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

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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103	Pugel, Thomas A., International Economics, International Edition, 12th ed. 2004, p. 39
104	19 C.F.R. § 351.303
105	Public Index to Administrative Record, *Hot-Rolled Carbon Steel Flat Products from India*
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108	*Certain Softwood Lumber Products from Canada*, Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination, 67 Fed. Reg. 15,545 (Apr. 2, 2002), Issues and Decision Memorandum at Section "Analysis of Programs, I, Benefit, The Regulatory Hierarchy"

I. Introduction

1. As has been found by panels and the Appellate Body on numerous occasions, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a "delicate balance" between disciplining the use of subsidies and countervailing measures while, at the same time, enabling Members whose domestic industries are harmed by subsidized imports to use such remedies.[1] India's claims, and its submissions throughout this proceeding, have revealed India's intention to skew this delicate balance in its own favor, by asking the Panel to adopt novel – sometimes even radical – interpretations of the SCM Agreement.

2. In its arguments regarding benefit, cumulation and facts available, India attempts to dismantle the rights of Members to address the injurious effects of unfair trading practices. And in its claims regarding specificity, public body and new subsidy allegations, India pleads for findings that would undermine the very purposes of the SCM Agreement, by allowing subsidizing Members to easily circumvent their obligations under the Agreement.

3. The United States asks the Panel to deny India's claims, and to protect and maintain the balance of rights and obligations attained by the negotiators of the SCM Agreement. Consistent with its mandate from the DSB under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the United States asks the Panel to review these findings in light of the appropriate standard of review. That is, the Panel should not conduct a *de novo* review of the administrative determinations. Rather, under the standard of review, the Panel should examine whether Commerce's determinations were "reasoned and adequate, in the light of the evidence on the record and other plausible alternative explanations."[2] In this submission, the United States will elaborate upon and clarify its earlier submissions before the Panel, and will demonstrate why Commerce's findings represent a "reasoned and adequate" application of the rights and obligations of the SCM Agreement to the facts before it.

II. India Has No Basis For Its Claims That Section 351.511(a)(2) Of the U.S. Regulation Is Inconsistent "As Such" With Article 14(d) of the SCM Agreement

4. In this dispute India makes several claims with respect to consistency of Section 351.511(a)(2) – the U.S. regulation for determining the benefit when goods or services are provided by a government for less than adequate remuneration – with the guidelines contained in Article 14(d) of the SCM Agreement. As explained in the U.S. first written submission,[3] the U.S. oral statement and the U.S. response to the Panel's first set of written questions,[4] India's claims that the regulation itself is "as such" inconsistent with the Article 14(d) guidelines are in error. India has employed a "kitchen sink" strategy of throwing every imaginable (or unimaginable) claim at the U.S. regulation. Many of the arguments raised by India in this context have already been considered and rejected in previous disputes. The United States will not repeat all of its prior responses to India's arguments, but rather will provide clarifications and

[1] *See, e.g., US – DRAMS CVD (AB)*, para. 115.
[2] *US – Antidumping and Countervailing Duties (AB)*, para. 516. (internal footnote omitted)
[3] *See, e.g.*, U.S. First Written Submission, paras. 28-81.
[4] *See* U.S. Responses to First Panel Questions, paras. 11-21.

observations with respect to India's arguments, especially with respect to those contained in India's answers to the Panel's first set of written questions.

A. The Text of Article 14 Does Not Support Calculating the Benefit Based on a Cost-to-Government Analysis

5. First, beginning with the text of Article 14(d) of the SCM Agreement, India, in its first written submission as well as in its answers to the Panel's written questions, offers several flawed textual interpretations to advance its argument that Section 351.511(a)(2) is "as such" inconsistent with the Article 14(d) guidelines. The interpretations offered by India are plainly inconsistent with the text of Article 14 as well as contrary to the findings of previous panel and Appellate Body reports involving similar claims. For example, in its responses to the Panel's first set of written questions, India remains steadfast in advancing – incorrectly – a cost-to-government test in determining whether a government provides a good or service at less than adequate remuneration within the meaning of Article 14(d).[5] As discussed extensively in the U.S. first written submission, India maintains this argument notwithstanding the fact that the title of Article 14 is called the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the *Recipient*." Moreover, the chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the *recipient* . . . shall be consistent with the following guidelines," including the guidelines in Article 14(d) for goods or services provided for less than adequate remuneration. Based on the clear text of the SCM Agreement, the Appellate Body in *Canada – Aircraft* flatly rejected a cost-to-government analysis for assessing the adequacy of remuneration. Instead, the Appellate Body confirmed that the proper analysis of benefit was in respect of the recipient.[6]

6. In response to Panel Question 4, India provides a matrix – purporting to divide the benefit calculation for goods or services into a two-step process – in an attempt to support its argument.[7] This exercise is both convoluted and in fact unsuccessful in providing any support for India's position. In fact, India's analysis is so convoluted that, in the same submission, India contradicts itself and acknowledges that "the countervailing duties are in respect of the amount of benefit to the recipient" and not that of the provider.[8]

7. The first step in India's suggested methodology is whether the government received adequate remuneration. India's argument fails here, at the beginning of its proposed analysis. The essence of the benefit determination under the SCM Agreement, as explained in the U.S. first written submission,[9] is to determine whether the *recipient* is better off in light of the government financial contribution than if the recipient had relied on the market, a determination which involves assessing whether the *recipient* obtained something "on terms more favorable

[5] *See, e.g.*, India Responses to First Panel Questions, Question 5 at p.3 ("The investigating authority shall first determine adequacy of remuneration to the government provider of the goods.") and India First Written Submission, paras. 21-32.
[6] U.S. First Written Submission, paras. 37-49.
[7] India Responses to First Panel Questions, Question 4.
[8] India Responses to First Panel Questions, Question 17.
[9] U.S. First Written Submission, paras. 28-81.

than those available in the market."[10] To do this, an investigating authority must compare the difference between the government price and a private, arm's-length benchmark price.[11] In other words, a proper comparison to the market is central to a benefit analysis under the Article 14(d) guidelines.

8. Several of India's challenges to the U.S. regulation are premised on its misinterpretation of the text of Article 14(d) and, primarily, India's unsupportable argument that adequacy of remuneration must first be assessed from the perspective of the provider of the goods, *i.e.*, the government. Take, for example, India's response to the Panel's question 4, where India claims that in some instances an investigating authority may not be entitled to find a benefit even where remuneration is determined to be inadequate. But this is not what Article 14(d) says. It is India's erroneous interpretation of the text of Article 14(d) that leads to its unsupported argument.[12] Rather, under the Article 14(d) guidelines, where an investigating authority determines that a financial contribution by a government has been conferred and that the adequacy of remuneration is insufficient, an investigating authority *may* find that the amount by which the private, arm's-length benchmark price exceeds the government price is a benefit under the SCM Agreement. In short, the analysis under Article 14(d) is not the two-step process suggested by India but, rather, a comparative exercise.

9. One of the ways in which India attempts to support its incorrect interpretation of Article 14(d) is through a flawed textual distinction between Article 14(b)-(c) and 14(d).[13] India argues—incorrectly— that the term "in relation to" contained in Article 14(d) means that the benchmark analysis under Article 14(d) is somehow fundamentally different from that under Articles 14(b) or (c)[14]:

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[10] *Canada – Aircraft (Panel)*, para. 9.*112* (emphasis added).

[11] *US – Softwood Lumber IV (AB)*, para. 90 ("Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. [Thus,] . . . the starting-point, when determining adequacy of remuneration, is the prices 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.")

[12] *See*, India First Written Submission, para. 27 ("Take, for instance, the scenario where an inefficient government provider engages in the supply of goods at a price that is below its own costs. However, this price may still be equal to or higher than prices at which other private parties may be providing those goods. The government provider may have been forced to supply below-cost in order to meet competition. Further, the extent of inadequacy of remuneration to the provider of the goods may or may not be equal to the quantum of benefit conferred on the recipient. Referring to the same example, the difference between the government's cost and its price on the one hand, may be higher than the difference between the government price and a private party price, on the other hand, i.e. the extent of inadequacy may be lesser than the extent of benefit.")

[13] India Responses to First Panel Questions, Question 5; India First Written Submission, paras. 48-57.

[14] *See* India Responses to First Panel Questions, Questions 5 and 23. We would also note that it is unclear from India's first written submission whether India attempts to distinguish Article 14(d) from paragraphs (a), (b), and (c) collectively, or only from subparagraphs (b) and (c). For instance, in paragraph 49, India introduces the standard for determining whether a benefit has been conferred under Article 14(a) (para. 49). Additionally, in paragraph 50, India draws attention to what it labels a "substantial difference in the structure, language and approaches of

> India emphasizes on the significant difference in the structure and wording of Article 14(d) with Articles 14(b)-(c). Articles 14(b)-(c) very categorically requires the use of an external comparable and the last sentence of these sub-paragraphs mandate that the difference between the comparable and the government price would be the amount of benefit. The words used in Article 14(d) are in diametric contrast.[15]

In making this argument, India ignores the parallel structure of subparagraphs 14 (b), (c) and (d), while drawing fictional links between dissimilar parts of the subparagraphs. For example, in its written submission, India begins by correctly noting that benefit determinations under Articles 14(b) and (c) "have to be made in comparison with certain things and the existence of a benefit is concluded the moment there is a difference in the amounts being compared."[16] India's argument deteriorates, however, once it claims that Article 14(d) has "an entirely different structure and terminology," compared to Article 14(b) and (c).[17] To the contrary, Article 14 of the SCM agreement clearly employs a consistent structure throughout each of its subparagraphs.

