UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(DS436)

U.S. ANSWERS TO PANEL'S FIRST SET OF QUESTIONS

July 26, 2013

TABLE OF REPORTS

Short Form	Full Citation
Canada – Aircraft (Panel)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – LCA (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
EC – LCA (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, adopted 18 August 2003
India – Patents (US) (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Mexico – Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Antidumping and Countervailing Duties (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011

US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – LCA 2nd complaint (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – OCTG from Argentina (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – OCTG from Mexico (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Softwood Lumber IV (AB)	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
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF EXHIBITS

Exhibit No.: USA-	Description
89	19 U.S.C. § 1677m
90	Corrections to paragraphs 382 – 383 of U.S. first written submission
91	Intentionally left blank
92	2004 Verification of the Questionnaire Responses Submitted by Essar Steel, Limited ("Essar") (January 3, 2006)
93	Hot-Rolled Carbon Steel Flat Products from India: Response of Essar Steel Ltd., to the Department's Countervailing Duty Supplemental Questionnaire (March 31, 2008)
94	Hot-Rolled Carbon Steel Flat Products from India: Response of Essar Steel Ltd., to the Department's Countervailing Duty Supplemental Questionnaire (November 14, 2007)
95	Certain Hot-Rolled Carbon Steel Flat Products from India: Fourth Supplemental Questionnaire Response (November 21, 2008)
96	Statutory Interpretation Reference Materials
97	19 U.S.C. § 1677d
98	Definition of "inference", Black's Law Dictionary (1991)

2 Questions for the United States

2.1 Requests for preliminary rulings

38. At paragraphs 3 and 23 of its first written submission, the United States lists India's claims that are included in the United States' requests for preliminary rulings. These paragraphs do not include the claims in section XII.C.4 of India's first written submission (alleged inconsistency with Article 11.1 of the SCM Agreement by failure to "initiate" an investigation into new subsidies). However, paragraphs 14 and 22 of the United States' first written submission (concerning a request for a preliminary ruling in respect of India's claims under Article 11 of the SCM Agreement) do refer to these claims. At paragraph 1 of its response to the United States' requests for preliminary rulings, India contends that the United States has not properly raised a request for a preliminary ruling with respect to claims in section XII.C.4 of India's first written submission. Please comment.

1. The United States does request a preliminary ruling by the Panel that the claims raised in section XII.C.4 were not included in India's panel request, as discussed in paragraph 22 of the U.S. first written submission. Specifically, India included the following phrase in its request for the establishment of a panel:

> Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.[1]

2. With respect to India's claim at section XII.C.4 of its first written submission, which uses similar language to that set out in its panel request, it is not clear from the description of this claim to which obligation in, or portion of, Article 11 it relates. That is, the description does not appear to correlate to any specific obligation contained in Article 11. India's panel request therefore fails to present the problem clearly. India itself reinforces this point by relying on "[a] conjoint reading of Article 11.1 with the first sentence of Article 10 of the SCM Agreement" to argue that the SCM Agreement "obligates the United States to take a procedural action to formally commence an investigation".[2] India did not include a claim under Article 10 of the SCM Agreement regarding the new subsidies allegations, and did not include a claim under Article 11 of the SCM Agreement that was sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

3. We also note that India appears to misunderstand the nature of questions concerning a panel's terms of reference. India's claim that the United States "has not properly raised" a jurisdictional challenge to the claims in section XII.C.4 of India's first written submission ignores the fact that a panel may consider matters regarding its terms of reference on its own initiative, and may address terms of reference matters at any time. For example, the Appellate Body has stated: "We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."[3] And, in *EC and certain Member States – Large Civil Aircraft*, the European Union *never* raised procedural objections to the U.S. inclusion of certain unwritten subsidy measures. The Appellate Body examined the measure *itself*, however, stating that "certain issues going to the jurisdiction of a panel are so fundamental that they may be considered at any stage in a proceeding."[4]

2.2 Public body

39. In footnotes to paragraphs 382-383 of its first written submission, the United States refers to various Exhibits. It would appear that some of these references are erroneous. Please verify the references and submit any corrections as appropriate.

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[1] *Request for the Establishment of a Panel by India*, WT/DS436/3, 12 July 2012.
[2] India First Written Submission, para. 608. (internal emphasis omitted)
[3] *US – 1916 Act (AB*), footnote 30 to para. 54.
[4] *EC and certain Member States – Large Civil Aircraft (AB)*, para. 791 (citing Appellate Body Report, *US – Carbon Steel*, para. 123.

4. A replacement page containing revised footnotes is included at Exhibit USA-90.

40. At paragraphs 416-427 of its first written submission, India understands the USDOC to have found that both the SDF Managing Committee and the JPC are public bodies. In its first written submission, the United States appears to defend a determination by the USDOC that only the SDF Managing Committee is a public body. Please clarify whether the USDOC determined that only the SDF Managing Committee was a public body, or whether it also found that the JPC is a public body. Please also identify which entity/entities was/were found to have made the financial contributions at issue.

5. Commerce stated in its final determination in the investigation: "The Department has determined in this proceeding that the SDF Management Committee is a government body."[5] Commerce additionally stated that "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."[6] Specifically, Commerce found that the SDF Managing Committee – which was composed exclusively of government officials – made all final decisions on loans, including setting the terms and approving waivers of SDF loans. Therefore, Commerce determined that the SDF itself, as controlled by the SDF Managing Committee, operates as a government entity and was therefore a "government or any public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

6. Regarding financial contribution, Commerce found that "the loans and loan forgiveness provided to steel producers under [the SDF] program constituted a financial contribution".[7] Given its earlier findings that the SDF Managing Committee in particular was a government body that controlled the SDF and made all final decisions on loans, the financial contribution was found to have been attributable to the government by virtue of the control exercised over the SDF by the SDF Managing Committee.

7. While the JPC handled much of the day-to-day operations of the SDF program, the JPC was just one part of the larger SDF program, and Commerce's findings in the investigation were not limited to any specific actions taken by the JPC, as divorced from the operations of the larger program. The two constituent committees worked together, with the Managing Committee making all final lending decisions and the JPC generally handling the day-to-day administration of the SDF program. Commerce 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.

41. At paragraph 382 of its first written submission, the United States refers to USDOC's determination that NMDC was "governed by" the GOI's Ministry of Steel. Please explain the basis for that determination.

8. In the 2004 administrative review, the first time that the NMDC program providing iron ore for less than adequate remuneration was examined, the evidence demonstrated that: 1) the GOI owned 98.37% of the NMDC[8]; 2) the GOI was heavily involved in the selection of directors of the NMDC, some of whom were directly appointed by the Ministry of Steel[9]; and 3) the NMDC's own website stated that the "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India."[10] In addition to this evidence from the 2004 administrative review, in

[5] *Investigation Issues and Decision Memorandum* at Comment 1 "Department's Position" (Exhibit IND-7).
[6] *Investigation Issues and Decision Memorandum* at Comment 1 "Department's Position" (Exhibit IND-7).
[7] *Investigation Issues and Decision Memorandum* at Comment 1 "Department's Position" (Exhibit IND-7). (emphasis added).
[8] *India's September 2, 2005, Supplemental Questionnaire Responses,* at p.2 A.2.a, and p.4.A.3.a (Exhibit USA-68); *2004 Verification Report of Government of India Response*, at 4 (January 3, 2006) (Exhibit USA-66)*; see also, India's April 23, 2007, Questionnaire Response (2006 AR),* at 41 (Exhibit USA-49).
[9] *2004 Verification Report of Government of India Response,* at 5-6 (January 3, 2006) (Exhibit USA-66); *see also, India's April 23, 2007, Questionnaire Response (2006 AR),* at 41 ("two Government Directors from Ministry of Steel, Government of India." (Exhibit USA-49).
[10] *2004 New Subsidies Allegation*, Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).

the 2007 administrative review, the GOI reported that it appointed two directors and had approval power over an additional seven out of 13 total directors.[11] Based on this evidence, Commerce determined that NMDC was "governed by", or controlled by, the GOI.

42. At paragraph 382 of its first written submission, the United States refers to USDOC's determination that NMDC is under the "administrative control" of India's Ministry of Steel & Mines.

a. What is meant by "administrative control"?

9. In the paragraph to which the Panel refers in its question, the United States quotes NMDC's use of the term "administrative control" on its website. Specifically, the record indicated that NMDC's website claimed that "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India."[12] In its own determination, Commerce stated that NMDC was "a mining company governed by the GOI's Ministry of Steel".[13] As explained in the U.S. first written submission, this finding reflected the record evidence establishing the relationship between NMDC and the GOI. Commerce's statement that NMDC was "governed by" the GOI indicated that the GOI controlled NMDC through its 98.37% ownership of the NMDC, and its appointment or approval of the majority of the directors.

b. What is the basis for USDOC's determination that NMDC is under the "administrative control" of India's Ministry of Steel & Mines?

10. As noted in the U.S. response to Question 42, the term "administrative control" was used by NMDC in its website description of the company, and was not used in Commerce's determinations. Commerce applied a simple control test in the determinations at issue in this dispute, because this was the standard WTO panels and the Appellate Body up to that time had indicated was appropriate. However, as stated in the U.S. first written submission, Commerce nevertheless discussed in its determinations a variety of evidence regarding the relationship between the GOI and NMDC, all of which would support a finding that the government controlled NMDC such that it could use that entity's resources as its own.[14]

2.3 Benefit

43. Please comment on India's assertion, at paragraph 82 of its first written submission, that Section 351.511(a)(2)(ii) does not "even contemplate adjustments that would ensure that the benchmark is in relation to the market conditions of the" country of provision.

11. India is incorrect in its characterization of U.S. law. At the outset, in responding to India's statements, it is useful to consider the structure and operation of the U.S. statute 19 U.S.C. 1977(5)(E) and its implementing regulations, contained in Sections 351.511(a)(1) and 351.511(a)(2), which are designed to ensure that Commerce evaluates the adequacy of remuneration in accordance with the guideline provided in Article 14(d) of the SCM Agreement.

12. As explained in paragraphs 30 through 31 of the U.S. first written submission, 19 U.S.C. 1677(5)(E) gives effect to the Article 14(d) guidelines nearly word-for-word. The statute provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being purchased in the country which is subject to the investigation

[11] *India's May 5, 2008, Questionnaire Response (2007 AR), at II-41* (Exhibit USA-67).
[12] *2004 New Subsidies Allegation*, Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).
[13] *2004 Preliminary Results, 71 Fed. Reg. at 1516* (Exhibit IND-17); *2006 Preliminary Results,* 73 Fed. Reg. 1586-1587, (Exhibit IND-32); *2007 Final Issues and Decision Memorandum,* Comment 10 (Exhibit IND-38); *2008 Preliminary Results*, 75 Fed Reg. at 1503(Exhibit IND-40).
[14] U.S. First Written Submission, paras. 381-383.

or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale."[15]

13. The relationship between 19 U.S.C. 1677(5)(E) and its implementing regulations is captured in the text of Section 351.511(a)(1) through explicit reference to "section 771(5)(E)(iv) of the Act." To clarify, the referenced provision is codified in U.S. law as 19 U.S.C. 1677(5)(E)(iv). Section 351.511(a)(1) is a general provision that applies to all three "tiers" of the U.S. regulatory hierarchy for benchmarks, including Section 351.511(a)(2)(ii). Based on this explicit reference to the statute, it is clear that the purpose of the regulations contained in Sections 351.511(a)(1) and 351.511(a)(2) is to give effect to the text of the statute, including its mandate to assess remuneration in relation to the "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in the country subject to the investigation—the very definition of prevailing market conditions contained in Article 14(d) of the SCM Agreement.

14. India misunderstands Section 351.511(a)(2)(ii) when it asserts that the regulation does "not even contemplate adjustments that would ensure that the benchmark is in relation" to such conditions. Quite the contrary, the U.S. regulation was created to do just that. In applying Section 351.511(a)(2)(ii) the United States views the factors identified in 19 U.S.C. 1677(5)(E)(iv)—namely, "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in the country subject to the investigation—as a non-exhaustive list of market conditions that can be taken into account to ensure that the benchmark price is adjusted to reflect prevailing market conditions, specifically in the country of provision.

