prospective reviews and retrospective final assessments. We recall, in this respect, that the US administrative reviews about which India complains combine both a prospective element (that is, the rate of duty to be applied going forward) and a retrospective element (that is, the amount of duty to be finally collected with respect to the past). In our view, the prospective element is subject to the relevant disciplines of Article 21 of the SCM Agreement. The retrospective element is subject to the relevant disciplines of Article 19.3 of the SCM Agreement, the SCM Agreement not having any provisions directly equivalent to Article 9.3 of the Anti-Dumping Agreement.

A. The prospective element

2. We deal first with the prospective element. India's position is that alleged "new" subsidies may only be brought within the scope of prospective reviews conducted pursuant to Article 21.2 of the SCM Agreement if the disciplines of Articles 11.1, 11.2, 13.1, 22.1 and 22.2 are complied with. In case such "new" subsidies are included in the scope of prospective reviews *ex officio*, that is, without a written application by the domestic industry, India claims that, pursuant to Article 11.6, the disciplines of Article 11.2 must still be complied with. Since these rules were not complied with in this case, the measures at issue are inconsistent with the SCM Agreement. The US position is that these provisions do not apply to such reviews, because they only apply to "investigations".

3. The European Union does not agree with India that Article 11 applies to review investigations initiated pursuant to Article 21.2. In our view, it is clear that, by its own terms, Article 11 of the SCM Agreement applies to a particular type of investigation, namely an investigation "to determine the existence, degree and effect of any alleged subsidy", commonly referred to as an original investigation. It does not apply to a review investigation conducted pursuant to Article 21.2, the purpose of which is different, namely, to determine whether or not the countervailing duty continues to be warranted. Article 21.4 incorporates the provisions of Article 12, but not the provisions of Article 11.

4. On the other hand, the European Union does not agree with the United States that the SCM Agreement is based on an absolute definitional distinction between the term "investigation" and the term "review". Neither term is defined in the SCM Agreement. In fact, there are many provisions of the SCM Agreement that use the term "investigation" or a similar term in a context that can only refer not only to original investigations, but also to review investigations. A contextual analysis of the SCM Agreement reveals that there are five types of proceeding: an original proceeding pursuant to Article 11; an interim review proceeding pursuant to Article 21.2; a sunset review proceeding pursuant to Article 21.3; a newcomer review proceeding pursuant to Article 19.3, second sentence; and a final assessment proceeding pursuant to Article 19.3, first sentence. Each of these involves an investigation, albeit it of a different type with different objectives. This observation is of great importance when it comes to a systematic interpretation of both the SCM Agreement and the Anti-Dumping Agreement, it being simply wrong to posit that any provision using the term "investigation" is necessarily limited to original investigations.

5. The European Union observes that Article 21.1 provides for the duty to remain in force only as long as necessary to counteract injurious subsidization. Article 21.2 uses the term "recur" expressly with respect to injury, but the context of this paragraph and the Article as a whole supports the view that it also captures the concept of *subsidization* that recurs or may recur. Article 21.3 also refers to the "recurrence" of subsidization. In the view of the European Union, the term "recur" indicates something that has stopped and then started again, or that may start again. In other words, it refers to something that is not the same subsidy as the subsidy assessed in the original investigation. In contrast, the term "continue" appears to refer to a subsidy that was the

subject of the original investigation. The term "recur" therefore supports the view that an interim review pursuant to Article 21.2 may relate to a new subsidy.

6. At the same time, the term "recur" suggests an element of commonality between what occurred previously and what occurred or what may occur subsequently. It most obviously catches so-called recurring subsidies, such as those granted pursuant to an overarching programme, or those that have such a close nexus that they are, in effect, incidences of the application of such a programme, even if the programme itself is not subject to investigation. In fact, the European Union would go further and suggest that the element of commonality is simply that the measures in question are both subsidies within the meaning of Article 1 of the SCM Agreement. This would mean that new subsidies could be brought within the scope of review investigations. As the United States observes, there would not appear to be any point in running a new original investigation in parallel to an existing measure, insofar as one is considering the prospective application of a duty or a combined duty, because no issue of due process arises. Just as in an anti-dumping proceeding, where the continuing and changing behaviour that is subject to scrutiny, also in review investigations, is the pricing by the firm investigated, so, in a countervailing duty case, the continuing and changing behaviour that is subject to scrutiny, also in review investigations, is the "subsidization" by the Member investigated. In this respect, the European Union finds it particularly significant that it is this general term (subsidization) that is used in Articles 21.1, 21.2 and 21.3 of the SCM Agreement: there is no reference to individual subsidies or subsidy programmes. This is consistent with Article VI:3 of the GATT 1994, which provides that the purpose of a countervailing duty is to offset *any* subsidy bestowed on the exported good.