10. As evident from its title—"Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient"—Article 14 lays out guidelines for how Members' investigating authorities must calculate the amount of subsidy. Each subparagraph of Article 14 provides specific guidelines for such calculations, specific to the type of subsidy in question: subparagraph (a) relates to equity capital; subparagraph (b) to loans; subparagraph (c) to loan guarantees; and subparagraph (d) to the provision or purchase of goods and services.[18] Given this framework, it is unsurprising that the first sentence of each paragraph in Article 14 employs an *identical* structure.

11. First, each subparagraph begins by identifying a particular type of financial contribution[19] as well as employing the phrase "shall not be considered as conferring a benefit unless . . ."[20] Each subparagraph also provides the particular condition that must be satisfied in order to establish that a benefit has been conferred.[21] This language establishes a structure under which an investigating authority, upon the existence of a particular condition, may find that a benefit has been conferred.

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paragraphs (a)-(c) of Article 14 as compared to paragraph (d) . . ." Furthermore, paragraph (a) does not contain a benchmark akin to those contained in paragraphs (b), (c), and (d). But because India's argument focuses on the process of determining the existence of a benefit in relation to a comparison to some benchmark, the United States understands that India is distinguishing Article 14(d) from 14(b) and (c).

[15] India Responses to First Panel Questions, Question 5.

[16] India First Written Submission, para. 49.

[17] India First Written Submission, para. 50.

[18] Article 14, SCM Agreement.

[19] *See, e.g.*, Article 14, SCM Agreement, subparagraph (a) "government provision of equity capital", (b) "a loan by a government", (c) "a loan guarantee", and (d) "the provision [or purchase] of goods or services."

[20] Article 14, SCM Agreement, paragraphs (a)-(d).

[21] *See, e.g.*, Article 14, SCM Agreement, paragraph (b) ("there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market").

12. In a general sense, Article 14 employs a parallel structure for finding that a benefit has been conferred in each of the subparagraphs (b), (c), and (d). Each subparagraph determines the existence of a benefit based on some deviation between what a recipient has actually paid and what they would otherwise have paid according to a benchmark price. For loans, for example, subparagraph (b) prescribes that a benefit exists if there is a "difference" in the price of a governmental loan versus a "comparable commercial loan."[22] For loan guarantees, subparagraph (c) similarly identifies a benefit if there is a "difference" between the amounts a firm pays for a loan with a government guarantee compared with what a "firm would pay on a comparable commercial loan absent the government guarantee."[23] For the provision of goods and services, subparagraph (d) states that a benefit exists if the government provides the goods or services in exchange for "less than adequate remuneration" or if the government purchases such goods or services for "more than adequate remuneration."[24]

13. India argues that while under subparagraphs 14(b) and (c) the investigating authority will find the existence of a benefit "the moment there is a difference in the amounts being compared," Article 14(d), on the other hand, employs a "much broader and more comprehensive framework."[25] India's claim, however, is inconsistent with the text. Rather, in a manner equivalent to 14(b) and (c), the text of the Article 14(d) guidelines provide that an investigating authority can find benefit as soon as it finds that remuneration for the provision of goods is less than adequate. In this vein, a comparative exercise is found in each of Articles 14(b), (c), and (d): the Article 14(d) guidelines envision a comparative exercise between the government price and a benchmark. Where the government price is more favorable than the benchmark, a benefit has been conferred. Indeed, even India acknowledges the comparative nature of the exercise. In response to the Panel's question asking India how it would calculate the amount of benefit under Article 14(d) India offers only one suggestion: by "using an appropriate benchmark."[26]

14. Yet, in its first written submission, India erroneously tries to distinguish the subparagraphs by comparing the phrase "difference" in 14(b) and (c) with the terms "in relation to" and "prevailing market conditions" in Article 14(d). India's textual argument fails because the corollary in Article 14(d) to the term "difference" – as employed in Articles 14(b) and (c) – is the phrase "less than . . . or . . . more than" (as used in the first sentence), and not "in relation to" or "prevailing market conditions" (the terms used in the second sentence). Terms such as "difference" and "less than" or "more than" are comparative in nature; they establish the standard of comparison between two amounts in order to determine the existence of a benefit. By contrast, the terms "in relation to" and "prevailing market conditions" are explanatory and come from the second sentence of Article 14(d).

15. If Article 14(d) is textually distinct from the other paragraphs of Article 14, it is because the second sentence in Article 14(d) exists as guidance for how to determine what constitutes adequate remuneration. To the extent there are differences among the subparagraphs, the term

[22] Article 14, SCM Agreement paragraph (b).
[23] Article 14, SCM Agreement paragraph (c).
[24] Article 14, SCM Agreement paragraph (d).
[25] India First Written Submission, paras. 49-50.
[26] India Responses to First Panel Questions, Question 23.

"adequate remuneration" is a more involved comparison than the corresponding benchmarks under subparagraphs (b) and (c). It is in *that* context that the phrases "in relation to" and "prevailing market conditions" become relevant. Article 14(d) is the only sub-paragraph for which the text provides a list of factors that a Member must consider in determining the benchmark—terms which include such factors as "transportation," a factor which must be taken into account to ensure a meaningful, apples-to-apples comparison.

16. In sum, contrary to India's arguments, a proper reading of the Article 14(d) guidelines is that a benefit is deemed to have been conferred any time actual remuneration exceeds (for the purchase of goods) or falls short of (for the provision of goods) adequate remuneration. The text of Article 14 simply does not support the distinction that India seeks to find.

B. There is No Support for Equating the Phrase "Commercial Considerations" in GATT Article XVII with "Prevailing Market Conditions" in Article 14(d)

17. India's reliance on a supposed connection to Article XVII of the GATT 1994 also fails to support its proposed interpretation of Article 14(d). In its first written submission India argues that Sections 351.511(a)(2)(i)-(iii) of the U.S. regulation are inconsistent with Article 14(d) because those provisions do not allow for determinations of benefit to be made "in accordance with commercial conditions."[27] India argues that the phrase "in relation to prevailing market conditions" – the terms actually contained in Article 14(d) – really means "in accordance with commercial considerations" – a term pulled from language contained in Article XVII:1 of the GATT 1994.[28] This position reflects India's mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. India continues to advance this unsupportable linkage in its response to question 7 of the Panel's first set of written questions. In particular, India again asserts that the Panel's findings in *Canada – Wheat* support the substitution of these terms.

18. This argument has no merit. In fact, the panel and Appellate Body reports in *Canada – Wheat* are clear in stating that WTO subsidy disciplines and the conduct covered by Article XVII are separate matters. And more specifically, the phrase "commercial considerations" has nothing to do with prevailing market conditions under the SCM Agreement.

19. A key panel finding in the dispute, upheld by the Appellate Body, was as follows:

> In our view, the circumstance that STEs are not inherently "commercial actors" does not necessarily lead to the conclusion that the "commercial considerations" requirement is intended to make STEs behave like "commercial" actors. Indeed, we think it should lead to a different conclusion, namely, that the requirement

[27] India First Written Submission, paras. 33-57.
[28] India First Written Submission, paras. 36-37.

> in question is simply intended to prevent STEs from behaving like "political" actors.[29]

Thus, for the purpose of an Article XVII inquiry, the language about "commercial considerations" is not aimed at making the STE into a private market actor. Accordingly, the "commercial considerations" language in Article XVII of the GATT 1994 has no relation to the setting of market benchmarks.

20. Furthermore, the findings of *Canada – Wheat* are clear in that Article XVII is aimed at discrimination, and is not aimed at preventing an STE from using its government-provided advantages.[30] In contrast, the SCM Agreement is aimed at disciplining government benefits provided to private market actors. Indeed, the Appellate Body explicitly approved the panel finding that the concerns addressed by Article XVII are different than those addressed by the SCM Agreement. In rejecting an argument that Article XVII should prevent an STE from using its government-provided advantages, the Appellate Body stated:

> Such an interpretation, which attributes a very broad scope to Article XVII:1, takes no account of the disciplines that apply to the behaviour of STEs ***elsewhere*** in the covered agreements. The Panel referred, in this regard, to the provisions of **the *SCM Agreement***, Article VI of the GATT 1994 and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and the *Agreement on Agriculture*.[31]

In sum, the *Canada – Wheat* findings – which India cites to show a linkage between the SCM Agreement and Article XVII of the GATT 1994 – show exactly the opposite.

21. In addition, as explained in the U.S. first written submission, India's conflation of "prevailing market conditions" and "commercial considerations" is entirely without support in the text of the SCM Agreement.[32] India's attempt to equate the two terms requires reading the words "commercial considerations" into the text of an unrelated and separate agreement. Yet, as fully addressed in the U.S. first written submission[33], had Members intended that benefit be calculated on the basis of "commercial considerations" they would have used that term, which was available since 1947. Instead, they chose a different term, "prevailing market conditions." India's continued advancement of this argument is incorrect.