15. Moreover, the text of Section 351.511(a)(2)(ii) itself, which provides that "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*"[16], contemplates an evaluation by Commerce as to whether a given price would be available in the country subject to the investigation. The nature of that assessment clearly envisions that the prevailing market conditions will be considered in accordance with Section 351.511(a)(1) and 19 U.S.C. 1677(5)(E)(iv). In sum, India's assertions about 351.511(a)(2)(ii) reflect a misunderstanding of the text as well as the regulatory scheme.

44. At paragraphs 30-36 of its first written submission, the United States explains the "three tier" hierarchy of the US regulation in determining whether remuneration for government provision of goods is adequate. Section 351.511(a)(2)(iv) sets forth that, in measuring adequate remuneration for Tiers I and II, the USDOC will adjust the comparison price for delivery charges and import duties. Please explain in which scenario the USDOC would adjust in-country benchmark prices (Tier I) for import duties.

16. It is important to clarify that Commerce's regulation, Section 351.511(a)(2)(i) provides three examples of prices that would qualify as a Tier I benchmark price: (1) actual prices between private parties in the country of provision; (2) actual import prices; and (3) actual sales prices from a competitively run government auction. When comparing a Tier I benchmark with the government price, as discussed above in response to question 43, the U.S. statute 19 U.S.C. 1677(5)(E)(iv) requires that adjustments will be made with respect to relevant prevailing market conditions, consistent with the Article 14(d) guidelines, including transportation costs.[17] Section 351.511(a)(2)(iv), therefore, is the implementing regulation specifically designed to adjust Tier I and Tier II benchmarks to include delivery charges and import duties for the purpose of accurately reflecting the prevailing market conditions.

17. Section 351.511(a)(2)(iv) does not require that Commerce adjust benchmark prices to include import duties in every instance, however. Rather, according to the text of Section 351.511(a)(2)(iv),

[15] 19 U.S.C. § 1677(5)(E)(iv) (Exhibit USA-87).
[16] 19 C.F.R. § 351.511(a)(2)(ii) (Exhibit USA-3) (emphasis added).
[17] 19 U.S.C. § 1677(5)(E) (Exhibit USA-87).

the benchmark price should "reflect the price that a firm actually paid."[18] Therefore, Tier I benchmarks based on actual prices between private parties in the country of provision or actual sales prices from a competitively run government auction, for example, will not be adjusted to include import duties because import duties are not relevant with respect to these wholly domestic transactions.

18. Where the Tier I in-country benchmark price is based on actual import prices, however, Commerce will adjust the benchmark price to include import duties, provided that import duties were actually charged. In other words, even where the benchmark price is based on actual import prices, Commerce will not adjust for import duties if, in the context of that particular transaction, import duties were not charged by the country subject to investigation.

19. This makes sense when considering the purpose of the Section 351.511(a)(2)(iv) adjustment, which is to ensure that the government price and the benchmark price reflect the actual price of the goods to the in-country purchaser. Commerce will only make adjustments to the government price and benchmark price that are necessary to reflect delivery of the government-provided good and the benchmark to the purchaser; the benchmark must reflect what the price a firm actually paid, nothing more.

20. An example of an adjustment where Commerce did include import duties and delivery costs under Section 351.511(a)(2)(iv) can be found in paragraphs 434, 435, and 455 of the U.S. first written submission, where Commerce used an actual sale of DR-CLO from Brazil to Essar, an Indian steel company, as the Tier I in-country benchmark price.[19] To summarize, in its 2006 and 2007 administrative reviews, Commerce adjusted the delivered price from Brazil to include all costs actually paid by Essar to import high grade iron ore lumps from the mine in Brazil to Essar's steel mill in India. These costs included taxes, import duties, and other charges, which record evidence showed were actually paid by Essar in order to acquire the iron ore lumps. Commerce adjusted the benchmark to include all of the actual costs necessary to get the NMDC ore to its factory, which did not include import duties, to ensure that the price reflected the actual prices paid by Essar in the country of provision, India.[20]

21. The United States further notes that making appropriate adjustment for import duties and delivery costs necessarily depends on the factual record before the investigating authority. Commerce will make adjustments to ensure that both the government price and benchmark price are compared on an apples-to-apples basis, to the extent that the factual record contains the relevant information.

45. Please explain how the references in footnote 629 bear on the first two sentences of paragraph 442 of the United States' first written submission.

22. Footnote 629 was affected by a clerical error. Footnote 629 was intended to reference where Commerce found MML and Orissa to be state owned companies and should read as follows: "See 2006 Preliminary Results, 73 Fed. Reg. at 1581 (IND-32) and Essar Verification Report 2004 Review, at 19 (Exhibit USA-92)."[21]

46. Please explain how the reference in footnote 630 bears on the substance of paragraph 443 of the United States' first written submission.

23. Footnote 630 was affected by a clerical error. Footnote 630 was intended to reference where, in its benefit calculations, Commerce considered the iron (FE) content. It should read as follows: "2006 Preliminary Results, 73 Fed. Reg. at 1587 (IND-32)."

[18] 19 C.F.R. § 351.511(a)(2)(iv) (Exhibit USA-3).
[19] U.S. First Written Submission, para. 455.
[20] *2006 Issues and Decision Memorandum*, at Section I.A.4 (IND-33) and *2007 Issues and Decision Memorandum*, at Section IV.A.3 (IND-38).
[21] The Essar Verification Report for the 2004 Review was not included in the U.S. first written submission, and is included now as Exhibit USA-92.

47. Please comment on India's assertion, at the Panel's first substantive meeting with the parties, that USDOC applied "triangulated" freight charges to the NMDC prices. Did USDOC adjust for the cost of freight from NMDC to a port, and then from the port to the customer, or did USDOC adjust for the cost of freight direct from NMDC to the customer? Please explain.

24. With respect to the transactions in question, Commerce added the following transportation charges to the government's ex-mine price: (1) rail transportation from the mine itself to the east coast port in India; (2) shipping by boat from the east coast port in India to the west coast port in India; and (3) transportation from the west coast port in India to the steel mill of the customer.[22] All three charges used by Commerce were the amounts *actually paid* by Essar.[23] Commerce's adjustment for transportation reflects how Essar actually transported the iron ore from the mines on the east coast of India to the mills on the west coast.[24] As such, the freight charges reflect the prevailing market conditions in India for the transportation of iron ore from the east coast mines to the west coast mills.

25. Article 14(d) of the SCM Agreement provides that the adequacy of remuneration will be determined in relation to the prevailing market conditions in the country of provision and, further, that prevailing market conditions include "price, quality, availability, marketability, transportation and other conditions of purchase or sale." In accordance with the Article 14(d) guidelines, the prevailing market conditions in the Indian market must include transportation costs, as a producer cannot use an input which is not delivered to the factory. The true costs of an input to a producer—the price actually paid—includes all of the delivery charges incurred by the producer to physically get the input to the producer's facility for use. By using the actual costs incurred by Essar in transporting iron ore, Commerce's adjustment reflects the prevailing market conditions in accordance with Article 14(d) as well as 19 U.S.C. 1677(5)(E)(iv) and Section 351.511(a)(2)(iv).

48. If an ex mine price from NMDC were the same as the ex mine price from an Australian miner, would the USDOC be entitled to find benefit when those prices are adjusted for delivery to an Indian customer (assuming that the costs of delivery from the Australian mine are greater than the costs of delivery from NMDC, such that NMDC's delivered price would be lower than the Australian mine's delivered price)? Please explain.

26. The United States understands the Panel to be asking whether, under Article 14(d) of the SCM Agreement, ex-mine sales of iron ore from NMDC could be found to confer a benefit where prices of iron ore from Australia, sold at the same ex-mine price but bearing a higher delivery cost, are used as a Tier II benchmark. In brief, yes—an investigating authority would be entitled to find benefit under such conditions, provided that an investigating authority determines, in accordance with the guidelines contained in Article 14(d) of the SCM Agreement, that NMDC's provision of iron ore is made for less than adequate remuneration.

27. This result is not exclusive to the use of out-of-country benchmarks. To the contrary, this properly will occur under the SCM Agreement when any benchmark is used, including in-country benchmarks. For example, consider the hypothetical where Indian-government Mine A is located next to Factory A, and ten private mines in India are situated much farther away from Factory A. The ten private mines all sell at the same price, and have equal transportation costs, which are much higher than those from Mine A to Factory A. The price from the ten private mills to Factory A, including the transport costs, would establish the private-party, arm's length benchmark applicable to Factory A. This makes perfect economic sense. If the government mine were a private party, it would take advantage of its proximity to Factory A, and maximize its profits by charging the same market price (including transportation costs) as the market price (including transportation costs) that Factory A would have to pay to obtain ore from any of the 10 private mines. Thus, the price (including transportation costs) that Factory A would have to pay for ore from any of the 10 private mines is the

[22] 2004 Verification Report Essar, p. 19 (Exhibit USA-92).
[23] 2006 Issues and Decisions Memorandum at 13-16 (Exhibit IND-33).
[24] 2004 Verification Report Essar, p. 19 (Exhibit USA-92).

appropriate economic benchmark for determining whether or not the price (including transportation costs) charged by government Mine A confers a benefit. That is, if the government mine does not charge the prevailing market price for the ore it sells to Factory A, it is giving up economic value it otherwise could have obtained, and thereby conferring a benefit on Factory A.

28. The Article 14(d) benefit guidelines provide that the adequacy of remuneration for government provided goods is to be determined in relation to the prevailing market conditions in the country of provision. As explained in the U.S. first written submission, the primary benchmarks for determining adequacy of remuneration are private, arms-length prices in the country of provision, reflecting all conditions of sale, such as transporting the good to the factory.[25] Therefore, in order to reflect the prevailing market conditions in India, all of the conditions of sales, including the costs associated with getting a good to the Indian market, must be included.

29. A prime example of this, discussed in response to question 44, is the fully delivered price that Essar paid for Brazilian iron ore shipped to its mill in India from Brazil, which was a price between two private parties for a good that actually entered and competed in the Indian market. This record evidence demonstrates that market conditions in India were such that an Indian company actually paid to have Brazilian iron ore to be shipped and imported into India rather than buying it from an Indian producer. The fully delivered cost represents the actual cost to Essar of the foreign iron ore it purchased to use in its steel making process and, as such, reflects the prevailing market conditions in the Indian market.

30. If the transportation charges were excluded from the Essar price, the benchmark would not reflect the prevailing market conditions in India, rather, those in Brazil. Using a price based on the Brazilian market conditions would contravene the logic that the actual cost to the buyer of an input includes all of the charges necessary to get the input to the factory for use. Moreover, it would be inappropriate to compare the fully delivered Essar benchmark price to the NMDC ex-mine price; the ex-mine price must also be adjusted, as provided in Article 14(d), to be a delivered price, in order to make an apples-to-apples comparison based on prevailing market conditions in India.

31. This same logic is no different for the Tier II world market prices where Tier I prices are unavailable. As explained in paragraphs 451 through 467 of the U.S. first written submission, that was the case here: Commerce used the Australian world market price for high grade iron ore fines and lumps in the 2006 and 2007 administrative reviews as the benchmark, adjusted for delivery costs. India argued that delivery costs should be excluded from the benchmark and that the ex-mines price should serve as the basis for the comparison.[26] However, just as for Tier I prices, in order for the Australian price to reflect the prevailing market conditions in India, all of the charges including freight to India must be included to accurately reflect that price as if it were imported into the Indian market. To rely strictly on the ex-mine prices to the exclusion of transportation costs, would have ignored the prevailing market conditions in the country of provision and left the benchmark price as a purely Australian price, unrelated to the Indian market, inconsistent with Article 14(d) of the SCM Agreement.

32. The Panel's proposed hypothetical, where an ex-mine price of iron ore from NMDC matches that of an Australian miner and delivery prices from Australia are higher than those from NMDC, must be evaluated pursuant to the text of the Article 14(d) guidelines—whether goods are provided for less than adequate remuneration given prevailing market conditions. The Article 14(d) guidelines do not indicate that, where there are no useable in-country prices, there can be no benefit based on an actual import price (such as the Essar price) or world market price (such as the Hammersley, Australia price) unless such benchmark prices are less than the subsidized in-country price by at least the cost of international freight and import duties. To the contrary, and especially when the producers in the

[25] *See U.S. – Softwood Lumber IV (AB)*, at para. 90 ("the starting-point, when determining adequacy of remuneration, is the price at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. 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").
[26] India's First Written Submission, paras. 305-311.

country of provision actually do source the goods from abroad, the use of an out-of-country benchmark, adjusted to reflect the prevailing market conditions in the country of provision, is an appropriate means to determine whether any benefit is being conferred on purchasers of goods in India.