7. That being said, the European Union would take the view that the right of an investigating authority to initiate a review pursuant to Article 21.2 of the SCM Agreement is not unfettered. Rather, by the terms of that provision, such a review may only be initiated where it is "warranted" or if an interested party submits "positive evidence substantiating the need for a review." In our view, what this actually means in practice will depend on the facts of a particular case, and be informed, as a matter of context, by Article 11 of the SCM Agreement.

8. For example, if the original subsidy and the *alleged* new subsidy are both incidences of the application of a subsidy programme countervailed by the original duty, it would seem self-evident that the more recent subsidy may be included in the scope of the Article 21.2 review, since it would not be a new subsidy at all, but simply an incidence of the application of an original subsidy. This would also be the case where an original subsidy programme has been amended: the amended programme could be dealt with in a review investigation.

9. On the other hand, if the original subsidy and the alleged new subsidy are very different (for example, different regional level, different granting authority, different type of financial contribution, different calculation of benefit, different assessment of specificity, etc.), then it seems to us that the evidential requirements for initiation of the review with respect to such a genuinely new subsidy, contextually informed by Article 11, may, in practice, more closely approach the requirements set out in Article 11. Thus, such new subsidies could be investigated in reviews upon provision of sufficient evidence by the applicant or, in special circumstances, the investigating authority.

10. In an intermediate situation, where the alleged new subsidy is distinct from but similar to the original subsidy, and there may, for example, be a discussion about whether or not the original subsidy has been "replaced" by the subsequent subsidy, the evidential requirements may, in practice, similarly be at an intermediate level.

11. The European Union considers that, in its assessment, the Panel should also take into account that, under Article 11.2 of the SCM Agreement, an application is required to contain such information as is reasonably available to the applicant (that is, in the public domain and accessible at no or little cost to the applicant), and this same approach would apply in the context of Article 21.2. Thus, if information about a subsidy (including such things as the products it benefits, the amounts of financial contribution involved, the benefits involved and its specificity) only becomes reasonably available after the initiation of an original investigation or review investigation, an applicant could seek to add such subsidy to a pending investigation, subject to requirements of due process.

12. Similarly, the European Union considers that the Panel should also take into account the fact that both Article 21.2 and Article 11.6 provide for the possibility of *ex officio* initiation. This could include, for example, a situation in which information about a subsidy was not publicly available prior to initiation, but is only obtained by the investigating authority during the course of an investigation.

13. The European Union leaves it to the Panel to assess whether or not, in this particular case, the evidence of the alleged new subsidies was sufficient to amount to positive evidence warranting the initiation of the relevant review investigations.

14. Consistent with these observations, the European Union is of the view that, by its own terms, Article 13.1 of the SCM Agreement applies to "any investigation". As we have explained above, this is not limited to original investigations within the meaning of Article 11 of the SCM Agreement, but extends to each of the five types of investigations that we have already identified.

15. At the same time, in our view, the obligation of prior consultation applies only once with respect to each subsidy. This means that if the same subsidy or subsidy programme that was the subject of an original investigation is subsequently the subject of a review investigation, there is no obligation to re-consult. However, if a new subsidy is brought within the scope of a review investigation, either following a request from the applicant or in special circumstances by the investigating authority, because there is positive evidence warranting the initiation of the review investigation also with respect to such new subsidy, then the obligation of prior consultation in Article 13.1 applies. This seems to us to be the necessary and reasonable corollary to accepting that new subsidies can be brought within the scope of review investigations conducted pursuant to Article 21.2 of the SCM Agreement.