[29] *Canada – Wheat (AB)*, para. 137.
[30] *See, e.g., Canada – Wheat (AB)*, para. 100 ("For all these reasons, we are of the view that subparagraph (a) of Article XVII:1 of the GATT 1994 sets out an obligation of non-discrimination, and that subparagraph (b) clarifies the scope of that obligation.).
[31] *Canada – Wheat (AB)*, para. 150 (emphasis added).
[32] U.S. First Written Submission, paras. 52-57.
[33] U.S. First Written Submission, paras. 51-57.

C. Section 351.511(a)(2) is Consistent with Article 14's Preference for Using Private Prices for the Benchmark When Determining Whether a Good is Provided at Less than Adequate Remuneration

22. As the United States explained in its prior submissions, India has no basis for challenging the hierarchical structure of Section 351.511(a)(2). In this submission, the United States will address the India's additional arguments on this issue, which are set out in responses to questions 18 and 21 of the Panel's first set of written questions. In particular, India argues that an import price actually paid by a producer in the Indian market is an out-of-country price, rather than an in-country price. Additionally, in its response to question 19, India objects to of the inclusion of delivery charges in both the government price and the benchmark price. Before addressing these arguments made by India, the United States first will provide additional, relevant context about the purpose of the regulation's structure.

23. The starting point and contextual basis for the U.S. regulations lies in the text of the SCM Agreement, and in particular, the chapeau of Article 14. The chapeau states that "any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained." The U.S. regulations contained in Section 351.511(a)(2) and their hierarchical structure do just that.[34]

24. The Article 14 guidelines are used to calculate the amount of "benefit" conferred by a financial contribution under Article 1 of the SCM Agreement. As the Appellate Body has noted previously, the term "benefit" refers to an advantage or something that "makes the recipient 'better off' than it would otherwise have been, absent that [financial] contribution."[35] The Appellate Body has identified the "primary benchmark" for determining whether a recipient of the good is "better off" as:

> *prices of similar goods sold by private suppliers* in the country of provision . . . that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration." [Thus,] . . . *the starting-point, when determining adequacy of remuneration, is the prices 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.[36]

[34] The structure of the U.S. regulations is described in the U.S. First Written Submission, paras. 30-36.
[35] *Canada – Aircraft (AB)*, para. 157.
[36] *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).

The Appellate Body has also recognized that when there are no private prices in the country of provision it is appropriate to use out-of-country private prices as the benchmark.[37]

25. The underlying rationale behind the benchmark hierarchy in Commerce's regulations is that, in determining the adequacy of remuneration, the methodology applied should result in the most probative determination of a benchmark price based on the prevailing market conditions in the country of provision—*i.e.*, the market value the recipient would have paid for the good or service in question, in the country under investigation. Thus, the preference for one type of data over another reflects the probative value of the data. As the Appellate Body confirmed, the most probative evidence of prevailing market conditions in the country of provision is actual, arm's-length prices between private parties in the market of the country of provision.[38] Such pricing evidence is used in a Tier I analysis under Section 351.511(2)(a)(i).

26. In the absence of preferred benchmark data, however, the investigating authority still must make a determination of the adequacy of remuneration. The hierarchy thus moves from empirical evidence of actual sales in the country of provision (Tier I), which includes actual imports, to out of country private transactions (Tier II), which—while less probative of the prevailing market conditions in the country of provision—is the next best alternative, as it is based on actual, private, arm's-length transactions for the goods or services in question. The U.S. regulations mirror the evidentiary preferences established by the Appellate Body in *US – Softwood Lumber IV* by giving priority to actual, in-country private prices (Tier I) and, in their absence, to world market prices, which reasonably would be available to purchasers in the country in question (Tier II).[39] In accordance with the hierarchy of the regulations, Commerce's preference is always:

> to measure the adequacy of remuneration by comparing the government price to a *market-determined price* for the good or service resulting from actual transactions in the country in question.

19 C.F.R. § 351.511(a)(2)(i) (emphasis added). As Commerce explained in the Preamble to the regulations:

> [o]ur preference is to compare the government price to market-determined prices stemming from *actual* transactions within the country. Such market-determined prices include actual sales involving private sellers and actual imports. They may also

[37] *US – Softwood Lumber IV (AB)*, para. 103; *see also, US – Antidumping and Countervailing Duties (AB)*, para. 446; *US – Antidumping and Countervailing Duties (Panel)*, paras. 10.16-10.23.
[38] *US – Softwood Lumber IV (AB)*, para. 90.
[39] 19 C.F.R. § 351.511(a)(2)(i) and (ii) (Exhibit USA-3).

> include, in certain circumstances, actual sales from government-run competitive bidding.[40]

27. Commerce has further explained why this evidence is normally the most probative of the adequacy of remuneration in the country under investigation:

> The most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the country. Thus, the preferred benchmark in the hierarchy is an *observed market price* for a good, in the country under investigation, *from a private supplier (or in some cases, from a competitive government auction) located either within the country, or outside the country (the latter transaction would be in the form of an import).* This is because such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation.[41]

In instances where neither in-country nor world market prices are available, Section 351.511(a)(2)(iii) (Tier III) of Commerce's regulation contemplates a third type of analysis: in the rare circumstances in which there are no market prices, Commerce can evaluate the government price based on factors other than market-based sales transactions, which may include a determination whether the government-administered price is consistent with industry cost and price-setting philosophies.

28. With this background in mind, the United States turns to India's arguments that an import price actually paid by a producer in the Indian market is an out-of-country price, and that the inclusion of delivery charges is somehow improper.[42] With regard to import prices, India argues that "prices emanating from countries other than the country in question represent 'out of country' prices."[43] India's position is incorrect as prices for imported goods, which are paid by domestic purchasers are in fact in-country prices; it is for this reason that under the U.S. regulation an actual import price is considered a Tier I price—a price, which emanates in the "country in question."[44] India's contention that import prices automatically are Tier II or out-of-country prices (to use the language in *US — Softwood Lumber IV (AB)*) is both factually incorrect and inconsistent with the realities of domestic markets.

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[40] *Countervailing Duties (Final Rule)*, 63 Fed. Reg. 65348, 65377 ("Preamble") (Nov. 25, 1998) (Exhibit USA-2). (Emphasis in original.)

[41] *Certain Softwood Lumber Products from Canada, Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 67 Fed. Reg. 15,545 (Apr. 2, 2002), Issues and Decision Memorandum at Section "Analysis of Programs, I, Benefit, The Regulatory Hierarchy" (internal exhibit pp. 44-46) (Exhibit USA-108).

[42] India Responses to First Panel Questions, Questions 18 and 21.

[43] India Responses to First Panel Questions, Question 21.

[44] *See* 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

29. With regard to delivery charges, India has no basis for objecting to the inclusion of delivery costs in both the benchmark and government prices.[45] India states, for example, that in its view such adjustments are unnecessary particularly where "prevailing market conditions are only ex-works."[46] Harkening back to India's misinterpretation of the text of Article 14(d), India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. For the multitude of reasons articulated in the U.S. first written submission, as well as explained again above, India's premise is incorrect. Under the SCM Agreement, the adequacy of remuneration is assessed with respect to the *recipient*, and the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation.

30. India likewise argues that if the government price is an ex-mine price, any charges associated with the delivery of goods should not be considered in the benefit calculation. This argument fails – whether or not a subsidy exists does not depend on whether the terms of sale are ex-works or delivered. An ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the factory in setting the market negotiated price. To accept India's interpretation would artificially isolate delivery costs from the price of a good and therefore shield it from the actual prevailing market conditions. Such an interpretation would not fulfil the purpose of the Article 14(d) benchmark comparison—which is to assess whether the recipient is better off than it would have been absent that financial contribution.[47]

31. With respect to both the use of import prices, and the appropriateness of taking account of delivery charges in the benchmark and government prices, consider the following hypothetical[48]: 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 mines to Factory A, including the transport costs, would establish the private-party, arm's length benchmark applicable to Factory A. This benchmark reflects prevailing market conditions because that is what the recipient of the good considers in making a purchase and what the private seller considers in negotiating the price. 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 delivered 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 appropriate economic benchmark for determining whether or not the price (including transportation costs) charged by

[45] India Responses to First Panel Questions, Question 19.
[46] India Responses to First Panel Questions, Question 19.
[47] *Canada – Aircraft (Panel)*, para. 9.112.
[48] *See also* U.S. Responses to First Panel Questions, Question 48.

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.

32. The considerations are exactly the same for actual import prices. If the above hypothetical is modified to reflect a situation in which the information from the 10 private mines were unavailable for use, but an actual private price for the imported input was the only usable price available, once again using the fully delivered price—including the ocean freight and all charges necessary to get the input to the recipient's factory—would be appropriate. For a company to actually import an input, the prevailing market conditions in the country of provision must be such that it is economically rational to purchase the input from a foreign supplier, including any associated transportation and delivery charges.

33. A prime example of this, discussed in the United States response to Panel 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.[49] 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.

34. If the transportation charges were excluded from the Essar price, the benchmark would not reflect the prevailing market conditions in India but, rather, a hypothetical undelivered price 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.

35. This same logic is no different for the Tier II world market prices where Tier I prices are unavailable. As explained in the U.S. first written submission,[50] that was the case here:

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[49] *See* U.S. Responses to First Panel Questions, Question 44 ("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. (U.S. First Written Submission, para. 455.) 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. (2006 Issues and Decision Memorandum, at Section I.A.4 (Exhibit IND-33) and 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38))")

[50] U.S. First Written Submission, paras. 451-467.