49. Please provide the conditions of sale on which the Hamersley, Australia prices used by USDOC were quoted in the Tex Report.

33. The prices quoted in the Tex Report are FOB port prices from Hamersley, Australia to where it is shipped in Japan.[27]

2.4 Use of delivered prices

50. With reference to the text of Section 351.511(a)(2)(iv), please explain the basis for the United States' assertion that the regulation requires the inclusion of delivery costs in both the government price and the benchmark price (United States' first written submission, para. 75).

34. While Section 351.511(a)(2)(iv) explicitly requires that the Secretary adjust the "comparison" (or benchmark) price, as explained above in response to questions 44, the requirement that both prices be adjusted is provided for in the U.S. statute 19 U.S.C. 1677(5)(E) and Section 351.511(a)(1) which generally require that adjustments be made to reflect prevailing market conditions without limiting the adjustments to either the government price or the benchmark price.

35. Moreover, Commerce does in fact adjust *both* the government price and the benchmark price in *every* instance to ensure that a comparison is made at the same point in the distribution chain. This fact is undisputed by India.

36. As explained above in response to questions 44 and 49, as well as in paragraph 463 of the U.S. first written submission, the essence of the benefit analysis is to assess whether the recipient obtained something "on terms more favourable than those available in the market." To summarize the U.S. position here, a benchmark comparison is only meaningful when it is based on an apples-to-apples comparison, whereby the benchmark price and government price are compared at the same point on the distribution chain. Adjusting both prices to reflect delivery charges in order to ensure comparability is consistent with the principles highlighted in the non-exhaustive list of prevailing market conditions contained in both Article 14(d) of the SCM Agreement and 19 U.S.C. 1677(5)(E), a list which specifically includes "transportation". Thus, when comparing the price of a government-provided good to the benchmark price, Commerce includes all delivery costs in both prices to ensure that the comparison is meaningful.

51. Please comment on India's assertion that because "the Tier-I benchmark price is an in-country benchmark price, there is no reason to adjust that in-country benchmark price to reflect the price the firm would pay if it imported the product" (India's first written submission, para. 90).

37. India's assertion at paragraph 90 of its first written submission is incorrect and reflects India's misunderstanding of the operation of the U.S. regulations. As explained in response to question 44, above, as well as in paragraph 455 of the U.S. first written submission, an actual import price is an in-country price between private parties under Tier I of the U.S. regulation. While a Tier I benchmark is not adjusted to include import duties and international shipping costs in every instance—for example where the Tier I price is based on either actual prices between private parties in the country of provision or actual sale prices from a competitively run government auction—it is adjusted to include

[27] See 2004 Issues & Decision Memorandum, at 3 (Exhibit IND-18); Essar Supplemental Questionnaire Response (2006 AR), November 14, 2007, (Exhibit USA-94); Essar Supplemental Questionnaire Response (2007 AR), November 21, 2008, at internal exhibit 4 (Exhibit USA-95).

such costs where the benchmark price is an actual import price and the country of import applies import duties.

38. As explained in response to question 44, above, when using an actual import price for the purposes of calculating a Tier I benchmark, it is necessary to adjust the benchmark price to reflect delivery charges and applicable import duties as these costs reflect the price actually paid by the purchaser in the country of provision. Section 351.511(a)(2)(iv) of the U.S. regulation requires, consistent with the Article 14 (d) guidelines, that such adjustments are made in order to ensure an apples-to-apples comparison and maintain the utility of a benchmark comparison in the first place.

39. The United States further refers the Panel to its responses to questions 44 and 52.

52. Does the United States accept the characterization of the operation of Section 351.511(a)(2)(iv) set forth at paragraph 15 of India's opening statement? Please explain.

40. India's characterization of Section 351.511(a)(2)(iv) in paragraph 15 of its opening statement reflects a misunderstanding of the U.S. regulation. For example, in paragraph 15 India seems to argue that import duties will be added to every Tier I and Tier II benchmark price, even for actual prices between private parties in the country of provision and actual sales prices from a competitively run government auction. As mentioned in the U.S. response to question 44, the purpose of the Section 351.511(a)(2)(iv) adjustment is to ensure that the government price and benchmark price reflect the actual price paid by an in-country producer and not more. Accordingly, under Section 351.511(a)(2)(iv), a Tier I benchmark price is not adjusted to include import duties where such duties were not imposed on the actual transaction.

41. The operation of Section 351.511(a)(2)(iv) is further explained in the U.S. response to question 44; the United States does not accept India's characterization as an accurate portrayal of the U.S. regulations.

53. Please comment on India's assertion, at paragraph 17 of its opening statement, that "the United States ends up finding a 'benefit' to the extent of ocean freight".

42. As discussed in response to question 48, above, the United States firmly disagrees with India's assertion that the United States finds a benefit to the extent of ocean freight in adjusting the benchmark for delivery costs. Rather, the U.S. statute and implementing regulations provide that "benefit exists to the extent that such goods or services are provided for less than adequate remuneration."[28] Ocean freight, import duties, and other delivered price adjustments under Section 351.511(a)(2)(iv) are merely one aspect of the entire benefit determination.

43. In paragraphs 16 and 17 of its opening statement, India appears to argue that the United States ignores prevailing market conditions in India whenever it adjusts the benchmark price to include transportation costs.[29] India argues that in doing so, "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."[30] This argument has no basis in economics or the text of the agreement. Consistent with guidelines contained in Article 14 of the SCM Agreement and contrary to India's assertion, 19 U.S.C. 1677(5)(E) directs Commerce to determine the adequacy of remuneration for a government provided good or service "in relation to the prevailing market condition for the good . . . in question in the country of provision." Moreover, the non-exhaustive list of prevailing market conditions under Article 14 explicitly includes "transportation", a fact which India ignores. India, in all

[28] 19 C.F.R. § 351.511(a)(1) (Exhibit USA-3).
[29] Moreover, in addition to paragraph 17 of its opening statement, India argues in its first written submission that the "sole objective of [the delivery cost] adjustment is to arbitrarily increase the benchmark price to a higher level" as well as to create "a legal fiction that introduces forced changes in the prevailing market conditions . . . inconsistent with the text of Article 14(d)", India First Written Submission, para. 90.
[30] India's opening statement at the first substantive meeting, paras. 16-17.

its assertions, fails to cite to any record evidence that would support its contention that Indian producers enjoy an alleged comparative advantage with respect to production or transportation. In fact, record evidence shows that Essar, an Indian company, actually imported iron ore from Brazil to use in making steel, when it had other domestic options available.[31] Moreover, as explained at paragraph 459 of the U.S. first written submission, the record indicates that Australia, the benchmark country, has more iron ore deposits than India (one of the many factors that might affect the theoretical principle of "comparative advantage" between trading partners with respect to particular factors of production). In short, to the extent that, in the real world, one could actually analyze and quantify the theoretical comparative advantage between two trading partners with respect to particular factor inputs, there is no basis for India's assertion of a comparative advantage with respect to iron ore as compared to other factor inputs.

44. Fundamentally, India's assertions with respect to shipping costs are incorrectly premised on its false belief that, under Article 14 of the SCM Agreement, the adequacy of remuneration should be assessed with respect to cost to the provider of the financial contribution as opposed to the benefit of the recipient.[32] As discussed extensively in the U.S. first written submission, India's interpretation is based on a flawed reading of the text, in which India reargues a cost-to-government approach already considered and rejected by the Appellate Body.[33] Rather, the essence of the benefit analysis under Article 14 of the SCM Agreement is to assess whether the *recipient* obtained something "on terms more favourable than those available in the market."[34] And because a producer cannot use an input which has not been delivered to its facility for use, the cost of that input to the recipient, the steel producer in this case, necessarily includes all of the delivery charges.

2.5 Specificity

54. Paragraph 423 of the United States' first written submission repeats paragraph 422, concerning economic diversification in the context of Article 2.1(c). Was paragraph 423 intended to explain the logic of considering the length of time during which a subsidy programme has been in operation? If so, please provide that explanation.

45. The Panel is correct to note that paragraph 423 of the U.S. first written submission repeats paragraph 422. Paragraph 423 was intended to explain the logic behind the length of time analysis contained in the third sentence of Article 2.1(c), an explanation which unfortunately was deleted during the final editing process. That explanation is provided below as follows:

> The length of time analysis contained in Article 2.1(c) reflects the fact that users applying for and receiving benefits under a newly created subsidies program may be few in number during the initial phase of that program, thereby making a subsidy appear specific. If a newly created program were viewed over a longer period of time, however, the program may be found to be used by a greater number of industries or enterprises than during the initial phase. This logic is consistent with what previous panels have said with respect to this provision. For example in *EC – Large Civil Aircraft*, the panel noted that "the use of a subsidy program by certain enterprises may not necessarily indicate 'predominant use' in the context of a relatively new subsidy programme that has not yet operated for enough time to understand its full impact on the economy."[35]

46. To summarize the compete argument set out in paragraphs 420 through 428 of the U.S. first written submission: the third sentence of Article 2.1(c) recognizes that a panel or investigating

[31] Essar's Supplemental Questionnaire Response (2006 AR), March 31, 2008, at 1-2 (Exhibit USA-93).
[32] "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)." India's opening statement at the first substantive meeting, para. 16.
[33] *Canada – Aircraft (AB)*, paras. 154-155.
[34] *Canada – Aircraft (AB)*, para. 157.
[35] *EC – Large Civil Aircraft* (panel), para. 7.976.

authority must account for the fact that where an economy is not diverse or a subsidy program is new, a *de facto* specificity analysis can render a "false positive." The extent of economic diversity of the country of provision and the length of time that a subsidy program has been in operation would only affect the specificity determination if the subject economy lacks diversification or if the period of time could directly impact the specificity determination. Neither is the case here.

2.6 Captive mining rights

55. Within its claim that the USDOC acted inconsistently with Article 12.5 of the SCM Agreement by failing to satisfy itself as to the accuracy of certain information, India contends that the USDOC erred in identifying a separate iron ore mining programme. (India's first written submission, para. 355) The United States does not appear to directly address this aspect of India's claim. Please address it or clarify whether the United States' assertions regarding the existence of a captive mining programme for iron ore should be considered to also address this aspect of India's claim.

47. Yes, the U.S. assertions regarding the existence of a captive mining program for iron ore should be considered to also address this aspect of India's claim. In particular, the United States addressed India's Article 12.5 claim with respect to a captive mining program for iron ore in paragraphs 482 through 484 of the U.S. first written submission. To summarize that part of our submission the United States explained that Commerce did not rely on "bare assertions" as alleged by India but rather, on record evidence—including two extensive reports regarding the Indian steel industry, which Commerce determined to be accurate because they were commissioned by the GOI. These reports substantiate the fact that India has a captive mining program for iron ore in which only four of the largest steel producers participate.[36]

48. 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."[37] Because Commerce satisfied itself as to the accuracy of information contained in these reports, which were commissioned by the GOI, the U.S. actions fully complied with obligations of Article 12.5 of the SCM Agreement.

2.7 Cumulation

56. At paragraph 128 of its first written submission, the United States refers to the Canadian International Trade Tribunal's understanding that "cross-cumulation" of the effects of subsidization and dumping is permitted because it is impossible to separate the effects of dumping from the effects of subsidizing the same goods. For purposes of the assessments performed under Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, does the United States consider that it is not possible to distinguish the effects of one set of imports (dumped and subsidized imports) from the effects of another set of imports (only dumped imports)? Please explain.

49. Yes, it is difficult to see how, as a practical matter, an investigating authority could distinguish the effects of the group of dumped and subsidized imports from the effects of the group of imports that are only dumped imports when performing the assessments provided for required under Articles 15.1, 15.2, 15.3 and 15.4. As the question notes, the United States has pointed out that findings of Canada's International Trade Tribunal (CITT) support this view.