B. The retrospective element

16. We turn now to the backward looking element of a US administrative review, which is similar to a refund proceeding in prospective duty systems. As we have already observed, the SCM Agreement contains no provisions that are directly equivalent to Article 9.3 of the Anti-Dumping Agreement, which deals with final assessment proceedings. There is merely the rule in Article 19.3, first sentence of the SCM Agreement that duties are to be levied in an appropriate amount, taking into account the renouncing of any subsidies. Nevertheless, in our opinion, Members are entitled to operate final assessment proceedings of the type used by the United States. The question is whether or not, in such final assessment proceedings, they are entitled to include new subsidies.

17. In our view, it may be that there is no absolute answer to this question. Rather, it may depend on the facts of particular cases. Following the example that we have already set out, if the original subsidy and the more recent subsidy are incidences of the application of a countervailed subsidy programme, then it seems self-evident that final assessment of the more recent subsidy can also be retrospective.

18. On the other hand, if the new subsidy is very different, and actually existed prior to the original proceedings, and the measure in question was a matter of public knowledge both for the complaining interested parties and the investigating authorities, but was not included in the original proceedings, then it must be doubtful that it would be possible to bring it directly into a final assessment proceeding *with respect to the past*, without that giving rise to some form of retroactivity and/or issues of due process. This question may require a case-by-case assessment because, as we have already indicated, there may be various reasons, some legitimate, some not, why a particular subsidy was not included in the original investigation. Thus, the European Union would suggest that the Panel may need to scrutinise carefully the facts of each case and measure in order to ascertain whether or not, in this respect, the terms of the SCM Agreement have been complied with.

ANNEX D-9

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia's participation in this dispute addresses systemic issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). These issues relate to public body, benefit, extraction rights and specificity. The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. For the purposes of finding the existence of a financial contribution under Article 1.1(a)(l) of the SCM Agreement, a public body must possess, exercise or be vested with "governmental authority", which is the power of an entity to command or compel a private body. The unique "defining elements" of the term "government" – "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" – also define the term "public body". Possessing or exercising governmental authority is distinct from being owned or controlled by the government, and the two concepts are not interchangeable. A government-owned or controlled entity might be a public body, but only where the government has delegated to the entity the ability to "control or govern the actions of a private body". The government's delegation of authority, not its ownership or control, thus dictates the entity's status as a public body.

3. An investigating authority must ensure that any determination that an entity is a public body is supported by positive evidence establishing that the relevant entity possesses, exercises or is vested with governmental authority (properly defined to mean the ability to compel – or give such power to – a private body). No single fact or combination thereof can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to governmental authority. A public body standard that relies systematically on evidence of government ownership or control as a proxy for governmental authority undermines both the Appellate Body's interpretation of Article 1.1(a)(1) of the SCM Agreement and the evidentiary provisions of the Agreement.

4. Investigating authorities have an affirmative obligation under the SCM Agreement to examine objectively all evidence related to the question of public body and to base their determinations on positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. They may not use evidence of government ownership or control to avoid this obligation.

III. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

5. In determining whether the government provision of a good confers a benefit, an investigating authority may use a benchmark other than private, in-country prices in "very limited" circumstances. Article 14(d) of the SCM Agreement establishes domestic market prices as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should be the first reference point used by an investigating authority to determine benefit.

6. In order to reject private, in-country benchmarks when determining whether a government-provided good confers a benefit, an investigating authority must establish that domestic prices of

that good are "distorted". The government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion.

7. Only the government (or an entity properly found to be a public body) providing the financial contribution may be considered a "predominant supplier" whose sales of a good distort domestic prices such that an alternative benchmark may be used to determine whether the government's provision of that same good confers a benefit. "Predominance" in a market refers to more than merely having a large market share – it is the ability of the government to exercise "influence on prices". Furthermore, having a "significant" market share is distinct from being the "predominant" supplier in that market, the former carrying far less evidentiary weight in a determination of price distortion. These principles also preclude an investigating authority from disregarding as a benchmark the prices offered domestically by a state-owned enterprise, unless the authority has properly determined that the enterprise is a public body.

8. Although external benchmarks may be used in very limited situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions. Article 14(d) requires an investigating authority to ensure that any benchmark "relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)". The Appellate Body has further emphasized that this obligation requires the investigating authority to adjust any alternative benchmark to reflect prevailing market conditions. The Kingdom is of the view that external benchmarks should not be permitted unless an exhaustive application of these standards demonstrates otherwise. Moreover, the use of external benchmarks also should be avoided because they negate comparative advantages – a result precluded by both the Appellate Body and the SCM Agreement's negotiating history.