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.[51] 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 hypothetical, undelivered, Australian price, unrelated to the Indian market, inconsistent with Article 14(d) of the SCM Agreement.

36. Similarly, the Panel's proposed hypothetical in Panel Question 48, 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 in India. As an initial matter, 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 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 by which to determine whether any benefit is being conferred on purchasers of goods under the prevailing market conditions in the India market. To require an administering authority to rely on the NMDC ex-mine price and adjust the benchmark price to be on an ex-mine basis would be equivalent to requiring the administering authority to ignore the actual prevailing market conditions in India, contrary to the Article 14(d) guidelines.

37. Based on the above, the United States first written submission, and the United States responses to Panel questions, Commerce's benefit regulation is consistent with the guidelines contained in Article 14 (d) of the SCM Agreement. India's arguments to the contrary are without merit and must be rejected.

III. India's Arguments Regarding Comparative Advantage Have No Merit

38. In its response to the Panel's written question 13, India continues to make assertions with respect to an alleged "comparative advantage."[52] In particular, based on vague and unsupported allegations that India has a "comparative advantage" with respect to unidentified countries, India objects to both the use of a Tier II analysis under Section 351.511(a)(2)(ii) and the use of "delivered prices" under Section 351.511(a)(2)(iv).[53] In the U.S. first written submission, the United States noted that India failed to provide any such evidence of a purported comparative

[51] U.S. First Written Submission, paras. 305-311.
[52] India Responses to First Panel Questions, Question 13.
[53] India First Written Submission, paras. 82 and 97; India Responses to First Panel Questions, Question 13.

advantage, either in the proceedings before the Department of Commerce or in its submissions before the Panel in these proceedings.[54]

39. In addition to failing to provide any evidence of an alleged comparative advantage, or failing even to specify just what India means by "comparative advantage," India inappropriately relies on the Appellate Body report in *US – Softwood Lumber IV* and further confuses the terms "comparative advantage" and "competitive advantage" throughout its first written submission and in response to question 13 of the Panel's first set of written questions.[55]

40. India's reliance on *US – Softwood Lumber IV* is misplaced. India relies on the statement that "any comparative advantage . . . would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration."[56] For several reasons, this statement does not – as India asserts – provide support for India's claims in this dispute. First, in *US – Softwood Lumber IV*, the benchmark at issue was an out-of-country benchmark – that is, the price of the good in a country other than the Member (Canada) that provided the subsidy.[57] In this dispute, the benchmark price is not a price wholly within a foreign country but, rather, is either the actual or constructed price *in India* of an imported product. Therefore the prevailing market conditions in India are already reflected in the benchmark.

41. Second, the Appellate Body noted that its comments on "comparative advantage" were "in the abstract."[58] This is almost necessarily so because "comparative advantage" is an abstract macroeconomic concept, difficult or even impossible to calculate in the real world. In *US – Softwood Lumber IV*, the Appellate Body made no attempt to do so, and in fact did not uphold Canada's challenge to the out-of-country benchmark at issue.

42. Third, the SCM Agreement contains no mention of "comparative advantage," and thus there is no basis for any assertion that it is central to the interpretation or application of the agreement.

43. Finally, and perhaps most simply, on the specific facts of this dispute, there is no issue regarding some sort of hypothetical need to take account of comparative advantage. Other than making a vague and unsupported assertion that India has an alleged comparative advantage as compared to the world price of iron ore, India has provided no evidence to support such an

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[54] U.S. First Written Submission, para. 458. The United States further notes that the Exhibits IND-50 and IND-51, which are cited by India in footnotes 325 and 326 of its first written submission were not part of the record evidence before Commerce in any of the determinations.

[55] *See, e.g.*, India First Written Submission, para. 96 and India Reponses to First Panel questions, Question 13 (India states that it has "only relied on 'comparative advantage' and not on 'competitive advantage' in its FWS" but that it "believes that the difference between 'comparative advantage' and 'competitive advantage' is not material to the instant dispute").

[56] India First Written Submission, paragraph 109.

[57] In *US – Softwood Lumber IV*, the underlying prices used by Commerce in establishing a benchmark were the prices of stumpage in bordering states of the northern United States (cross-border stumpage prices), adjusted to take into account market conditions prevailing in Canada. *US – Softwood Lumber IV (AB)*, at. para. 107 and n. 103.

[58] *US – Softwood Lumber IV (AB)*, at. para. 109.

argument. And, to the contrary, as the United States explained in its First Written Submission, record evidence in the administrative proceeding showed, for example, that Australia, which was the source of the benchmarks at issue, has larger deposits of iron ore than India. In short, on the record of this dispute, there is no basis for India to assert a need to take account of any supposed comparative advantage in India's favor. [59]

44. Furthermore, in arguing that India has a comparative advantage because it does not have to "bear the risk and expense of international transactions," India misuses the term "comparative advantage."[60] The United States is aware of no source that would support the proposition that "risk and expense of international transactions" has anything to do with the macroeconomic concept of comparative advantage, and India has cited to none.

45. And finally, India's arguments conflate two quite different economic concepts, the macroeconomic concept of "comparative advantage," and microeconomic ideas of a "competitive advantage."[61] As indicated by the Panel's question 13 and India's response, India uses the phrases "comparative advantage" and "competitive advantage" interchangeably throughout its first written submission.[62]

46. This confusion is significant because while India relies on the mention of "comparative advantage" in *US – Softwood Lumber IV*, India's allegations (which are in any event unsupported by any evidence) seem to relate to a supposed competitive advantage for certain firms.[63] In sum, for the reasons set out above, India's critiques of the U.S. regulation and Commerce's determination on the basis of failing to account for some sort of alleged "comparative advantage" are baseless.

[59] U.S. First Written Submission, para. 459.
[60] India First Opening Statement, para. 15.
[61] "Comparative advantage"—as opposed to "competitive advantage"—is the advantage that one country has over another in the production of a particular good relative to other goods if it produces that good less inefficiently than it produces other goods, as compared with the other country. Blinder, Alan and Baumol, William, "Economics: Principles and Policy," 11th ed., p.49. *See also*, Pugel, Thomas A., International Economics, International Edition, 12th Ed. 2004, at p. 39 (Exhibit USA-103) (explaining "the key word here is *comparative*, meaning 'relative' and 'not necessarily absolute.' Even if one country is absolutely more productive at producing everything and the other country is absolutely less productive, they both can gain by trading with each other as long as their relative (dis)advantages in making different goods are different. Each of these countries can benefit from trade by exporting products in which it has the greatest relative advantage (or least relative disadvantage), and importing products in which it has the least relative advantage (or the greatest relative disadvantage). Ricardo's approach is actually a double comparison—between countries and between products".) In other words, the concept of comparative advantage is about different *relative* efficiencies among countries. Competitive advantage, on the other hand, relates to a general advantage that a firm has over its competitors. Generally, one might consider competitive advantages as a broad range of things that explain why one firm is more competitive than another. Comparative advantage, on the other hand, could explain why France exports wine to England, while England exports cloth to France.
[62] India First Written Submission, paras. 305-309.
[63] India First Written Submission, para. 69.

IV. Commerce Did Not Err in Finding That NMDC Provides Iron Ore For Less Than Adequate Remuneration

47. In addition to its "as such" challenges to the U.S. regulation for calculating benefit where goods are provided for less than adequate remuneration, India has made multiple "as applied" claims including those with respect to: Commerce's determination that NMDC's sales of high grade iron ore conferred a benefit, that the provision of captive mining rights for iron ore and coal was for less than adequate remuneration, and Commerce's benefit calculations in the challenged proceedings. As discussed in the U.S. first written submission, many of these claims echo the flawed arguments put forward by India in its "as such" challenge. For example, India's as applied claims include the unsupportable argument that Commerce should have determined whether a benefit was conferred by using a cost-to-government analysis.[64] And, as fully addressed in the U.S. first written submission, all of India's "as applied" claims are without merit.[65] In the following section, The United States provides additional clarification and reactions with respect to India's arguments.

48. With respect to India's claims that the NMDC's sale of high grade iron ore did not confer a benefit consistent with Article 14(d) of the SCM Agreement, further clarifications about the specific calculations performed by Commerce are provided below.[66] In addition to its first written submission, India continues to advance objections to Commerce's benchmark calculations in its responses to the Panel's first set of written questions.[67] As explained in the U.S. first written submission and the relevant determinations,[68] as well as in the U.S. responses to the Panel's first set of written questions[69], India's objections lack basis. Commerce appropriately calculated the benefit for the NMDC's provision of iron ore at less than adequate remuneration in the 2004, 2006, 2007 and 2008 administrative reviews.[70]

49. In each of these reviews, there were no private, arm's-length prices ("Tier I" prices) for high grade iron ore and lumps in the Indian market in the record evidence submitted to Commerce. Instead, the record evidence showed private, arms-length prices for high grade iron ore lumps and fines in the form of world market FOB prices from Hammersley, Australia—as contained in the Tex Report.[71] Under the U.S. regulations, discussed above, such prices are

[64] U.S. First Written Submission, paras. 429-467.
[65] U.S. First Written Submission, paras. 429-467, 514-524, and 557-570.
[66] India's claims, as described in paragraphs 279-319 of India's first written submission are as follows: (1) Commerce should have determined whether a benefit was conferred by using a cost-to-government standard; (2) Commerce ignored domestic price information on the record; (3) Commerce refused to use an available in-country price; (4) Commerce failed to adjust the benchmark prices to reflect prevailing market conditions; (5) Commerce improperly excluded NMDC prices from the world market price benchmark; and (6) the U.S. has not performed its obligations under Article 14(d) of the SCM Agreement in good faith. The U.S. responses to these baseless claims are contained in paragraphs 429-467 of the U.S. First Written Submission.
[67] India Responses to First Panel Questions, Questions 12, 17 and 20.
[68] U.S. First Written Submission, paras. 429-476.
[69] U.S. Responses to First Panel Questions, paras. 11-44.
[70] U.S. First Written Submission, paras. 429-475.
[71] 2004 Preliminary Results, 71 Fed. Reg. at 1517, (Exhibit IND-17) and 2004 Issues and Decisions Memorandum, at Comment 2 (Exhibit IND-18); 2006 Issues and Decision Memorandum, at Section I.A.4 (Exhibit IND-33); 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38); and 2008 Issues and Decision Memorandum, at Section II.A.12 (Exhibit IND-41).

considered "Tier II" prices. To these world market FOB prices, Commerce added delivery charges under Section 351.511(2)(a)(iv) of the U.S. regulation, including shipping and handling charges and import duties that would actually be required to transport Australian iron ore to the steel company being examined.