50. Distinguishing the effects of these two different sets of imports is not practical for two reasons. First, as the United States explained in paragraph 126 of its FWS, when subsidized and dumped imports and dumped imports are both simultaneously sold in a market and are competing with each other and the domestic like product, both groups of imports have a compounding effect with respect to the pricing and sales levels of the domestic industry. When subsidized and dumped imports

[36] U.S. First Written Submission, para. 482.
[37] Article 12.5 of the SCM Agreement.

and dumped imports are both having an injurious effect on the industry, the competitive pricing levels of both groups of imports will produce often more significant price depression or price suppression than might have occurred in the absence of one of the groups of unfairly traded imports. In light of the mutually reinforcing negative effects of the two groups of imports in the market, both groups of imports will have a more pronounced negative effect on the industry's pricing and sales levels. As a result, when both dumped and subsidized imports and dumped imports are in the market simultaneously and having negative price and sales effects, "the effects of dumping and subsidizing" -- as the CITT noted with respect to a group of dumped imports and a group of subsidized imports -- "are so closely intertwined that it is practically impossible to unravel them in order to allocate specific or discrete portions to the dumping and the subsidizing".[38]

51. Second, the difficulties involved in distinguishing between the effects a group of dumped imports and a group of subsidized imports are further heightened when – as is the case here – one group is dumped and the other group is subsidized and dumped. In this circumstance, **all** of the imports in both groups are dumped, and thus all dumped imports are contributing to injury. In addition to the CITT, the Australian Customs and Border Protection Service[39] recognizes that distinguishing the effects of dumping versus subsidization on an industry is not possible. Furthermore, India itself has confirmed that it does not contend that the U.S. authority should have distinguished the injurious effects of dumping from those of subsidization when imports are both subsidized and dumped.

52. The impossibility of unravelling the collective and mutually reinforcing effects of these two groups of unfairly traded imports is especially significant when considered in light of the policies underlying cumulation, as articulated for example by the Appellate Body. As the Appellate Body has stated:

> 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...[40]

53. Put another way, requiring an authority to attempt the undoable exercise of separating the adverse price and volume effects of a group of dumped imports from those of dumped and subsidized imports would prevent an authority from "properly taking into account the combined injurious impact of all unfairly traded imports that are affecting an industry adversely at the very same time," which is one goal of cumulation in injury investigations.

57. At paragraph 133 of its first written submission, the United States argues that, to the extent the Panel agrees that "cross-cumulation" is not inconsistent with Article 15.3 of the SCM Agreement, it would be reasonable for an investigating authority to consider the effects of subsidized imports and dumped imports in the assessments provided for in Articles 15.1, 15.2 and 15.4. Please clarify how the Panel should interpret the expression "subsidized imports" in these provisions, including whether this expression could refer to imports that have not been found to be subsidized.

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[38] Certain Grain Corn Originating in or Exported from the United States of America and Imported into Canada for Use or Consumption West of the Manitoba-Ontario Border, Inquiry No. NQ-2000-005 at 13-14 (CITT, March 7, 2001) (Exhibit USA-6).

[39] Certain Grain Corn Originating in or Exported from the United States of America and Imported into Canada for Use or Consumption West of the Manitoba-Ontario Border, Inquiry No. NQ-2000-005 at 13-14 (CITT, March 7, 2001). (Exhibit USA-6); See, e.g., Certain Hollow Structural Sections Exported from the People's Republic of China, the republic of Korea, Malaysia, Taiwan, and the Kingdom of Thailand, Report to the Minister No.177 (Australian Customs and Border Protection Service, June 7, 2012) at 87 (Exhibit USA-7).

[40] *US - OCTG from Argentina (AB)*, paras. 296-97 (emphasis added).

54. The United States understands the phrase "subsidized imports" to cover imports that an authority has found to have received a subsidy, as that term is defined in the SCM Agreement. This interpretation, however, does not preclude the cumulation of those "subsidized imports" with other unfairly traded imports. In this regard, the United States would note that Article VI of the GATT 1994 provides important context for interpreting Article 15. Article VI.6.a of the GATT 1994 provides that a Member may impose antidumping or countervailing duties where it determines that "the effect of ***dumping or subsidization***, as the case may be, is such as to cause or threaten material injury to an established domestic industry…" We note that Article VI speaks of injury in the singular and suggests that a unitary analysis may be appropriate for assessing injury. Thus, Article VI contemplates a situation in which an authority must deal with both dumped and subsidized imports of the same product, and points toward the assessment on a cumulated basis of the effects of the unfairly traded imports, whether subsidized or dumped.

55. Aside from the fact that the AD Agreement and SCM Agreement are generally elaborations of the AD and CVD provisions in Article VI, the provisions of Article VI.6.a of GATT 1994 are particularly important context on this issue because they are specifically referenced in the injury provisions of the SCM Agreement and the AD Agreement. Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994 in conjunction with the injury disciplines contained in Article 15 of the SCM Agreement, as does Article 3.1 of the AD Agreement.[41] Further, the text of the SCM Agreement and the AD Agreement both expressly authorize an authority to cumulate the volume and price effects of dumped or subsidized imports.

56. In addition to these textual considerations, the United States also has explained[42] that it is consistent with the policies underlying the provisions of Article 15.3 of the SCM and Article 3.3 of the AD Agreement to cumulate the volume and price effects of unfairly traded imports when they are simultaneously in the market and having an impact on the industry.

57. Returning again to the narrower issue of the interpretation of the term "subsidized imports"—the meaning of that phrase alone does not govern the scope of an authority's injury investigation. Rather, the authority's conclusions about the volume, price and impact of the cumulated imports will necessarily address the effects of the subsidized imports that are included in the cumulated group of imports, even when cumulated with dumped imports. It is simply doing so on a collective basis for both dumped and subsidized imports, which is an approach that is fully consistent with the policies underlying cumulation. In this way, the group of imports examined for purposes of injury under Articles 15.1, 15.2 and 15.4 of the SCM Agreement is the same as the group established under Article 15.3.

58. If the effects of subsidized imports and the effects of dumped (but not subsidized) imports are "cross-cumulated", how should an investigating authority demonstrate a causal relationship between the subsidized imports and the injury to the domestic industry

[41] Article 15.1 of the SCM Agreement states:

> 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[41] and *(b)* the consequent impact of these imports on the domestic producers of such products.

Article 3.1 of the AD Agreement states:

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

[42] United States First Written Submission, paras. 123-126.

without attributing the injury caused by dumped (but not subsidized) imports to subsidized imports?

58. The nature of cumulation – which is a principle explicitly contained in the text of both the AD and SCM Agreements – is that the effects of the cumulated imports are looked at in the aggregate, without unravelling which how each subset of cumulated imports affected the domestic industry.

59. As the United States indicated in its FWS and at the Panel hearing, the cumulation of subsidized and dumped imports with dumped imports is fully consistent with the text, object and purpose of the SCM Agreement, the AD Agreement and Article VI of the GATT. That is, an investigating authority may assess, on a cumulated basis, the injury caused by dumped and subsidized imports that are simultaneously causing material injury to an industry, whether the imports are dumped or subsidized.[43] Or put another way, because an authority may cumulate the injurious effects of all unfairly traded imports that are simultaneously affecting the industry, the authority need not, under the Agreement, perform a non-attribution analysis for unfairly traded imports that are cumulated in its analysis. Any contrary conclusion would, in effect, 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. The United States notes that, like Article 15.3 of the Agreement, Article 15.5 does not state that dumped imports are intended to be an "other" known factor of injury whose effects should be distinguished from subsidized imports, especially in a situation in which the subsidized imports are found to be dumped, as is the case here.

60. The Panel's question highlights a critical flaw in India's claim that the cumulation of subsidized and dumped imports from India and four other subject countries with other imports that were only dumped improperly attributes to subsidized imports the injurious effects of other dumped imports.[44] In arguing that the Commission's decision to cumulate subsidized and dumped imports is inconsistent with the provisions of Article 15.5, India fails to account for the fact that all of the imports found by Commerce to be subsidized in the original investigation, including those from India, were also found by Commerce to be dumped.[45] The United States and India agree that it is appropriate for an authority to cumulatively assess the injurious effects attributable to imports that are both dumped and subsidized. If this is the case under the Agreement, then the Commission could reasonably cumulate the other dumped imports with the dumped and subsidized imports because doing so recognizes the practical impossibility of disentangling the effects of the imports. Such an approach is, moreover, consistent with the text of Article 3.3 of the AD Agreement, which allows an authority to cumulate dumped imports (whether or not subsidized) with other dumped imports.[46]

61. Furthermore, the Appellate Body has acknowledged that "it may well be the case that the injury the {countervailing and dumping} duties seek to counteract is the same injury to the same industry."[47] Given this statement, it would be anomalous for the Panel to conclude that an authority is prohibited from cumulating subsidized and dumped imports with other imports that are only dumped.

59. Please comment on the European Union's argument, on the basis of the Appellate Body's discussion of the rationale behind the practice of cumulation, that "cumulation of imports makes sense in the context of investigations 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" (European Union's third party submission, para. 69).

[43] As the Appellate Body has explained, "cumulation remains 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…" *US – OCTG from Argentina (AB)*, paras. 296-97 (emphasis added); *EC-Pipe or Tube (AB)*, para. 116.
[44] India First Written Submission, paras. 510-517.
[45] *See, e.g.*, ITC Injury Determination, pp. I-1 to I-4. (Exhibit IND-9).
[46] AD Agreement, Art. 3.3. We note that India has not challenged the Commission's conclusion that these imports meet the criteria for cumulation under Article 3.3.
[47] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570, fn. 549.

62. The United States believes that the European Union's reading of the Appellate Body's report in *EC – Tube or Pipe Fittings, in so far as it goes,* accurately reflects the findings in that case and the factual circumstances which were at issue: multiple sources of dumped imports. However, although perhaps not recognized by the EU in its third party submission, statements made by the Appellate Body in that report would apply equally to a situation in which a domestic industry is injured by multiple sources of both dumped and subsidized imports.

63. In its third party submission, the European Union quite correctly states that the cumulation of dumped or subsidized imports makes sense in injury investigation because the "objective {of the injury analysis} is to determine the total impact of the imports at issue on the domestic industry."[48] This is a reasonable reading of the SCM and AD Agreements because it is consistent with the Appellate Body's statements in *EC - Tube or Pipe Fittings*. As the Appellate Body stated in that report, cumulation plays an important role in injury investigations because dumped or subsidized imports from individual countries may "not individually be identified as causing injury" to the industry but, when assessed collectively, they may "in fact {be} causing injury." [49] The Appellate Body explained that, in this situation, 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 these effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports." Given this, the European Union reasonably states that this indicates that the Appellate Body's focus was on "the total impact of the imports at issue on the domestic industry."

64. Nonetheless, to the extent that the EU does not recognize that the logic of its analysis does not extend to cumulation of dumped and subsidized imports, the European Union's reading of *EU – Tube or Pipe Fittings* is overly narrow. The EU discussion of that report fails to acknowledge that the Appellate Body's statements about cumulation apply equally well in investigations involving both subsidized and dumped imports. As the Appellate Body indicated in *EU – Tube or Pipe Fittings*, when dumped and subsidized imports are being sold in the market simultaneously, imports from one or more of the subject countries may not themselves be individually causing injury to the industry. Nonetheless, these same imports, when cumulated with the other subject imports, may be found to be causing material injury to the industry. As the Appellate Body explained in *US – OCTG from Argentina*, in these circumstances, "cumulation remains a useful tool for investigating authorities to ensure that <u>all</u> sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…"[50] Given the applicability of these policy considerations to an investigation involving both dumped and subsidized imports, it is entirely consistent with the Appellate Body's statements in *EU – Tube or Pipe Fittings* for an authority to cumulate the effects of both dumped and subsidized imports in an investigation, because doing so will allow the authority to assess the "total impact" of these unfairly traded imports on the industry, which the European Union expressly concedes is a policy underlying cumulation.

65. In sum, the United States believes that the Appellate Body's statements in *EU – Tube or Pipe Fittings* are not inconsistent with the United States' reading of the SCM and AD Agreements, especially when read in conjunction with the unitary approach to this issue suggested by the text of Article VI.6.a of the GATT 1994.