9. Where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks. Such benchmarks can be tailored to the unique circumstances of the country, industry and enterprises concerned, and they can reflect prevailing market conditions with little or no adjustment. Domestic cost-based benchmarks also are more likely to be consistent with the rule that a benefit analysis may not nullify a country's comparative advantage. Such benchmarks are therefore preferable to any other form of alternative benchmark.

IV. THE GRANTING OF THE RIGHT TO EXTRACT A NATURAL RESOURCE CANNOT CONSTITUTE A SUBSIDY

10. A government's granting of extraction rights is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. In particular, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii). Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. The Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question and (ii) there is a reasonably proximate relationship between the government action and the enjoyment of the tangible goods by the recipient. Neither of these requirements is met where the government grants intangible extraction rights. This jurisprudence provides compelling support for the conclusion that the granting of a "potentiality" in the form of extraction rights cannot constitute the provision of a good under Article 1.1(a)(1)(iii) of the SCM Agreement.

11. Because the granting of extraction rights does not constitute the provision of a good or service under Article 1.1(a)(1)(iii), an investigating authority may not use "adequacy of remuneration" under Article 14(d) to determine whether the granting of such rights confers a benefit. Article 14(d) applies only to the "the provision of *goods* or *services* or purchase of *goods* by a government", and states that "adequacy of remuneration *shall* be determined in relation to prevailing market conditions *for the good or service in question*". (emphasis added) Article 1.1(b) of the SCM Agreement reinforces this conclusion: as an extraction right cannot constitute a financial contribution, no benefit can "thereby" be conferred.

12. The granting of a right to exploit a nation's *in situ* natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources. A

determination that the granting of intangible extraction rights alone constitutes a "financial contribution" would infringe upon the public international law principle that each State enjoys permanent sovereignty over its natural resources (PSNR). Many developing countries work with non-governmental entities to maximize the efficient, sustainable exploitation of their natural resources. Seen in this light, the granting of extraction rights, by itself, is not a financial contribution by a government but instead a necessary act by which the government delegates to the rights-holder responsibility for developing sovereign resources. Subjecting Members' resource development policies to SCM Agreement disciplines would undermine the certainty of control over sovereign development that PSNR is intended to ensure.

V. DETERMINATIONS OF *DE FACTO* SPECIFICITY MUST TAKE INTO ACCOUNT THE LEVEL OF DIVERSIFICATION OF ECONOMIC ACTIVITIES IN THE EXPORTING COUNTRY AND CANNOT BE BASED ON THE INHERENT CHARACTERISTICS OF A GOOD OR SERVICE

13. When determining *de facto* specificity under Article 2.1(c) of the SCM Agreement, investigating authorities must take into account the level of diversification of economic activities in the exporting country. The explicit diversification requirement of Article 2.1(c) obligates investigating authorities to consider the broader economic context in which a subsidy program operates. It is the Kingdom's view that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner. That is exactly what the diversification requirement of Article 2.1(c) was designed to prevent.

14. Saudi Arabia further submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, there is nothing in the text of the SCM agreement that permits a finding of specificity on this basis. Second, investigating authorities have an affirmative obligation under the SCM Agreement to "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence relating to the four factors found in Article 2.1(c). Authorities may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, this expansive interpretation could also render the specificity determination under Article 2 redundant – the investigating authority need only determine (under Article 1) the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity. Finally, any decision on whether *de facto* specificity may be based solely on a good's inherent characteristics may not penalize less diversified economies in express violation of Article 2.1(c).

VI. CONCLUSION

15. The decision to be rendered by the Panel in this case will serve as an important precedent with respect to key systemic issues under the SCM Agreement. The Kingdom of Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on the interpretive issues set out above.

ANNEX D-10

THIRD PARTY ORAL STATEMENT OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to affirm all of the positions set out in its Third Party submission. Today, the Kingdom will summarize its views on the proper interpretation of the Agreement on Subsidies and Countervailing Measures. In particular, the Kingdom will address (i) the proper standard for a public body determination; (ii) the use of alternative benchmarks in benefit calculations; (iii) why extraction rights cannot constitute a subsidy; and (iv) the proper interpretation and application of the *de facto* specificity criterion.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. First, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* established the definitive standard that an investigating authority must apply when determining that an entity is a public body for the purposes of finding a financial contribution under Article 1.1(a)(1) of the SCM Agreement. A public body must possess, exercise or be vested with "governmental authority", which is properly defined as the power to command or compel a private body.