50. With respect to the DR-CLO ore benchmarks, on the other hand, private arm's-length prices were available and on record, which meant that Commerce was able to use such actual "Tier I" BCI prices[72], namely the prices at which the Indian steel companies actually purchased DR-CLO from private parties.[73] One price was a domestic Indian price and, another, an import price.[74] Similarly to its calculation with respect to high grade iron ore and lumps, Commerce added to these prices the actual charges incurred by the steel companies to transport the DR-CLO to their respective factories.[75] For all of the above, Commerce compared the respective private benchmark prices to the NMDC prices on an apples-to-apples basis in order determine whether and to what extent NMDC prices were less than adequate remuneration.

51. The United States did not, as India argues in its response to questions 17 and 19, artificially inflate the benchmark by adding in unnecessary delivery costs or, as India argues in response to question 20, by ignoring evidence on the record of private arm's-lengths transactions. These issues as well as other aspects of India's "as applied" claims are addressed below.

52. In its first written submission, India incorrectly argues that Commerce failed to set forth reasons for not using certain in-country benchmarks in the 2006, 2007, and 2008 administrative reviews and that suitable in-country price information was available.[76] These erroneous claims are addressed in the U.S. first written submission at paragraphs 439 to 449. India, however, in response to question 20 of the Panel's first set of written questions, argues that the explanations offered by the United States in its first written submission are "ex-post facto rationalizations". But it is India and not the United States that is trying to add new arguments to the matters considered during the administrative proceeding.[77] In particular, India argues that the U.S. should not be allowed to address the purported in-country pricing "evidence" raised by India in its own first written submission—namely an association chart and a proprietary price quote from the 2006 administrative review containing iron ore prices.[78] Yet the explanations contained in paragraphs 439 to 445 of the U.S. first written submission are directly responsive to the arguments India raises in the context of this WTO dispute.

53. During the administrative proceedings at issue, none of the parties argued that the information contained in the association chart should be used in calculating the appropriate

[72] Essar and Ispat each submitted BCI information on private transactions for DR-CLO purchases. Commerce used Essar's BCI information for Essar's DR-CLO calculations and Ispat's BCI information for Ispat's DR-CLO benefit calculations.
[73] U.S. First Written Submission, paras. 432, 434-435.
[74] U.S. First Written Submission, para. 342.
[75] U.S. First Written Submission, para. 437.
[76] India First Written Submission, paras. 284-289.
[77] India Responses to First Panel Questions, Question 20.
[78] India First Written Submission, para. 287.

benchmarks. India raises this argument only now. As explained in the U.S. first written submission the alleged pricing information contained in these documents was incomplete.[79] For example, with respect to the association chart, the parties are not identified; there is no way to determine if the prices were in fact private.[80] Of the few parties that are identified in the chart, several are state-owned companies.[81] Further, there was no record evidence or explanation provided in or accompanying the chart to demonstrate whether the prices represented actual private market transactions, as opposed to quotes or estimates.[82] Further, the specific percentage of iron ore content is not identified in the data, an important factor in assessing the value of iron ore.[83] For all of these reasons it is unsurprising that at the time of the administrative proceeding, no party asked that the information be used by Commerce in its benchmark determination.

54. With regard to the price quote from Tata, the second piece of evidence cited by India, the United States notes that 22 of the 24 pages of the exhibit relied on by India – Exhibit IND-70 – are not, as India asserts, public documents. Rather, they are business confidential documents subject to administrative protective order (APO).[84] Accordingly, the pricing data in the document was confidential and could not be used as a benchmark for any other party's transactions.

55. The first two pages of Exhibit IND-70 reflect an original public document. The document consists of a letter from the law firm of Haynes Boone to the Secretary of Commerce, and it contains no data. The fact that the public document consisted of only this two-page letter is clear from the number of pages, "2", indicated in the upper right hand corner of the first page. Notably, by regulation (19 C.F.R. 351.303(d)(2)(ii)), all documents submitted to Commerce must state, in the upper right hand corner, "the total number of pages in the

[79] U.S. First Written Submission, paras. 439-445.
[80] U.S. First Written Submission, paras. 441-442.
[81] U.S. First Written Submission, para. 442.
[82] U.S. First Written Submission, para. 440.
[83] U.S. First Written Submission, para. 443.
[84] India's submission of this information and references to it in the proceeding also raise a separate issue. Under Annex 1 of the Panel's Working Procedures, this information would fit within the definition of BCI:

> For the purposes of these proceedings, business confidential information (BCI) means information previously submitted to the U.S. Department of Commerce as confidential information protected by Administrative Protective Order ("APO") in the course of the countervailing duty investigation and administrative reviews (Investigation No.C-533-821) that is submitted to the Panel by the United States or by India.

As a result, this information is to be treated in accordance with the procedures in Annex 1 unless India has provided the agreement, in writing, of the person who provided the information in the course of the investigation to make the information publicly available. The United States assumes that India has obtained this written agreement and has simply overlooked providing it to the Panel and the United States. Otherwise, India was not permitted to submit this information absent a letter from the entity authorizing both the United States and India to submit in this dispute, in accordance with the BCI procedures, any confidential information submitted by that entity in the course of the proceedings at issue. India would have further been required to observe the other provisions of the BCI procedures, which it also has not done.

The United States is separately approaching India to clarify this matter.

document, including cover pages, appendices, and any unnumbered pages."[85] Moreover, the letter from the law firm of Haynes Boone to the Secretary of Commerce is listed in the Public Index to the public verification report, labeled Pub. Doc. 256. This Public Index is now attached as Exhibit USA-105. This letter served as one of the many documents in the public administrative record in the Hot-Rolled Carbon Steel Flat Products from India determination.

56. Contrastingly, the remaining 22 pages of Exhibit IND-70 are a few of the confidential verification exhibits that Commerce collected during its on-site verification of Tata. These documents were attached to Tata's Confidential Verification Report, labeled BCI Doc. 52 in the Confidential Index (attached as Exhibit USA-106). At Tata's request, Commerce treated all of the verification exhibits collected at Tata's verification as confidential under the APO. Commerce only included these 22 pages in the confidential record, as part of the APO version of the verification report.[86]

57. The public version of the verification report, on the other hand, does not contain any verification exhibits. The entirety of the public version of the verification report is attached as Exhibit USA-107 for the Panel's review. Therefore, in creating Exhibit IND-70, an exhibit that India erroneously references several times throughout its first written submission[87], India attached 22 additional pages to the original two-page public letter, and these 22 pages were protected under the APO.

58. Further, as explained in the U.S. first written submission, not only is the data confidential but the data cannot be used as benchmarks because they do not reflect actual private, arm's-length transactions. Instead, these documents merely contain a price quote[88] and not a completed transaction. Therefore their contents have no bearing, as India would purport, on the availability of a public in-country arm's length private price in India with respect to the challenged determinations.[89]

59. Further to the topic of proprietary information, in response to the Panel's question 27, which asks how an investigating authority might "use" confidential information pertaining to Company A in its determination in respect of Company B without "disclosing" that confidential information to Company B, India states that an investigating authority can use the data as long as it does "not disclos[e] the nature of source of such information." As explained in the U.S. first written submission, such a task would be an impossible feat and India's response offers no

[85] 19 C.F.R. § 351.303 (Exhibit USA-104).
[86] Official Proprietary Record Index, at document number 52 (Exhibit USA-106).
[87] *See* India First Written Submission, paras. 281-282, 287, 346-347, and 354.
[88] U.S. First Written Submission, paras. 439 – 445.
[89] The United States further notes that in addition to citing to the confidential pages contained in Exhibit IND-70 as alleged evidence supporting India's arguments with respect to an in-country price, India also cites to the confidential pages in support of its arguments against the existence of a captive mining program for iron ore. *See*, India First Written Submission, paras. 281-282, 287, 346-347, and 354. In response, the United States submits that, even aside from the fact that India's reliance on these documents violates paragraphs 3, 5, 6, and 8 of the BCI Working Procedures, the contents of these documents do not support India's arguments for the reasons laid out in paragraphs 449-507 of the U.S. First Written Submission.

practical direction.[90] Where, for example, only two companies exist in an industry, Company B could assume that any pricing data applied by the investigating authority with respect to it would be from Company A. The use of one party's BCI in respect of another party's calculations would mean that the calculations could be reversed and the data revealed. The United States notes that India does not explain how an investigating authority could use such data without breaching Article 12.4 of the SCM Agreement, which protects BCI from disclosure. As the United States explained in its first written submission, the use of one party's BCI for another party's calculations would mean that the calculations can be reversed and the data revealed.