60. The Panel notes the United States' argument, during the Panel's first substantive meeting with the parties, that the fact that Article VI:6(a) of the GATT 1994 refers to the imposition of both anti-dumping and countervailing duties suggests that "cross-cumulation" is consistent with that provision. The Panel notes that the first sentence of Article VI:6(a) of the GATT 1994 refers to "the effect of the dumping or subsidization, as the case may be…" Is the phrase "as the case may be" relevant to the issue of whether or not Article 15 of the SCM Agreement envisages separate analyses of the effects of dumped imports and subsidized imports respectively? Please explain.

[48] EU Third Party Submission, para. 69.
[49] *EU – Pipe Fittings (AB)*, para. 116.
[50] *US – OCTG from Argentina (AB)*, paras. 296-297 (emphasis added); *EC- Pipe Fittings (AB)*, para. 116.

66. In interpreting Article VI:6(a), all language in the article should be considered. The phrase "as the case may be" supports that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations. In particular, this language recognizes that there may be situations in which it "may be the case" that the unfair trade practices covered by an authority's injury determination may involve dumping, subsidization, or both. According to most common definitions, "as the case may be" means "according to the circumstances", and therefore does not indicate a binary choice between two options.[51] Article VI.6(a) requires that the effects of "dumping or subsidization, as the case may be", must cause injury to the domestic industry. The "circumstances" invoked by this phrase are the circumstances at play in the domestic industry, and the unfair trade practices affecting the conditions of competition in the market. Very often, a domestic industry will be faced with both dumped and subsidized imports, and where these circumstances exist, it would be appropriate to interpret Article VI.6(a) as contemplating an analysis of injury based on these circumstances.

67. Therefore, the phrase "as the case may be," as used in Article VI of the GATT1994, indicates that the Agreement contemplates that an injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports. Furthermore, Article VI.6.a's use of the word "or" to join the phrases "dumping" and "subsidization" and its use of the phrase "as the case may be" reflects the fact that injury determinations can reflect either or both unfair trade practices.

68. The United States also notes that it is recognized that use of "or" as a disjunctive word in many contexts does not preclude use of the word with a conjunctive meaning. In Article VI:6(a), the word "or" should not be interpreted as "one or the other" exclusively (that is, an exclusive "or"), but given the text, context, and purpose of Article VI:6(a), should be read as an inclusive "or", meaning "and/or". [52]

69. We also note that, as the U.S. submitted in its oral responses at the first substantive meeting, the provisions of Article VI.6.a of GATT 1994 are specifically referenced in the injury provisions of the SCM Agreement and the AD Agreement. Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994 in conjunction with the injury disciplines contained in Article 15 of the SCM Agreement, as does Article 3.1 of the AD Agreement. Further, the text of the SCM Agreement and the AD Agreement both expressly authorize an authority to cumulate the volume and price effects of dumped or subsidized imports. Given these textual considerations, the United States believes that it is consistent with the text of the WTO Agreements, as well as the policies underlying the provisions of Article 15.3 of the SCM and Article 3.3 of the AD Agreement, to cumulate the volume and price effects of unfairly traded imports when they are simultaneously in the market and having an impact on the industry.[53]

61. At paragraphs 22 and 23 of its opening statement, the United States refers to an "injury investigation".

a. Does each anti-dumping and countervailing duty proceeding have a separate injury investigation?

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[51] *See, e.g.*, "Collins" online definition at: http://www.collinsdictionary.com/dictionary/english/as-the-case-may-be, last checked July 26, 2013; and "Oxford Dictionaries" online definition at: http://oxforddictionaries.com/us/definition/american_english/as%2Bthe%2Bcase%2Bmay%2Bbe__1, last checked July 26, 2013.

[52] See e.g., Justice G.P. Singh, Principles of Statutory Interpretation (10th ed. 2010), at 477-78 ("It is well settled that sometimes 'and' can mean 'or' and sometimes 'or' can mean 'and'") (Justice Singh is the former Chief Justice of the Madhya Pradesh High Court); see also The Chicago Manual of Style (16th ed.), Rule 5.220 at 266. U.S. jurisprudence also has a long history of interpreting the word "or" as meaning "and" in particular circumstances. See e.g., United States v. Fisk, 3 Wall. 445, 70 U.S. 445, 447, 18 L. Ed. 243 (1865); De Sylvia v. Ballentine, 351 U.S. 570, 76 S. Ct. 974, 100 L. Ed. 1415 (1956); and United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979). (Exhibit USA-96)

[53] *US - OCTG from Argentina (AB)*, paras. 296-97 (emphasis added).

70. When multiple petitions are filed simultaneously for antidumping and countervailing duty investigations of subject imports from more than one country, the Commission conducts a single proceeding for all the subject imports covered by the petitions to make its injury determinations. The Commission assigns a separate investigation number to each investigation for each subject country and, after doing so, issues a separate determination for imports for each country, even when the Commission performs its injury or likely injury determination based on a cumulative analysis for some or all of the subsidized and dumped imports. When the Commission performs its injury or likely injury determination based on a cumulative analysis for some or all of the subsidized and dumped imports, there is one combined injury analysis for all of the cumulated imports. In particular, the Commission conducts a single injury investigative proceeding for all injury investigations involving the same product that are initiated simultaneously and includes the pertinent record evidence for all of the subject imports in a single staff report at the conclusion of the investigations.

b. Regarding the factual scenario set forth at paragraph 23 of the United States' opening statement, is there any provision of the WTO Agreement that restricts the injury investigation to the effects of "unfairly traded" imports? In other words, once an injury investigation extends beyond merely subsidized imports, or merely dumped imports, to cover imports that are either dumped or subsidized, is there any provision of the WTO Agreement that would prevent the injury investigation from including fairly traded imports? Please explain.

71. Yes. Article VI.6(a) of the GATT 1994, and by reference Article 15 of the SCM Agreement and Article 3 of the AD Agreement, expressly conditions a Member's right to apply anti-dumping or countervailing duties on a finding that "the effect *of the dumping or subsidization*, as the case may be, is such as to cause or threaten material injury". Therefore, an authority is *not* permitted to impose duties on a product based on the effects of *fairly* traded imports. This is consistent with the arguments the United States has raised in its submissions.

72. As the United States explained in response to question 60, Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994, stating that the injury findings prescribed in Article 15 of the Agreement relate to a "determination for purposes of Article VI of GATT 1994."[54] Article VI(6)(a) of the GATT 1994, in turn, provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of *dumping or subsidization*, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry…" Indeed, Article VI's title is "Antidumping and Countervailing Duties" and it speaks of injury in the singular, which suggests that a unitary analysis is appropriate for assessing injury from multiple sources of unfairly traded imports. Finally, Article 15.3 of the SCM Agreement and Article 3.3 of the AD Agreement each authorize an authority to cumulate subsidized imports or dumped imports, but neither Agreement authorizes the authority to cumulate fairly traded imports with the dumped or subsidized imports.

73. In sum, the text of Article 15.3 of the SCM Agreement and Article 3.3 of the AD Agreement only authorize the cumulation of unfairly traded imports that are subject to simultaneous injury investigations. Given this, the United States believes that neither Article 15.3 of the SCM Agreement nor Article 3.3 of the AD Agreement would provide express or implicit authorization to extend the investigation to include fairly traded imports. Moreover, it is entirely consistent with the policies underlying cumulation to permit an authority to cumulate the effects of "unfairly traded" imports in its analysis, given that one object of the Agreements is to permit an authority to impose antidumping and countervailing duties on such unfairly traded imports when they are injuring the industry.[55] Thus, in

[54] SCM Agreement, Article 15.1. The AD Agreement contains the same language in reference to Article VI of the GATT 1994.

[55] The Appellate Body has explained that authorization to cumulate these unfairly traded imports reflects the fact that "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… {Thus,} cumulation remains a useful tool for investigating authorities to ensure that all sources of

the view of the United States, the specific text of Article VI of the GATT 1994, read in conjunction with Article 15 of the SCM Agreement and Article 3 of the AD Agreement, would prevent the injury investigation from including fairly traded imports with unfairly traded imports.

2.8 Sunset review

62. Would the Panel be correct in understanding that the United States intended to refer to the 2013 sunset review (and not the 2012 sunset review) at paragraphs 274-275 of its first written submission?

74. The United States appreciates the Panel identifying and providing an opportunity for the United States to correct this error. The United States was referring to the Sunset Review Determination that was concluded and published on March 13, 2013. This Sunset Review is properly referenced at footnote 440 in the U.S. first written submission.

63. Does the United States cumulate or "cross-cumulate" in sunset reviews? If so, what effects are cumulated or "cross-cumulated"? In your answer, please clarify (i) whether the United States generally makes a new injury determination in sunset reviews, and (ii) whether the United States made a new injury determination in the sunset reviews for the certain hot-rolled carbon steel flat products from India subject to this dispute.

75. As an initial matter, as the United States will set out in the answer to question 64 below, obligations with respect to sunset reviews are set out in Article 21 of the SCM Agreement. Given that India has not raised any claims under Article 21, the United States understands that there are no meaningful claims within the Panel's terms of reference with respect to sunset reviews.

76. That said, for the panel's background information, the United States is pleased to provide information about sunset reviews.

77. In the U.S. system, each sunset review is a distinct proceeding, and the conduct of any particular sunset review will depend on the facts and circumstances of each case. However, under the statute, the Commission may "cross-cumulate" subsidized and dumped imports in sunset reviews. Under the statute, as the United States explained in its first written submission,[56] the Commission also has discretion not to cumulate any subject imports, whether dumped or subsidized.[57]

78. With respect to "new injury determinations," neither the WTO Agreement nor U.S. law calls for the Commission to make new injury determinations, that is, to determine whether the domestic industry is materially injured by the subject imports. Instead, the Commission assess whether expiry of the duty would likely lead to continuation or recurrence of injury, as the Agreements provide.[58] As the Appellate Body explained in *US – Carbon Steel*, which involved a consideration of the interplay between the investigation and sunset review obligations of the SCM Agreement:

> … original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.[59]

79. Because of the differences between the two analyses, the Commission determines, in an original investigation, whether an industry is being materially injured or threatened with material injury, as contemplated by the Agreements.[60] In a sunset review, in contrast, the Commission makes

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injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…" *US – OCTG from Argentina (AB)*, paras. 296-97; *EC- Pipe or Tube (AB)*, para. 116.

[56] Paragraphs 88-90 and 143-144 of US FWS.

[57] 19 U.S.C. §1675a(a)(7) (Exhibit USA-9).

[58] SCM Agreement, Article 21.3; *see also* AD Agreement, Article 11.3.

[59] *US – Carbon Steel (AB)*, para. 87; *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.

[60] SCM Agreement, Article 15; AD Agreement, Article 3.

a determination of whether revocation of the order would be likely to lead to continuation or recurrence of material injury.[61]

80. With respect to the product at issue in this dispute, the Commission did not make a "new injury determination" in the sunset reviews for hot-rolled steel. Instead, consistent with the text of Article 21.3 of the SCM Agreement, the Commission issued a sunset determination that focused on whether revocation of the orders would be likely to lead to continuation or recurrence of material injury. To perform its sunset reviews of the orders, the Commission collected and evaluated new record evidence for the five-year period (2001-2006) following the period investigated in its original injury investigations, did not cumulate all eleven subject countries (as it did in the original investigations) but cumulated three separate groups of imports, and then issued either negative or affirmative sunset determinations for each of the three groups of subject imports.[62]

64. Does the United States accept that India has raised an "as such" or "as applied" claim under Article 21.3 of the SCM Agreement with respect to sunset reviews?

81. Based on the plain text of India's panel request, India has not raised either an "as such" or "as applied" claim under Article 21.3 of the SCM Agreement with respect to sunset reviews. The Panel was established with standard terms of reference, which means that the Panel's terms of reference are limited to the matters raised in India's panel request.[63] The panel request does not include a claim under Article 21.3. Therefore, there are no Article 21.3 claims (either as such or as applied) in the terms of reference of this dispute.

82. As the Appellate Body has previously explained:

> The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has authority to consider under its terms of reference. A panel cannot assume jurisdiction it does not have.[64]

83. The United States also notes that India has no valid claims with respect to sunset reviews under Article 15 of the SCM Agreement. India's panel request does make an allegation that U.S. sunset reviews are inconsistent with various provisions of Article 15. Accordingly, claims with respect to Article 15 and U.S. sunset reviews are in the Panel's terms of reference. India also discusses these claims in its first written submission. [Footnote with info below] However, these claims fail as a substantive matter, because Article 15 of the SCM Agreement does not impose obligations with respect to sunset reviews.[65] As the Appellate Body findings have confirmed clear, Articles 15.1

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[61] SCM Agreement, Article 21.3; AD Agreement Article 11.3.