3. Under this standard, a finding that an entity is a public body must be supported by positive evidence establishing governmental authority. The Kingdom notes that no single fact or combination thereof can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to governmental authority and was singled out by the Appellate Body as insufficient to establish a public body.

4. In making a public body determination, investigating authorities have an affirmative obligation under the SCM Agreement to examine objectively all evidence related to the question of public body and to base their determinations on positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. Accordingly, they may not use evidence of government ownership or control to avoid this obligation.

III. ALTERNATIVE BENCHMARKS ARE PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, SUBJECT TO STRICT DISCIPLINES

5. Turning now to the use of benchmarks in calculating benefit, the Kingdom notes that Article 14(d) of the SCM Agreement establishes domestic market price as the principal standard for determining whether and to what extent the government provision of a good confers a benefit. Accordingly, private, domestic prices must be the first reference point used to determine benefit, and a benchmark other than such prices may be used only in "very limited" circumstances.

6. In order to reject private, in-country price benchmarks, an investigating authority must establish that domestic prices of the good at issue are distorted. Price distortion *might* exist where, for example, the government is the "predominant" supplier of the good in the domestic market, but such distortion must always be proven with actual evidence. Thus, the government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion. Moreover, any inquiry into price distortion requires an investigating authority to consider all evidence, not just the role of the government.

7. In order to find that the government is the "predominant" supplier of a good, an investigating authority must demonstrate that the government (or a public body) is the

predominant, rather than just a significant, supplier. The SCM Agreement's text and related jurisprudence establish that the same standard for defining "government" or "public body" under Article 1.1(a)(l) of the SCM Agreement must apply when determining whether the "government" is the predominant supplier of a good under Article 14(d) of the SCM Agreement. Article 14(d) addresses "provision of goods or services... by a *government*", which is a direct reference to the type of government financial contribution in Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, only the government (or entities properly determined to be public bodies) providing the financial contribution may be considered a "predominant supplier". State-owned enterprises would not meet this standard merely by virtue of their ownership structure.

8. These principles also preclude an investigating authority from disregarding prices offered by state-owned enterprises for the purposes of calculating a benefit unless those enterprises have been properly determined to be public bodies. The Appellate Body has established that state-ownership or control is not sufficient to deem an entity a public body, and that the conduct of state-owned enterprises is presumptively not attributable to the state. Thus, a price offered by a state-owned enterprise may not be considered a "government price" and deemed unusable as a benchmark unless the enterprise has been found to possess, exercise or be vested with governmental authority.

9. The Kingdom would also like to emphasize that although external benchmarks may be used in "very limited" situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions. The Kingdom is of the view that external benchmarks should not be permitted unless an exhaustive application of the standard provided in Article 14(d) of the SCM Agreement demonstrates otherwise. Appellate Body jurisprudence supports this view. In fact, the Appellate Body has cautioned that "it has to be kept in mind that prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member". More recently, the Appellate Body in *Canada – Renewable Energy* noted serious difficulties in using an external benchmark, including the level and number of adjustments that may be required.

10. Furthermore, an external benchmark which does not reflect the domestic market circumstances of the recipient of an alleged subsidy is an arbitrary measure that could negate the natural comparative advantages of the Member under investigation – a result that the Appellate Body has warned against. The adjustments needed to make external benchmarks reflect a Member's comparative advantage would typically be so subjective as to vitiate the benchmark's ultimate reliability.

11. Thus, the Kingdom is of the view that, where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks.

IV. THE GRANTING OF THE RIGHT TO EXTRACT A NATURAL RESOURCE CANNOT CONSTITUTE A SUBSIDY

12. The Kingdom now turns to the issue of extraction rights. The Kingdom is of the view that a government's granting of extraction rights cannot constitute a subsidy because it is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. Only those actions listed in Article 1.1(a)(1) may constitute "financial contributions" and thus be subject to the SCM Agreement's subsidy disciplines. The granting of extraction rights, however, does not fall within the plain meaning of any of these financial contributions, including the provision of a good.