60. Finally, with respect to the application of Section 351.511(2)(a)(iv), the U.S. provision which adjusts for delivered prices, the guidelines contained in Article 14(d) contemplate an apples-to-apples comparison by directing Members to account for prevailing market conditions—including transportation—in assessing the adequacy of remuneration.[91] Charges associated with delivering the goods to the recipient's factory must be included in order to make a relevant comparison at the same point in the distribution chain. These charges are an integral and inseparable part of determining a benchmark price that reflects prevailing market conditions in the country of provision. In purchasing an input, the purchaser does not simply accept the lowest price regardless of the location of the good. The true cost to the purchaser is the fully delivered price. Removing the delivery charges from the equation does not reflect the prevailing market conditions in the country of provision of the good as required by Article 14(d).

61. Finally, in its responses to questions 17 and 19 of the Panel's first set of written questions, India continues to argue that the U.S. comparison of delivered prices is inconsistent with the Article 14(d) guidelines. In so doing, however, India also notes that Commerce adjusts both the benchmark price and the NMDC price to the same point in the distribution chain—the delivered price—based on the charges that the benchmark ore and the NMDC ore actually incurred or would have incurred if the domestic purchaser had imported the product. For the reasons stated above, the U.S. regulations are both drafted and applied in a way that ensures a meaningful comparison, consistent with the Article 14(d) guidelines.

62. For all of the reasons set out above, India's as applied challenges to the U.S. regulations for the calculation of benefit where remuneration is less than adequate are without merit and should be rejected.

V. Commerce's Findings With Respect To Specificity Were Consistent With the SCM Agreement

63. In its submissions, India makes a series of challenges under Articles 2.1 and 2.4 of the SCM Agreement to Commerce's specificity determinations with respect to the GOI's sale of iron ore and captive mining programs. As an initial matter, and as explained in the U.S. answers to the Panel's first set of written questions as well as the U.S. first written submission, Article 2.1

[90] U.S. First Written Submission, paras. 444 – 445.
[91] *See, e.g.*, U.S. First Written Submission, paras. 461-467 and U.S. Responses to First Panel Questions, Questions 44, 48, and 50-53.

of the SCM Agreement is a definition and does not contain any obligations on a Member.[92] It therefore 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.[93] This issue aside, as explained in the U.S. written submissions, Commerce's specificity determinations met the definition and were consistent with Article 2.4 of the SCM Agreement. Based on record evidence, Commerce determined that the sale of iron ore and captive mining programs for iron ore and coal were used by a limited number of certain enterprises.[94] India's challenges with respect to Commerce's specificity determinations are contrary to record evidence and simply wrong. India continues to hold on to and advance interpretations that are inconsistent with the text of the SCM Agreement and run contrary to findings of prior panels that are persuasive on this point. There is no basis for concluding that Commerce's determinations were inconsistent with the U.S. obligations under Article 2.1 or 2.4 of the SCM Agreement.

A. Commerce's Determination That the NMDC Provision of Iron Ore Is Specific Because It Is Used By A Limited Number of Certain Enterprises Is Consistent With Articles 2.1(a) and 2.4 of the SCM Agreement

64. With respect to Commerce's finding that the NMDC iron ore program was used by a limited number of certain enterprises, the record evidence demonstrates that almost all of the iron ore consumed in India is used for the production of steel, by steel and pig and sponge iron producers.[95] Article 2.1 provides that specificity may be found if a subsidy program is "use[d] by a limited number of certain enterprises." When considering whether a subsidy program is used by "a limited number of certain enterprises," consideration of the number of enterprises or industries is made with respect to the economy of the Member concerned.[96] The question before an investigating authority is whether the enterprises or industries are "a sufficiently discrete segment" of the "economy in order to qualify as 'specific' within the meaning of Article 2 of the SCM Agreement."[97] In the 2004, 2006, 2007, and 2008 administrative reviews, Commerce found that the GOI's provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore.[98] Further, the record evidence showed that 76 percent of the iron ore was used by steel producers.[99] Indeed, most of the NMDC's customers as listed on the NMDC's website were iron ore and steel companies.[100] As explained in paragraph 415 of the U.S. first written submission, positive evidence demonstrates that a limited number of certain enterprises, when compared to the quite diverse economy of India, use the NMDC iron ore program.[101] By contrast, the crux of India's arguments that Article 2 requires, under all circumstances, that an investigating authority's or panel's determination of specificity can only be made with reference to a "comparative set" or "similarly-situated"

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[92] U.S. Responses to First Panel Questions, Question 70; U.S. First Written Submission, para. 389.
[93] *US – Zeroing (Japan) (AB)*, para. 140.
[94] *See, e.g.*, U.S. First Written Submission, paras. 388-428; U.S. Responses to First Panel Questions, paras. 45-46.
[95] *Dang Report*, p. 48 (attached to 2006 New Subsidies Allegation (JSW)*)*, at internal Exhibit 31 (Exhibit USA-50).
[96] *US – Upland Cotton (Panel)*, paras.7.1143-7.1147.
[97] *US – Upland Cotton (Panel)*, para. 7.1151.
[98] U.S. First Written Submission, para. 415.
[99] *Dang Report*, p. 48 (attached to 2006 New Subsidies Allegation (JSW)*)*, at internal Exhibit 31 (Exhibit USA-50).
[100] 2004 New Subsidies Allegation, p. 4, internal Exhibit 7 (May 2, 2005) (Exhibit USA-69).
[101] Article 2.4 of the SCM Agreement states that "any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence."

entities, as described in paragraphs 245-261 of India's first written submission, would amount to the creation of an additional requirement before a finding of specificity could be made. As explained in paragraphs 397-407 of the U.S. first written submission, this step is not found anywhere in the text of the SCM Agreement (nor by necessary implication of the text).

65. India also incorrectly argues that if the "inherent characteristics" of a good limit its use to a limited number of certain enterprises, the provision of that good cannot be found to be specific.[102] As explained in the U.S. first written submission, there simply is no basis in the text of Article 2 for prohibiting findings of specificity based on the good's "inherent characteristics." Rather, as previous panels have correctly found, when the good provided by the government is of limited utility, it is more likely that a subsidy is conferred on certain enterprises.[103] India's reading of Article 2.1 would create a loophole permitting Members to subsidize by providing inputs that can only be used by a limited group of enterprises.

66. Finally, with respect to India's arguments that the last sentence of Article 2.1(c) required Commerce to specifically address the diversification of the Indian economy and the duration of the program, India's assertions are incorrect and contrary to the findings of previous panels with respect to this provision. As explained in the U.S. first written submission, Commerce in fact did take account of these factors but, in the context of a *de facto* specificity analysis, was not required to address them explicitly in its determinations.[104] The panel in *EC – DRAMS*, for example, rejected the contention that a party must make explicit findings regarding these considerations when the other parties fail to raise the issue. Rather, the Panel found that it was not "unreasonable" that the EC did not include any explicit statement regarding the two factors in the third sentence of Article 2.1(c) in its Final Determination.[105] Similarly, in *US – Softwood Lumber IV*, the panel found that the U.S. had properly taken account of economic diversity with an implicit statement about the granting authority's economic activities because it was a publically known fact that the Canadian economy is a diversified economy.[106]

67. Here too, it is evident that India's economy is highly diverse, containing a very large number of industries, a fact which India does not dispute.[107] Comparatively, only a limited number of industries in the iron and steel sector actually use the iron ore, as explained above. Finally, the fact that only a limited number of industries can use iron ore[108] renders irrelevant any concern regarding the length of time that the NMDC program has been in operation.[109] It is therefore no surprise that no parties, including the GOI, bothered to raise these issues during the challenged administrative proceedings.

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[102] India First Written Submission, paras. 239-278.
[103] U.S. First Written Submission, paras. 408 – 412 (citing to *U.S. – Softwood Lumber IV (Panel)*, para. 7.116).
[104] U.S. First Written Submission, paras. 420-428.
[105] *EC – DRAMS (Panel)*, para. 7.229.
[106] *US – Softwood Lumber IV (Panel)*, para. 7.124.
[107] In fact, neither party raised the issue of India's economic diversification or the length of time the subsidy program had been in operation with respect to Commerce's *de facto* specificity analysis.
[108] 2004 New Subsidies Allegation, p. 2, internal Exhibit 6 (May 2, 2005) (Exhibit USA-69).
[109] U.S. First Written Submission, para. 426; U.S. Responses to First Panel Questions, paras. 45-46.

B. Record Evidence Demonstrates That the GOI Has a Captive Mining Policy With Regard To Iron Ore Mining Rights

68. In its written submissions, India repeatedly denies the existence of a captive mining program for iron ore and that absent a "captive" mining program for iron ore, mining rights are generally available under India's mining lease laws and thus not specific under Article 2 of the SCM Agreement. This argument has not merit. Commerce's finding that India' does have a captive mining program for iron ore was based on record evidence, and Commerce thus has a sound basis for finding that the program is *de facto* limited to a few steel companies.