[62] The Commission majority determined that subject imports from Argentina would have no likely discernable impact on the domestic industry and, therefore, terminated the reviews with respect to subject hot-rolled steel imports from Argentina. ITC Sunset Determination at 13-14 (Exhibit IND-9). The Commission majority also exercised its discretion to cumulate subject imports from the remaining nine subject countries into two groups: 1) subject imports from Kazakhstan, Romania, and South Africa were cumulated together for the purposes of the likelihood of injury determinations; and 2) subject imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine were cumulated together for the purposes of the likelihood of injury determinations. ITC Sunset Determination at 20 (Exhibit IND-9).

[63] *Constitution of the Panel Established at the Request of India; Note by the Secretariat*, WT/DS436/3 (April 24, 2012).

[64] *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body, adopted 16 November 1998, para. 92.

[65] In its first written submission, India asserts that the U.S. statute's provisions relating to cumulation in sunset reviews are inconsistent, as such, with the SCM Agreement. India First Written Submission, paras. 133-152. India also asserts that the Commission's sunset review determination for hot-rolled imports from India is inconsistent, as applied, with the SCM Agreement. India First Written Submission, paras. 518-521.

through 15.5 do not directly apply to the substantive aspects of a Member's sunset review determination.[66]

2.9 New subsidy allegations

65. At paragraphs 578-583 of its first written submission, India contends that the United States initiated investigations into a number of new subsidy allegations. At paragraph 583 of its first written submission, the United States submits that USDOC published a notice of initiation for each administrative review. Please confirm whether the United States *initiated* an *investigation* into the new subsidy allegations referred to by India.

84. As explained in our first written submission, Commerce initiates and conducts "investigations" to determine the existence, degree, and effect of alleged subsidization of a product, as described in Article 11 of the SCM Agreement, during the original investigation phase of the proceeding. Subsequently, if a product has been found to be subsidized and a countervailing duty is imposed, Commerce may conduct periodic administrative reviews of the subsidization of the product.

85. When Commerce conducts such an administrative review, it publishes a "notice of initiation" *of the administrative review proceeding*. For each of the administrative reviews at issue in this case, Commerce published a notice of initiation in the *Federal Register*.[67] In the context of such reviews, Commerce will "investigate" or "examine" existing subsidies programs found to benefit the merchandise under review.

86. With respect to new subsidy allegations, Commerce's reference to "initiating an investigation" in the New Subsidies Memorandum for each review denotes only that Commerce had accepted a new subsidy allegation, and would examine further the information contained therein in the context of the on-going administrative review of the subsidization of a given product. This does not mean that Commerce initiated an additional original investigation for purposes of Article 11 of the SCM Agreement. Rather, it determined that the petitioners' allegations were sufficient to justify examination or "investigation" of the new subsidy programs in the context of the administrative reviews.

66. At paragraph 582 of the United States' first written submission, the United States submits that the relevant "administrative reviews … were conducted in accordance with Article 21 of the SCM Agreement." Do these administrative reviews fall within the scope of Article 21.2 of the SCM Agreement?

87. Since India points to no obligation in the text of Article 21.2 that these reviews would breach, India does not appear to actually be claiming that the reviews are inconsistent with Article 21.2, but rather that these reviews should instead be analyzed under Articles 11, 13 and 22 of the SCM Agreement.

88. That being said, we note that U.S. administrative reviews are conducted in accordance with Article 21 of the SCM Agreement, and are conducted consistent with the extensive procedural and evidentiary rules reflected in Article 12, as well as Commerce's own procedures. Article 21.2 envisions a review of "the need for the continued imposition of a subsidy", and Article 21.1 provides generally that a countervailing duty "shall remain in force … to the extent necessary to counteract subsidization which is causing injury." Thus, when an investigating authority conducts an assessment proceeding to determine the amount of countervailing duty to levy retrospectively, it may examine the duty "necessary to counteract subsidization" on the imports subject to that proceeding.

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[66] *US - Corrosion-Resistant Steel from Germany (Sunset) (AB)*, paras. 58-92 ; *see also US - Corrosion-Resistant Steel from Japan (Sunset) (AB)*, paras. 123-127; *US - OCTG from Argentina (Sunset) (AB)*, paras. 271-285 & 286-294; and *US - OCTG from Mexico (Sunset) (AB)*, paras. 167-173.

[67] *See* First Review Initiation (Exhibit USA-80); 2004 Initiation (Exhibit USA-81); 2006 Initiation (Exhibit USA-47); 2007 Initiation (Exhibit USA-82).

89. An interested party in such an assessment proceeding may allege that a subsidy program found to confer benefits in the original investigation has now been terminated or confers no current benefit, and therefore, ask for the amount of subsidy and corresponding CVD rate to be reduced. Likewise, an interested party may allege that a new subsidy program is conferring benefits and ask for the amount of subsidy and corresponding CVD rate to be increased. Once a definitive countervailing duty has been imposed on a particular product, the discovery of additional subsidies on the same product would appropriately form part of the analysis of the duties to levy and the need for the continued imposition of the duty.

67. Please comment on the European Union's statement 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)." (European Union's third-party statement, para. 1) In your answer, please clarify whether the retrospective element of administrative reviews, as identified by the European Union, would cover new subsidy allegations.

90. The United States does not consider it to be a relevant distinction to speak of "retrospective" and "prospective" elements of administrative reviews. India has challenged the inclusion of new subsidies as part of those reviews, or assessment proceedings, under Articles 11, 13 and 22 of the SCM Agreement, and for the reasons the United States has explained, those claims are unavailing. Further, as explained in the U.S. answer to Question 66, when an investigating authority conducts an assessment proceeding to determine the amount of countervailing duty to levy retrospectively, it may examine whether imports have ceased to benefit from subsidies previously being conferred and whether imports are benefitting from new subsidies to determine the duty to levy that is not in excess of the subsidy found to exist.

68. Is there a situation in which a new subsidy allegation raised during an administrative review (for the product covered by that review) could lead to a new original investigation under Article 11 of the SCM Agreement? Please explain.

91. No. As explained in our first written submission at paragraph 584, the SCM Agreement sets out a process by which Member countries may investigate instances of subsidization materially injuring its domestic producers, and, where appropriate, impose duties to countervail those effects. Once duties have been imposed, a Member may periodically determine the correct amount of duty to levy and may review the need for continued imposition of the duty. Thus, a new subsidy allegation raised in an administrative review relating to a particular product on which a countervailing duty has already been imposed, will not lead to a new original investigation of the same product. Instead, that subsidy will be "investigated" or "examined" in the context of the administrative review.

92. We also note that in its responses to panel questions at the oral hearing, India clarified that it is not arguing that a separate, new investigation must be initiated for new subsidy allegations raised during an on-going countervailing duty proceeding, such that multiple investigations would need to be performed at the same time. The United States agrees. As the United States has argued in its first submission, orchestrating multiple such investigations would need to be extremely burdensome, and could serve no conceivable purpose.

2.10 Facts available

69. At paragraph 32 of its opening statement, the United States submits that "inferences are a necessary and unavoidable element in selecting from, and applying, the *available* facts."

a. What is the meaning of the term "inference" as used in Sections 1677e(b) and 351.308? In your answer, please (i) address whether an "inference" will necessarily have a factual basis; and (ii) comment on the European Union's

observations at paragraphs 76-82 of the European Union's third-party submission.

93. The term "inference" is not defined in the U.S. statute or regulations. The term, however, has been defined as "[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted."[68] Accordingly, the inference that is drawn when the application of Article 12.7 becomes necessary must have a basis in the facts and circumstances of the case.

94. The United States largely agrees with the European Union's views expressed in paragraphs 76-78 of its third party submission. In particular, the United States also views Article 12.7 of the SCM Agreement as a vital tool permitting authorities to proceed in the face of non-cooperation and the withholding of information by interested parties in a countervailing duty investigation. The European Union correctly recognizes that inferences are a routine and necessary part of determinations in which necessary information is withheld. The European Union has also recognized that how attenuated an inference may be is a function of all the surrounding facts and circumstances, including the procedural context. As the European Union notes, the procedural context includes the situation in which questions have been properly put, and interested parties afforded an opportunity to respond and comment.

95. In addition, the European Union's view expressed in paragraph 78 of its third party submission mirrors the U.S. position: "As a matter of principle, WTO law permits administering authorities to put appropriate questions and draw inferences if full responses are not forthcoming." In the U.S. view, the system in which antidumping and countervailing duty determinations are made is rooted in an investigatory format carried out by administering authorities that relies upon the participation and cooperation of the parties to the proceeding.[69] This type of system could not function without the ability of such authorities to draw inferences in response to a party's failure to provide the necessary information requested.

96. We discuss the European Union's submission with respect to facts available further in our answer to Question 76.

b. What "inference" is made when "facts available" are applied? Would the application of "facts available" necessarily imply an "inference"?

97. In the U.S. view, inferences are an inherent part of making determinations based on the facts available, for the reason that such determinations will be made only when "necessary information" is not provided. If "necessary information" is not provided, there unavoidably will be informational gaps in the record, which could prevent the authorities from making their determinations. To prevent such circumstances from impeding an investigation, the SCM Agreement allows authorities to make their determinations instead "on the basis of the facts available". Inferences are therefore applied in the process of selecting from among the available facts.

98. For example, where an interested party fails to respond to a question relating to benefits received under a subsidy program, an investigating authority may infer that the party received benefits. The investigating authority may also infer that the subsidy received was not less than the amount received by other cooperating parties. In this example, the investigating authority selects from and applies facts available – the fact applied to the uncooperative party rests upon facts reflecting the actual subsidy practices of the foreign government in light of the actual experience of companies in that country. As this example illustrates, inferences (that a subsidy was received and its amount) are grounded in facts. Each determination in which it is necessary to resort to facts available, including those where a party has refused to provide necessary information, should be supported by available facts on the record of the investigation or administrative review.

[68] Black's Law Dictionary, at 536 (1991).
[69] *EC-DRAMS (Panel),* at para. 7.61 ("a significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation.").

c. If relevant information was not provided by an interested party, what are the criteria and method used by the US investigating authority to select facts among the different facts available on the record? What are the limits to an investigating authority's discretion in selecting from the different facts available?

99. If a party refuses to provide necessary information as requested, but Commerce finds that the information is contained on the record from another source and is verifiable, Commerce applies that information and does not resort to the use of facts available.[70] Where a party has refused to provide necessary information as requested, and the precise information needed is not on the record, Commerce must fill in the missing gaps with information that is available. Determinations based upon facts available are case-specific and rely on the totality of the evidence in any given investigation or administrative review. Thus, the method used by Commerce in its proceedings can vary, depending on the facts and circumstances of the case.[71]

100. For example, where a company refuses to provide information concerning the amount of the benefit received, Commerce relies on the facts available to provide *a reasonable estimate of the level of subsidization provided by the government for that subsidy program*. Commerce does this by using a proxy benefit calculation. Normally, this is the actual subsidization rate provided by the government to another responding party in the same investigation or review that has cooperated in providing the necessary information for that program. The uncooperative company may have benefitted to a greater or lesser extent than any cooperative company, but the investigating authority cannot know the true extent of the benefit without obtaining the actual data from the company. In such a case, therefore, where the precise information is not provided, actual benefit rates based on a cooperating company in the same or similar situation may provide a reasonable basis upon which the authority can base its determinations.

101. An investigating authority would not have unfettered discretion in selecting from among the facts available. For example, Article 12.7 establishes that facts available may be used if an interested party refuses access to "necessary information"; in selecting from among the facts available, then, the fact selected must be relevant to the missing information. Nor would application of facts available permit an investigating authority to disregard obligations in the SCM Agreement, for example, to make its injury determination on the basis of positive evidence and an objective examination of facts. As a matter of U.S. domestic law, when relying on secondary information, Commerce must examine the reliability and relevance of the information to be used, to the extent practicable.[72] Where Commerce finds that certain information is unreliable or not relevant to the party or the industry being examined, Commerce disregards such information.