13. First, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii) of the SCM Agreement. Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. Extraction rights are not tangible items because the quantity and value of resources at issue are unknown when the government grants the right to extract them. Whether an extraction right will produce any tangible good is speculative, and will depend on, among other things, the quantities of extractable resources actually available and the actions of the rights-holder.

14. Second, the Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question, and (ii) there is a reasonably proximate relationship between the government action and the

enjoyment of the tangible goods by the recipient. Neither of these requirements is met where the government grants intangible extraction rights.

15. The Kingdom also notes that the granting of a right to exploit a nation's natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources. A determination that the granting of intangible extraction rights alone constitutes a "financial contribution" would infringe upon the public international law principle that each state enjoys permanent sovereignty over its natural resources. Such a determination would also undermine Members' certainty of control over their own sovereign development.

V. DETERMINATIONS OF *DE FACTO* SPECIFICITY MUST ACCOUNT FOR ECONOMIC DIVERSIFICATION AND CANNOT BE BASED ON THE INHERENT CHARACTERISTICS OF A GOOD OR SERVICE

16. Turning now to the last issue of specificity, the Kingdom would like to confirm that Article 2.1(c) of the SCM Agreement expressly requires investigating authorities to take into account the level of diversification of economic activities in the exporting country when determining *de facto* specificity. This express requirement means that the specificity criterion is highly dependent on the unique economic conditions of the Member in question. The SCM Agreement prohibits authorities from applying the *de facto* specificity requirement in a manner that disadvantages economies simply because they are less diversified. To the contrary, the diversification requirement obligates investigating authorities to consider the broader economic context in which a subsidy program operates. It is the Kingdom's view that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner.

17. The Kingdom also submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, nothing in the SCM Agreement's text permits a finding of specificity on this basis. Second, investigating authorities must "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence and may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, such an expansive interpretation of *de facto* specificity could render the specificity determination redundant because an investigating authority need only determine under Article 1 of the SCM Agreement the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity.

VI. CONCLUSION

18. Mr. Chairman, this concludes the Kingdom's statement. I thank you for your attention.

ANNEX D-11

THIRD PARTY ORAL STATEMENT OF TURKEY

I. INTRODUCTION

Mr. Chairman, Members of the Panel,

1. Turkey would like to thank the Panel for the opportunity to present its views in this proceeding on the dispute between the United States of America (hereinafter referred to as United States) and Republic of India (hereinafter referred to as India).

2. The Republic of Turkey (hereinafter referred to as "Turkey") would like submit its third party opinion due its interest on the correct and coherent interpretation of the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the "SCM Agreement").

3. In this statement Turkey will focus on the issue whether "facts available" methodology can be used to draw "adverse inferences" in (hereinafter referred to as "adverse facts available") countervailing duty investigations.

II. THE USE OF "FACTS AVAILABLE" FOR ADVERSE INFERENCES IN COUNTERVAILING DUTY INVESTIGATIONS

Mr. Chairman,

4. Before moving to the question whether "*adverse facts available"* is justified under SCM Agreement, Turkey would like to briefly discuss whether such a method has a legal presence in the structure of the WTO Law at all.

5. Turkey underscores that Annex II of the AD Agreement serves as a determining guideline. The last sentence of paragraph 7 of Annex II provides legal flexibility to the investigating authority to use information that is *less favorable* to the interest of the party if it denies cooperating through *"withholding"* relevant information. Paragraph 7 reads as follows:

> It is clear, however, that if an interested party *does not cooperate* and thus relevant information is being *withheld* from the authorities, this situation could lead to a result which is *less favourable* to the party than if the party did cooperate. (emphasis added)

6. The textual reading of the sentence points out that the investigating authority has to answer a threshold question concerning whether the interested party refused to cooperate through "withholding" relevant information.

7. "*Withhold* "has a meaning of "*to refuse give or grant something*"[1] which, as matter of fact, necessitates an adverse way of acting. In light of a conceptual interpretation it is noteworthy to discuss whether the word "withholding" is different from "refusal of granting access to" or "refusal of providing" relevant information as underlined in Article 6.8 of the AD Agreement. Turkey opines that these concepts are not different from each other. Quite the contrary, it would be accurate to point out that the two scenarios shown in Article 6.8 of the AD Agreement can also be considered as acts of "*withholding*" since this word itself encompasses a wide variety of possibilities. In that context, the refusal of giving or granting something can be considered to be corresponding the situations depicted in Article 6.8 of AD Agreement.