69. As explained in the U.S. first written submission[110] and U.S. responses to the Panel's first set of written questions,[111] India's claim that there is no iron ore "captive" mining rights program is inconsistent with record evidence demonstrating that the GOI has a captive mining rights policy. In its response to the Panel's written question 29, the United States notes that India appears to soften its position and acknowledge the existence of captive mining. India qualifies its previous position by stating that "some of the licensees may be using [mining leases] for captive consumption" but that "others may only be engaged in selling the extracted iron ore."[112] India also attempts to divert the discussion of whether such a program exists to a consideration of India's laws, which do not establish a *de jure* program of "captive" mining for iron ore.[113] None of this, however, should distract from the clear evidence that the GOI has a *de facto* "captive" mining rights program for iron ore in which only four steel companies participate. Commerce properly based its determination on this evidence.

70. As explained in the U.S. first written submission, the GOI has a captive iron ore mining policy for four of India's largest steel makers. The record is replete with evidence confirming this finding; in particular, two extensive reports regarding the Indian steel industry, which were commissioned by the GOI: the *Dang Report* and the *Hoda Report*. The *Dang Report*, issued by the Indian Ministry of Steel, specifically identifies a GOI policy of having captive mining leases.[114] One of the identified broad policy measures in the *Dang Report* states, in relevant part, that the "Policy of captive mining leases should continue . . ."[115] The *Hoda Report* contains a section titled 'Allocation of Captive Mines to Steel Makers,' which contains a discussion of whether the captive mining policy should be expanded.[116] In addition, the *Hoda Report* identifies one of the interested groups in the discussion as "steel mill owners with captive mines."[117] The *Hoda Report* goes on to state that "captive mines are a reality in India, and many of them are run efficiently."[118] The evidence of captive mining programs in these GOI-commissioned reports is supported by several articles from Indian newspapers. For example, an

[110] *See, e.g.*, U.S. First Written Submission, paras. 478-484.
[111] *See* U.S. Responses to First Panel Questions, paras. 47-48.
[112] India Responses to First Panel Questions, Question 29.
[113] India First Written Submission, paras. 372-277; India Responses to First Panel Questions, Question 26.
[114] *Dang* Report, p. 52 ("Policy of captive mining leases should remain in place. . .") (attached to 2006 New Subsidies Allegation (JSW) at internal Exhibit 31) (Exhibit USA-50).
[115] *Dang* Report, p. 52 (attached to 2006 New Subsidies Allegation (JSW) at internal Exhibit 3 (Exhibit USA-50).
[116] *National Mineral Policy, Report of the High Level Committee ("Hoda Report")*, at 143 (attached to 2006 New Subsidies Allegation (Tata) at internal Exhibit 10) (Exhibit USA-71).
[117] *Hoda Report*, pp. 143 and 158, fn 4 (Exhibit USA-71).
[118] *Hoda Report*, p. 159 (Exhibit USA-71).

article from the *Times of India*, discussing the *Hoda Report*, states that if the recommendations of the *Hoda Report* are followed captive mining may be eliminated.[119]

71. The *Dang and Hoda* reports, in addition to newspaper reports, identify the four steel companies who have been granted captive mining rights pursuant to India's captive mine policy. The Dang Report states that four Indian steel companies, SAIL, TISCO (now known as Tata), JSPL and JVSL (now known as JSW), had captive mines for iron ore.[120] The Times of India article identifies SAIL and Tata Steel as having captive mines.[121] The Financial Express, in an article entitled "India's Iron Ore Rush," identifies Tata Steel, SAIL, JSW and JSPL as having captive iron ore mines.[122] Finally, in another Financial Express article, Tata Steel is identified as getting "all of its iron ore and two-thirds of its coal supplies from captive mines." [123] Therefore, while the Indian mining laws may not state that India grants captive mining rights for iron ore, India's widely known policy of granting captive mining leases was amply reflected in the information examined by Commerce.

72. India's response to this evidence is limited to the suggestion that the Panel review the conclusions on captive mining in the *Hoda Report.*[124] The United States encourages the Panel to review the conclusions and recommendations of the report at pages 217-18 entitled "Allocation of Captive Mines to Steel Makers."[125] The report states that there is no basis for "policy changes" and that

> "[s]tand alone mining and *captive mining should continue to co-exist in the country*. The position should be reviewed in 2016-1017 in light of the emerging situation of establishment of steel capacity in the country, on the one hand, and accretions to the level of iron ore resources in the country, on the other. A view can be taken at that time on whether the balance of advantage in the grant of [mining leases] . . . should be changed in favor of steel mills."[126] (Emphasis added)

Further, the *Hoda Report* states that "[e]xisting captive mines should be renewed if they have complied with the conditions of the lease and life of the steel plant so warrants taking into account existing and planned capacities."[127] The report also expressed the view that "[s]teel making capacities already in existence on 1 July 2006 *that do not have captive mines* may also be given preferential allocation of adequate iron ore reserves within the state without the need to

[119] 2006 New Subsidies Allegation (Tata), internal Exhibit 11, p.1 (Exhibit USA-71).
[120] *Dang Report*, p. 48 (Exhibit USA-50); *Hoda Report*, p.143 and 158, fn 4 (Exhibit USA-71).
[121] 2006 New Subsidies Allegation (Tata), internal Exhibit 11, p. 1 (Exhibit USA-71).
[122] 2006 New Subsidies Allegation (Tata), internal Exhibit 14 (Exhibit USA-71).
[123] 2006 New Subsidies Allegation (Tata), internal Exhibit 13 (Exhibit USA-71).
[124] India Responses to First Panel Questions, Question 30.
[125] *Hoda Report*, p.217 (attached to 2006 New Subsidies Allegation (Tata) at internal Exhibit 10) (Exhibit USA-71).
[126] *Hoda Report*, p.217 (attached to 2006 New Subsidies Allegation (Tata) at internal Exhibit 10) (Exhibit USA-71).
[127] *Hoda Report*, p.217 (attached to 2006 New Subsidies Allegation (Tata) at internal Exhibit 10) (Exhibit USA-71).

go through the process of tender/auction, as a one-time measure *to provide a level playing field*."[128]

73. Thus, contrary to India's assertions that the conclusion of the *Hoda Report* demonstrates that India does not have a captive mining rights policy for iron ore, or that the conclusions are "ignored" by the United States, the report clearly confirms the existence of a GOI "captive" mining rights policy for iron ore.[129]

74. For these reasons, while the Indian laws on the granting of mining rights do not contain explicit language concerning "captive mining," that fact does not undermine the evidence supporting the existence of the GOI's *de facto* "captive" mining policy, as outlined above. India has not demonstrated that the U.S. determination of a *de facto* "captive" mining rights policy for iron ore by the GOI is inconsistent with any provision of the SCM Agreement. Moreover, record evidence is clear: the GOI maintains a captive mining program for iron ore. As such, India's unsubstantiated arguments to the contrary should be rejected.

C. Record Evidence Demonstrates That Tata Steel's Captive Mining Rights For Coal Are Subject to India's Law on Captive Mining of Coal

75. In addition to India's challenges to Commerce's determination of *de facto* specificity with respect to a captive mining program for iron ore, India also challenges—similarly unsuccessfully—Commerce determination of *de jure* specificity with respect to a captive mining program for coal. In its response to question 25 of the Panel's first set of written questions, for example, India avoids answering the Panel's yes or no question and, instead, states that the existence of a mining rights program for coal or a captive mining rights program for coal "is not relevant to the present dispute" because "the coal mining rights granted to Tata was what was countervailed by the United States."[130] Yet, the question of whether record evidence demonstrated the existence of a captive mining program for coal is at the very heart of this part of India's challenge. As explained in the U.S. first written submission, the GOI's provision of a captive mining lease to Tata was specific, as defined by Article 2.1(a) of the SCM Agreement.[131] India is incorrect that the existence of a captive mining rights program is not relevant.

76. Moreover, India has failed to show any evidence that Tata's captive mining lease is exempt from India's laws governing the captive mining of coal. Commerce found that the GOI's provision of captive mining leases for coal was *de jure* specific based on an examination of India's laws which limit the provision of captive mining leases for coal to three sectors, the steel, cement and power industries.[132] The record demonstrates that India nationalized coal mineral rights in 1973, which limited the mining of coal to public companies. The Coal Mines Nationalization Act was amended two times, in 1976 and 1993, to provide that iron and steel

[128] *Hoda Report*, p.217 (attached to 2006 New Subsidies Allegation (Tata) at internal Exhibit 10) (Exhibit USA-71).
[129] India Responses to First Panel Questions, Question 29.
[130] India Responses to First Panel Questions, Question 25.
[131] U.S. First Written Submission, paras. 508-513.
[132] U.S. First Written Submission, para. 508.

companies and power companies, respectively, were permitted to mine coal for captive use.[133] In 1996, the law was again modified to include the cement industry.[134] The Ministry of Coal's guidelines for the allocation of captive coal blocks provide that "[p]reference will be accorded to the power and steel sectors."[135]

77. Further, the United States fails to understand the basis on which India continues to assert that Tata's lease is exempt from the laws. The relevant laws contain no exemption for Tata's lease. Tata has not identified any provision of the relevant laws that exempts Tata's lease from the express limits on captive mining rights of coal to three industries, which includes the steel industry. India claims that because Tata's captive coal mining lease is older than the laws and has not been re-issued, it is exempt from the laws, yet India fails to identify a single provision of Indian law on the record which states Tata's lease is exempt from the general coverage.