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[70] *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-15) ("the Department found that Krakatau had not used this program. This determination was based on information provided by the GOI; this information indicated that Krakatau was eligible to receive benefits under this program, it had neither applied for nor received such benefits."); *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-16; Exhibit USA-17) ("In this investigation, for certain programs, we had information from the GOI and the EC regarding subsidies received by CAS."); *see also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027, Sep. 13, 2005, at 7-8 (Comment 1). (Exhibit USA-18; Exhibit USA-19) ("In cases where the government has responded on behalf of a non-responding company, the Department has used the government response to the extent it serves to establish non-use of certain programs.").

[71] For example, as noted in the U.S. first written submission, in the 2007 Administrative Review, Commerce used Essar's own information on its EPCGS licenses in its application of facts available rather than apply the approach used for other subsidy programs. Thus, where more relevant or reliable information is available on the record, Commerce applies such information in making its determinations based upon the facts available.

[72] 19 U.S.C. § 1677e(c) ("Corroboration of secondary information") (Exhibit USA-12).

102. U.S. law also requires that Commerce not decline to consider incomplete information that is submitted by an interested party provided the information is timely, verifiable, and not so incomplete that it cannot serve as a reliable basis for a determination.[73]

d. How can an "inference" be said to be "adverse to the interests of [a non-cooperating] party" if the US investigating authority presumably does not know the missing relevant information?

103. Where a party refuses to provide necessary information as requested, it is not possible for the administering authority to know whether, when facts available are applied, the result is less favorable or more adverse[74] to the interests of the uncooperative party from the limited information available on the case record. However, as AD Agreement Annex II, paragraph 7 recognizes, when facts available are applied "this situation could lead to a result which is less favourable to the party than if the party did cooperate."

e. Irrespective of beneficial or adverse effects to an interested party, how can an "inference" be used as an "element in selecting from … *available* facts"?

104. When information requested is withheld, administering authorities do not have available to them necessary, verifiable evidence of the fact they sought to obtain. In such situations, administering authorities must make determinations based on inferences with respect to the facts that are available. The inference may be introduced when an administering authority decides *which* available facts are appropriate to use when a responding party has provided no verifiable, substantiated information relevant to the determination at hand. For example, as described in the U.S. response to part c of this question, when an interested party fails to provide benefit information, Commerce selects an actual subsidization rate provided by the same government to another responding party in the same investigation or review that has cooperated in providing the necessary information for that program. If multiple subsidy rates are available, Commerce may find it appropriate to use an adverse inference in selecting the higher of the available rates, provided nothing on the record indicates this rate is unreliable with respect to the uncooperative party. This inference assumes that the party would have submitted more beneficial information were the actual facts more beneficial than those provided by other parties, and that the non-cooperation reflects a greater likelihood that the more adverse fact better reflected the party's situation. This inference prevents the party from benefitting unduly if it in fact received a higher benefit from the subsidy program than any of the cooperating companies.

f. Does the United States assume that an interested party that fails to cooperate or provide the requested information is wilfully withholding information that is less favourable to it than the information already on the record? In your answer, please address whether there are other reasons that may reasonably lead to non-cooperation or failure to provide the requested information.

105. There may be a variety of reasons interested parties decide to withhold information from administering authorities. However, without a party's cooperation, authorities have no way of knowing a party's reasons for withholding information and/or not participating in a proceeding. Where a responding company is not able to provide the necessary information to Commerce, they are requested to tell Commerce that this is the case, and to explain the reasons for their inability to provide the information.[75] If a responding company does not provide requested information, and does not indicate to Commerce the reasons why it cannot provide the information, Commerce may infer

[73] *See* 19 U.S.C. § 1677m(d) ("Deficient submissions") and §1677m(e) ("Use of certain information").
[74] There is no intended difference between the term "adverse" and the term "less favourable" referenced in Annex II of the AD Agreement. *See, e.g.,* The New Shorter Oxford English Dictionary (1993), at 3482, defining the term "unfavourable" to include "adverse, unpropitious".
[75] *See* section 1677m(d) (Exhibit USA-89). For deficient submissions, Commerce is required to "provide that person with an opportunity to remedy or *explain the deficiency* in light of the time limits established for the completion of investigations or reviews under this title."(Emphasis added).

that the company is capable of submitting the relevant information, and that the company would have provided information that would have put it in a more favorable position if it had such information.

106. The authority provided in Article 12.7 facilitates authorities in completing their examinations and making timely determinations. Accordingly, Article 12.7 is an essential part of the limited investigative options of an administering authority for obtaining necessary information. Authorities do not hold subpoena power or other evidence gathering powers over those outside their jurisdiction; thus, the possibility of resorting to the facts available, and drawing inferences based upon the refusal of parties to provide necessary information, plays a fundamental role in the investigative system of both antidumping and countervailing duty proceedings.[76] The power to make reasonable inferences prevents non-cooperating companies from impeding investigations, and may ensure that parties do not unduly benefit from their refusal to provide necessary information.

Questions for Both parties

3.1 Specificity

70. At paragraph 10 of its third-party statement, China submits that "Article 2.1 [of the SCM Agreement] contemplates a sequential analysis. … 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." Furthermore, at paragraph 12 of its third-party statement, China submits that "[t]his is not a simple matter of form, but an important issue of substance." Finally, at paragraph 13 of its third-party statement, China submits that a "'subsidy programme' must have been identified and substantiated when an investigating authority evaluates specificity under the first two 'other facts' under Article 2.1(c)." Please comment on China's statements. In your answer, please address how these statements would reflect on the facts of this case.

107. China's views expressed in paragraphs 10, 12, and 13 of its third party submission mirror positions it has taken in *United States – Countervailing Duty Measures on Certain Products from China* (DS437).[77] China's views are based on incorrect interpretations of Article 2 of the SCM Agreement and do not reflect positions that India has advanced in its submissions.[78]

108. As explained in the U.S. First Written Submission, Article 2.1 of the SCM Agreement sets out "principles" for determining whether a subsidy, identified according to Article 1 of the Agreement, is "specific" to "an enterprise, industry, or group of enterprises or industries," referred to as "certain enterprises."[79] As this dispute involves specificity determinations made under Article 2.1(c) of the SCM Agreement, the focus is on the principles for finding that a subsidy is *de facto* specific, that is, when a subsidy is limited in fact to certain enterprises. Thus, where an investigating authority clearly substantiates, on the basis of positive evidence,[80] that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement.

109. China's view expressed in paragraph 10 of its third party statement–that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c)—is based on an incorrect interpretation of Article 2.1 of the SCM Agreement.[81] As an initial matter, there is no language in the SCM Agreement indicating that an investigating authority must examine each

[76] *EC-DRAMS* (Panel), at para. 7.61.
[77] In response to this question, we also refer the Panel to the U.S. Responses to the Panel's First Set of Questions (May 17, 2013), at paras. 79 – 82, which is publically available on the USTR website: www.ustr.gov/node/8116.
[78] India's First Written Submission focused on the term "certain enterprises" in Article 2.1 and argued that an investigating authority cannot determine *de facto* specificity without proving that the alleged subsidy was given to "certain enterprises" over an appropriate "comparative set." India First Written Submission, para. 240-273.
[79] U.S. First Written Submission, para. 392, *citing* SCM Agreement, Article 2.1.
[80] SCM Agreement, Article 2.4.
[81] China Third Party Oral Statement, para. 10.

paragraph of Article 2.1 in every case. Rather, the chapeau provides that they contain "principles" which "shall apply" to a specificity determination. In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body explained: "subparagraphs (a) through (c) of Article 2.1 are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle, and which allows for their concurrent application."[82]

110. This statement of the Appellate Body conforms to the ordinary meaning of Article 2.1 and makes clear that, in general, the paragraphs in Article 2.1 should be applied "concurrent[ly]" and that, although Article 2.1 "suggests" that the specificity analysis will "ordinarily" proceed sequentially, this is not a mandatory prescription.[83] China appears to be arguing that Article 2.1 spells out an order of analysis "rule", yet such a rule is not supported by the text. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stated: "We consider that the use of the term 'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered in an analytical framework that recognizes and accords appropriate weight to each principle."[84] The Appellate Body further "recognize[d] 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."[85] Article 2.1 is not drafted with a mandatory order of analysis, but rather only requires that investigating authorities "apply" the "principles" set out in paragraphs (a) through (c).

111. For these reasons, China's view expressed in paragraph 10 of its third party statement is not based on a proper interpretation of Article 2.1 of the SCM Agreement. China's view is, in fact, an argument based on "form" over "substance."[86] The United States would also note that Article 2.1 of the SCM Agreement is a definition. It does not contain any obligations on a Member. Therefore it would not be accurate to refer to a Member "breaching" Article 2.1 and a measure cannot be found to be inconsistent with Article 2.1 alone.[87]

112. Likewise, China's view expressed in paragraph 13 of its third party statement – that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under Article 2.1(c) – also is based on an incorrect interpretation of Article 2.1 of the SCM Agreement.[88]

113. China's arguments are inconsistent with the text of Article 2.1 of the SCM Agreement: There simply is no requirement to identify a formal "subsidy programme" as part of an Article 2.1(c) analysis. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." China's interpretation would negate the distinction between Article 2.1(c), which relates to subsidies that are *de facto* specific, and the text of Article 2.1(a), which relates to subsidies that are *de jure* specific. In particular, China seems to argue that both Article 2.1(a) and Article 2.1(c) require that a

[82] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 873.
[83] *See also US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 796 (explaining that "the language of Article 2.1(c) . . . indicates that the application of this provision will *normally* follow the application of the two subparagraphs of Article 2.1") (emphasis added).
[84] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366. *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 942.
[85] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371. The Appellate Body also "caution[ed] against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, *when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case*," implying that when the potential for application of other subparagraphs is *not warranted*, Article 2.1 does not require such an examination. *Id.* (emphasis added). *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 754.
[86] China Third Party Oral Statement, para. 12.
[87] *US – Zeroing (Japan) (AB)*, para. 140.
[88] China Third Party Oral Statement, para. 13.

subsidy be formally implemented through legislation or some other instrument, a proposition unsupported by the text of Article 2.1 of the SCM Agreement.[89]

114. Finally, regarding how China's statements would reflect on the facts of this dispute, simply stated, they don't: China's statements are divorced from the relevant facts of this dispute. For example, China's views on the "required" order of analysis in this dispute are not at issue, as neither India nor the United States allege that there were written measures that could have led to a *de jure* specificity determination with respect to either the provision of iron ore or captive mining rights for iron ore. Where there are no written measures to be analyzed under subparagraph (a) or (b), it is appropriate for an investigating authority to focus its analysis solely on Article 2.1(c).

115. Moreover, with respect to China's view that a "subsidy programme" must be identified and substantiated when an investigating authority evaluates specificity under Article 2.1(c), the facts at issue in this dispute demonstrate that there was no allegation that the relevant subsidies were *de jure* specific. Instead, in the determinations at issue, specificity was demonstrated on a "*de facto*" basis – *i.e.*, by the fact that only a limited number of industries could use the alleged subsidies. India does not even claim that a "subsidy programme" was not identified; instead, it contests, for example that the NMDC iron ore program is specific to certain enterprises.[90] For these reasons, we disagree with China's assertion that the facts of this dispute do not substantiate the existence of a "subsidy programme."[91]

3.2 Public body

71. In the 2004 administrative review, USDOC found that NMDC is "a part of the GOI". Is this finding sufficient to show that NMDC performs, and has the authority to perform, governmental functions? Please explain.