8. Considering the impediment of the investigation, however, Turkey supports a more cautious stance. In this respect, the investigating authority should consider the facts gathered during the investigation and decide whether the position of the interested party amounts to "withholding" in terms of paragraph 7 of Annex II.

[1] Chambers English Dictionary.

9. Pursuant to paragraph 7 of Annex II, the investigating authority has the discretion to draw negative inferences through "facts available" methodology in the event that the interested party is found to be non-cooperative and withholds relevant information. This discretion, however, is not unlimited. In terms of textual interpretation, Turkey understands that the investigating authority may resort to "secondary" information" less favorable to the non-cooperating interested party compared to the information that the authority would have possessed if the interested party had cooperated in full manner. In that regard, the last sentence of paragraph 7 envisages a compare and contrast exercise. The investigating authority is obliged to choose among different sets of information the one that would be considerably less favorable to the interest of the non-cooperative party as defined in the last sentence of paragraph 7 of Annex II.

10. Such an examination, however, is complicated. The authority has to decide on the right group of information by depending on a hypothetical reference point on what the non-cooperative interested party would have submitted if it had cooperated in full manner. As an answer to this question, paragraph 7 of Annex II stipulates that the use of secondary sources should be undertaken with special circumspection which brings the obligation to act as an unbiased and objective investigating authority.

11. In light of our explanation Turkey underlines that "*adverse facts available*" is justified under AD Agreement.

Mr. Chairman,

12. Addressing the primary question whether "adverse facts available" is applicable under the SCM Agreement, Turkey would like to highlight that the answer is closely related to the issue whether Annex II of AD Agreement is applicable to Article 12.7 of the SCM Agreement.

13. Turkey supports the approach that there is textual and conceptual parallelism between Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement. Both articles serve guidance on how to react if the interested party in question refuses to submit necessary information requested by the authority or significantly impedes the investigation through various means.[2] The primary difference between two articles is the inclusion of "*interested member*" to the text of Article 12.7 of the SCM Agreement, which is understandable considering that countervailing duty investigations primarily concentrate on the structure and mechanics of the alleged subsidy program. In terms of "*interested parties*", however, both articles have the same application pattern.

14. Turkey considers that Annex II is an integral part of the AD Agreement constituting the "context" of the Article 6.8 in terms of Article 31 of Vienna Convention on Law of Treaties (hereinafter referred to as "VCLT"). This interpretation was underscored in a number of panel and Appellate Body Reports in which Annex II was considered to contain certain substantive parameters for the application of the individual elements of Article 6.8 of the AD Agreement[3] and accepted to be incorporated to the Article 6.8 by reference.[4]

15. Considering the significance and position and legal weight of the rules stipulated in Annex II of the AD Agreement, it would be legally unreasonable to hold that the investigating authority is bound with clear-cut and carefully detailed rules and procedures in an dumping investigation while the same authority have a "free-ride" in countervailing duty investigation for the simple reason that there is no legal discipline resembling the rules in Annex II. In fact, this issue was addressed in Appellate Body Report of *Mexico – Anti-Dumping Measure on Rice* in which the Appellate Body held the view that it would be anomaly to conclude that Article 12.7 of the SCM Agreement permitted to use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.[5]

16. In light of our explanations, Annex II of AD Agreement should be considered as an integral part of the Article 12.7 of the SCM Agreement, in regard to applying "facts available" based conclusions in countervailing duty investigations.

[2] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 291.
[3] *Egypt – Anti Dumping Measures on Rebar* (Panel), para. 7.152.
[4] *US – Hot Rolled Steel* (AB), para. 75.
[5] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 295.

17. Accepting Annex II as an integral part of the Article 12.7 of the SCM Agreement, Turkey considers that the use of "adverse facts available" is justified in countervailing duty investigations. As a matter of law, however, the investigating authority is obliged to observe the same legal discipline envisaged in the last sentence of paragraph 7 of Annex II before drawing negative inferences through the use of facts available.

18. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of SCM Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

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