116. As the United States has previously explained, in the 2004 administrative review, Commerce's public body analysis focused on whether the NMDC was controlled by the government, consistent with the standard that WTO panels and the Appellate Body up to that time had indicated was appropriate. Nevertheless, as stated at the first substantive meeting, as well as in the U.S. first written submission, Commerce's determinations were based on a variety of evidence regarding the relationship between the GOI and NMDC, all of which would support a finding that the government controlled NMDC such that it could use that entity's resources as its own.[92]

117. While the 2004 administrative review decision pre-dates the Appellate Body report in US-AD/CVDs (China), the U.S. first written submission also identified record evidence that would support a finding that the NMDC performs government functions. Specifically, NMDC performs a governmental function in the context of India's domestic legal and political system because it was established by the GOI to mine and sell public resources, including government-owned iron ore, and because NMDC exploits those public resources on behalf of the Indian government.[93] Indeed, the evidence indicated that the GOI was heavily involved in the selection of directors of the NMDC, some of whom were

[89] China's reliance for its interpretation on the panel's findings in *EC – Large Civil Aircraft*, instead of the ordinary meaning and context of Article 2.1(c), is misplaced.[89] The panel in that dispute was considering whether, as part of its analysis into whether certain loans provided to Airbus were "disproportionately large," and if Airbus was the "predominant user," the panel should consider a "subsidy program" and if so, what constituted the "subsidy program." *EC – Large Civil Aircraft (Panel)*, paras. 7.961-7.977. As a result, the facts and legal issues before that panel differed significantly from the issues that confront the Panel here, which relate to an entirely different type of subsidy: the provision of production inputs for less than adequate remuneration.
[90] *See, e.g.,* India First Written Submission at para. 272 ("[T]he United States has determined that the alleged benefit from the NMDC program was limited to users of iron ore . . . .").
[91] China Third Party Oral Statement, para. 15.
[92] U.S. First Written Submission, paras. 381-383.
[93] U.S. First Written Submission, paras. 382 and 385.

directly appointed by the Ministry of Steel,[94] and that NMDC's own website stated that the "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India."[95]

118. We also note that the Panel is not precluded from finding that record evidence supported a public body determination based on a different standard from that which Commerce applied in the investigation and reviews at issue. To the contrary, the Appellate Body itself in *US – AD/CVDs (China)* found that while Commerce (and the panel in *US – AD/CVDs (China)*) had applied an erroneous interpretation of Article 1.1(a)(1), the evidence on record in the underlying proceeding nevertheless supported a finding that the State-Owned Commercial Banks (SOCBs) in China were public bodies. In doing so, the Appellate Body found that:

> the USDOC, in CFS Paper, *discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government*, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions. Whether or not we would have reached the same conclusion, it seems to us that in its CFS Paper determination, the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions.[96]

Therefore, it is not necessary for Commerce to have applied a standard it could not have been aware of in order for the Panel to find that the United States did not act inconsistently with Article 1.1(a)(1) in determining the NMDC to be a government or public body for purposes of the SCM Agreement.

72. According to Exhibit US-75 (internal exhibit 22), the JPC "shall ensure that the demands of Defence, Power and irrigation, Exports of Engineering Goods, Steel and Coal Sectors, Atomic Energy Organisations, Railways, and other priority sectors are met in full and only the balance quantities available are distributed to other consumers." Is this evidence that the JPC was established to perform a governmental function? Please explain.

119. Yes. The referenced clause in the GOI's 1971 administrative order certainly indicates that the JPC, which is part of the broader SDF program controlled by the SDF Managing Committee, was established to execute certain government functions and effectuate the GOI's policy goals in the steel sector generally. This clause demonstrates that the JPC was specifically tasked with regulating supply in the steel sector such that it could ensure that certain sectors---that had been designated by the GOI as "priority sectors," such as Defense and Atomic Energy---had their steel needs met before steel products were made available to consumers generally.

120. Similarly, in the GOI's 1992 administrative order[97], the GOI ordered that the JPC would be responsible for coordinating supply and demand of iron or steel produced by member steel plants "with respect to Defense, Small Scale Industries Sector, …(illegible) and the North Eastern Region." For these named sectors, the JPC was tasked with ensuring supplies of steel products on priority terms.

121. As detailed in the response to Question 40 above, however, we note that Commerce determined that the SDF Managing Committee in particular was a government body that made all final decisions on loans, including setting the terms and approving waivers of SDF loans. As described in the U.S. first written submission at paragraph 537, the GOI established the SDF program and its constituent committees for the purpose of levying and distributing funds in order to modernize the

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[94] *2004 Verification Report of Government of India Response,* at 5-6 (January 3, 2006)(USA-66); *see also, India's April 23, 2007, Questionnaire Response(2006 AR),* at 41("two Government Directors from Ministry of Steel, Government of India."(USA-49).
[95] *2004 New Subsidies Allegation*, Exhibit 6, p.2 (May 2, 2005) (USA-69).
[96] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 355. (emphasis added)
[97] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at internal Exhibit 21 (Exhibit USA-75).

steel sector, and to ensure that there was a steady supply of certain types of iron and steel in line with government goals.

73. According to NMDC's website (Exhibit US-69, page 1 of internal exhibit 6), NMDC was accorded the status of a "schedule-A Public Sector Company by the GOI 'Mini Ratna' in 'A' category in its categorisation of Public Enterprises". Is this relevant to the question of whether or not NMDC constitutes a public body? Please explain.

122. Yes. While Commerce did not specifically cite this evidence in its public body finding, for reasons explained in our answer to Question 71, Exhibit US-69 does constitute further record evidence that the GOI treated the NMDC as a public entity rather than a private entity, and confirms the evidence already submitted and discussed by the United States in its submissions to the Panel. Based on the record evidence, the Government of India clearly viewed NMDC as a public enterprise supporting government policies in the steel sector. As discussed in the U.S. first written submission at paragraph 385, during Commerce's on-site 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.[98]

3.3 Sunset review

74. At paragraph 141 of its first written submission, India submits that "in a sunset review conducted pursuant to Article 21.3 of the SCM Agreement, the United States is not permitted to engage in a cumulative assessment which is against the general principles embodied under Article 15.3 of the SCM Agreement." If the Panel were to find that the provisions relating to injury determination in original investigations are not directly applicable to sunset reviews, would "cross-cumulation" be permitted or prohibited by Article 21.3 of the SCM Agreement? In your answer, please address the Appellate Body's finding in *US – Oil Country Tubular Goods Sunset Reviews* that, in the context of the AD Agreement, "[g]iven the express intention of Members to permit cumulation in injury determinations in original investigations, and given the rationale behind cumulation in injury determination, we do not read the *Anti-Dumping Agreement* as prohibiting cumulation in sunset reviews."

123. As noted in response to question 64, there are no meaningful claims with respect to U.S sunset reviews within the Panel's terms of reference. As background, however, the United States will address this question (though it is not within the terms of reference, and thus is not an appropriate matter to be addressed in the report of the panel.)

124. Based on the text of the agreement, read in context and in light of the object and purpose of the SCM Agreement, "cross-cumulation" is permitted by Article 21.3 of the SCM Agreement. As noted in response to Question 64 above, the question at issue in a sunset review is different than the question in an original injury investigation. Furthermore, the disciplines set out in Article 15 do not apply to sunset reviews. As the United States noted in its first written submission, the Appellate Body has explained that the sunset review provision of the AD Agreement:

> does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[99]

Because the provisions of the SCM Agreement are the comparable in all relevant manners to the AD Agreement, this AB finding applies equally to the SCM Agreement.

[98] *2004 Verification Report,* at 9 (Exhibit USA-66).
[99] *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

125. The Appellate Body's findings in *US – Oil Country Tubular Goods Sunset Reviews* further support an interpretation of the SCM Agreement as allowing for "cross-cumulation" in sunset reviews. In that report, the Appellate Body emphasized that, although cumulation was not specifically mentioned in the sunset provisions of the AD Agreement, cumulation was permissible in sunset reviews under the Agreement because it was mentioned as a permissible methodology for injury analyses under Article 3 of the Agreement and was consistent with the basic policies underlying cumulation of unfairly traded imports.[100] In that same report, however, the Appellate Body again emphasized that the sunset provisions of the AD Agreement "do not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review," nor do they "identify any particular factors that authorities must take into account in making such a determination."[101] Moreover, the Appellate Body stated that an authority is "not mandated to follow the {injury} provisions … {of the AD Agreement} when making a likelihood-of-injury determination."[102]

126. Accordingly, although cumulation is generally permitted in sunset reviews under the AD Agreement and SCM Agreements, the precise contours of an authority's cumulation analysis need not follow the requirements set forth in Article 15.3 of the SCM Agreement or Article 3.3 of the AD Agreement. Moreover, as the United States has explained previously, the practice of "cross-cumulation" of subsidized and dumped imports is fully consistent with the text, object and purpose of the Article 15 of the SCM Agreement, Article 3 of the AD Agreement, and Article VI of the GATT 1994. It is also consistent with the policy underlying cumulation articulated by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*:

> Both an original investigation and a sunset review must consider possible sources of injury: in an original investigation, to determine whether to impose antidumping duties on products from those sources, and in a sunset review, to determine whether anti-dumping duties should continue to be imposed on products from those sources. 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.[103]

127. Although the Appellate Body's statement was made in the context of the AD Agreement, it applies equally to a situation involving multiple sources of subsidized and dumped imports that are simultaneously injuring an industry being examined pursuant to the SCM Agreement.

3.4 Facts available

75. What is the relevant context to interpret Article 12.7 of the SCM Agreement? In your answer, please address whether the Panel should rely on Annex II of the AD Agreement in interpreting Article 12.7.

128. Article 6.8 and Annex II of the AD Agreement provide relevant context for interpreting Article 12.7 of the SCM Agreement. The text of Article 12.7 of the SCM Agreement is identical to that of Article 6.8 of the AD Agreement in terms of the structure of the article and the use of the same term – "facts available." The role played by Article 6.8 of the AD Agreement, including Annex II, is the same as Article 12.7: "to allow authorities to continue with the investigation and make a determination,

[100] *US – OCTG from Argentina (AB)*, paras. 294-300.
[101] *US – OCTG from Argentina (AB)*, paras. 281.
[102] *US – OCTG from Argentina (AB)*, paras. 280.
[103] *US - OCTG from Argentina (AB)*, paras. 296-97 (emphasis added).

positive or negative, on the basis of the facts available."[104] In light of the similarity between them, the AD Agreement is particularly helpful context for understanding the meaning of Article 12.7, as contemplated under the customary rules of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties.

129. The Appellate Body has recognized that Annex II of the AD Agreement provides context concerning the application of facts available that is relevant to understanding the application of facts available under Article 12.7 of the SCM Agreement. In particular, the Appellate Body has stated that "[a]s in the Anti-Dumping Agreement, Article 12.7 prescribes the information that may be used for such purposes as the 'facts available.'" Regarding the relevance of Annex II to the SCM Agreement, the Appellate Body further observed that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[105]

76. Please comment on the European Union's observations that (i) "the authority must draw the inference that best fits the facts that have been evidenced" (European Union's third party submission, para. 79), and (ii) "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." (European Union's third party submission, para. 80)

130. Article 12.7 does not provide guidance on how administering authorities are to apply facts available or the basis upon which authorities are to select which facts to apply in any given situation. Nonetheless, given that authorities are permitted to make determinations based on facts available when an interested party refuses to provide *the information necessary* for making a determination, it is inherent in any application of the "facts available" that an administering authority may draw inferences that best fit the facts on the record in a particular case. In making determinations based on facts available, and in drawing inferences based on those facts, administering authorities must take account of all relevant, substantiated facts on the record.[106] For example, inferences cannot be drawn that contradict verifiable facts, or that aim merely to punish an uncooperative party.

131. However, using an inference that may be adverse to the interests of the non-cooperating party is not equivalent to a punitive application of the facts available. In paragraph 79 of its submission, the European Union states that "[i]n drawing inferences, the 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)." As noted in response to Question 69 above, however, it may be that there are two possible and reasonable inferences, and it is appropriate to select the fact based on the inference that is more adverse to the non-cooperating party. For example, when an interested party fails to provide benefit information, the investigating authority may select an actual subsidization rate provided by the same government to another responding party in the same investigation or review that has cooperated in providing the necessary information for that program. If multiple subsidy rates are available, the investigating authority may find it appropriate to use an adverse inference in selecting the higher of the available rates. This inference assumes that the party would have submitted more beneficial information were the actual facts more beneficial than those provided by other parties, and therefore is not "solely" to punish non-cooperation.

77. At paragraph 16 of its third-party statement, Turkey submitted that "Annex II 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." What

[104] *Mexico – Rice*, Panel Report, para. 7.238. *See also EC-DRAMs from Korea, (*Panel Report), at para. 7.61 ("The fact that the SCM Agreement does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same.").
[105] *Mexico – Rice (AB)*, para. 295
[106] *Mexico – Rice (AB)*, para. 294.

legal significance should be attached to the fact that the SCM Agreement does not contain an annex equivalent to Annex II of the AD Agreement?

132. Please see the U.S. response to Question 75 above.