78. In its response to question 26, India argues that Tata's lease was granted by a Raj prior to the laws at issue. However, as explained in the U.S. First Written Submission, Tata pays royalties consistent with the laws, not with the lease.[136] Although the lease requires payment to the Raj, Tata actually pays the GOI, which, by law, assumed all of the mineral rights in India, including the iron ore in Tata's mine.[137] There is no exemption in the relevant law nationalizing the mineral rights for coal specific to the coal contained in Tata's mines. Tata is required to pay the GOI based on the rates established in the laws rather than on the terms of the original lease. Thus, India's claim that Tata is exempted from the law on captive mining rights simply is not supported by record evidence and is not credible.

79. The United States would also react to India's response to the Panel's written question 28, where India disputes Commerce's finding in the 2006 administrative review that Tata, in its questionnaire, response, acknowledged that the GOI and the State Government of Jkarkhand (GOJ) granted captive coal mining rights. India argues that such finding is "incorrect and contrary to the facts on the record."[138] The United States simply would draw the Panel's attention to Tata's actual questionnaire response, contained in exhibit IND - 65. On page 20 of that exhibit, Tata explicitly notes the existence of "captive mining operations" as well as its obligations to "pay the mining royalty in terms of the MMDR Act." While Tata may argue that part of the MMDR Act doesn't apply to it, it does not deny in its questionnaire response the existence of a captive mining program nor its obligation to pay royalties pursuant to such program. In short, Commerce found that Tata participated in the captive mining program for coal based on record evidence.

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[133] 2006 New Subsidies Allegation (Tata), p. 11 and internal Exhibits 18 (Coal Mines Amendment Act 1976 at section 3), and 19 (Coal Mines Amendment Act 1993 at section1) (May 23, 2007) (Exhibit USA-71).
[134] 2006 New Subsidies Allegation (Tata), internal Exhibit 20 (Ministry of Coal, Notification S.O. 199(E) March 15, 1996) (Exhibit USA-71).
[135] 2006 New Subsidies Allegation (Tata), internal Exhibit 23, p. A.9 (Guidelines for Allocation of Captive Blocks) (Exhibit USA-71).
[136] U.S. First Submission, para. 511.
[137] India Responses to First Panel Questions, Question 28.
[138] India Responses to First Panel Questions, Question 28.

80. Examined closely, India may be arguing a fine distinction that for some terms of the lease the new laws apply but not the part of the law which restricts captive mining to the three industries, one of which is steel. But India cannot sustain this supposed distinction without identifying the legal scheme that provides for such an exception. And such an exception cannot be found on the record evidence. As a result, Commerce's finding that the continued explicit provision of iron ore mining rights by the GOI under Indian law is specific because it is expressly limited to certain enterprises.

VI. U.S. Cumulation Measures Are Not Inconsistent As Such, or As Applied in the Underlying Hot-Rolled Steel Proceedings, with Article 15 of the SCM Agreement

81. In its submissions to the Panel, India has presented "as such" and "as applied" claims under Article 15 of the SCM Agreement with respect to cumulation in original investigations and sunset reviews. India's claims are unfounded. As demonstrated in the U.S. first written submission and in the U.S. answers to the Panel's questions, India's arguments fail because the cumulation of subsidized and dumped imports is consistent with the text of Article 15 of the SCM Agreement, when read in the context of Article VI of the GATT 1994 and Article 3 of the AD Agreement, and in light of the object and purpose of the SCM Agreement.[139] In addition, with respect to sunset reviews, India's "as such" and "as applied" claims[140] under Article 15 have no merit because Article 15 does not apply to sunset reviews.[141] The United States will first address the inapplicability of Article 15 to sunset reviews, and then turn to cumulation in original investigations.

A. India's Challenges to Cumulation in the Context of Sunset Reviews Must Fail

82. India's as such and as applied claims[142] under Article 15 of the SCM agreement with respect to the cumulation of subsidized and dumped imports in sunset reviews must fail because Article 15 does not apply to sunset reviews.[143] The problem with India's challenges to these measures is a simple one. India included in its Panel Request a challenge to the U.S. statute and the Commission's sunset determination under Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement to the U.S. statute and the Commission's sunset determination. These provisions, however, only govern injury determinations in original investigations, and do not apply in the context of sunset reviews.

83. Article 15 of the SCM Agreement is entitled "Determination of Injury", and Article 15.3 contains obligations with respect to cumulation of imports "subject to countervailing duty *investigations*". Moreover, in the anti-dumping context, the Appellate Body has expressly rejected the claim that the requirements relating to cumulation in original investigations are

[139] U.S. First Written Submission, paras. 116-129; U.S. Responses to First Panel Questions, Questions 56-61, 62-64, and 74.
[140] India asserts that the U.S. statutory provision relating to cumulation in sunset reviews is 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 steel imports from India is inconsistent, as applied, with the SCM Agreement. India First Written Submission, paras. 518-521.
[141] U.S. First Written Submission, paras. 136-142; U.S. Responses to First Panel Questions, Question 64.
[142] India First Written Submission, paras. 133-150.
[143] This issue is also discussed in U.S. Responses to First Panel Questions, Question 64.

directly applicable to sunset reviews.[144] In *US – OCTG from Mexico* and *US – OCTG from Argentina*, for example, the Appellate Body found that the cumulation provisions of the AD Agreement are not directly applicable to sunset reviews. The Appellate Body explained that the requirements of the provision only "'speak{} to the situation '{w}here imports of a product from more than one country are simultaneously subject to *antidumping investigations*,'" and that "the text of Article 3.3 plainly limits its applicability to original investigations."[145] As a result, the Appellate Body stated, the cumulation "conditions of Article 3.3 do not apply to likelihood of injury determinations in sunset reviews."[146] The same reasoning applies to the SCM Agreement, and necessarily leads to the conclusion that Article 15 of the SCM Agreement does not apply in the context of sunset reviews.

84. The United States would note that the SCM Agreement does contain obligations with respect to sunset reviews; those obligations, however, are set out in Article 21 of the SCM Agreement. On their face, the obligations under Article 21 and Article 15 serve different purposes. India's panel request does not raise any Article 21 claims with respect to sunset determinations, and any such issues are not within the Panel's terms of reference.[147]

85. In this regard, the United States recalls that the Panel was established with standard terms of reference. Accordingly, the Panel's terms of reference are limited to the matters raised in India's panel request.[148] As the Appellate Body has 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.[149]

As a result, any such Article 21 claims (which have not, in any event, been asserted by India) would be outside the terms of reference of this dispute.

86. In addition to the key difference between the SCM Agreement articles applicable to investigations and those applicable to sunset reviews, the United States notes that India misunderstands important factual differences between investigations and sunset reviews. Relying on *EU – Footwear from China*, India asserts that the determination in the sunset review relied on the determination in the original injury investigation, and therefore is "tainted" by the

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[144] *US – OCTG from Argentina (AB)*, paras. 286-294; *US – OCTG from Mexico (AB)*, paras. 167-173.
[145] *US – OCTG from Argentina (AB)*, paras. 294, 301; *US – OCTG from Mexico (AB)*, para. 170.
[146] *US – OCTG from Argentina (AB)*, paras. 302 and 280; *US - OCTG from Mexico (AB)*, para. 170. *See also*, *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 and 286-294; *US – OCTG from Mexico (Sunset)(AB)*, paras. 167-173
[147] Request for the Establishment of a Panel by India, WT/DS436/3, July 12, 2012, paras. 8, 10(b) and 12(e).
[148] *See* Constitution of the Panel Established at the Request of India, Note by the Secretariat, WT/DS436/4 (February 20, 2013).
[149] *India – Patents (US) (AB)*, para. 92.

allegedly WTO-inconsistent original injury investigation.[150] India's argument is illogical for two reasons.

87. First, the sunset determinations for hot-rolled steel examined a different legal issue than that considered in the original investigation. The original investigation entailed an examination of whether subject imports during the original period of investigation materially injured the domestic industry or threatened it with material injury.[151] In contrast, the focus of the sunset review was an assessment of data during the period of the sunset review to determine whether the likely volume, price and impact of subject imports were likely to lead to continuation or recurrence of material injury to the domestic industry if the orders were revoked.[152]

88. Second, India overlooks the fact that the Commission's determination in the sunset reviews was based on a very different set of imports than was its original injury determination. In its original determinations, the Commission cumulated the subject dumped and subsidized imports from all eleven countries and issued an affirmative injury determination for all eleven countries.[153] In its sunset reviews, however, the Commission collected and evaluated new record evidence for a different period of review, and made a different evaluation and reached different conclusions.[154] In short, as the United States explained in response to Panel question 63, the original investigation and sunset review were distinct processes with different purposes.[155]

89. In sum, for the reasons set out above, India has no basis for either an "as such" or "as applied" challenge to cumulation in sunset reviews.

B. Article 15 of the SCM Agreement Does Not Prohibit Cross-Cumulation of Unfairly Traded Imports in Original Investigations

90. As the United States explained at length in its first written submission and its response to the Panel's questions,[156] the text of Article 15.3 does not impose an obligation on Members that would prohibit cumulation of dumped and subsidized imports in original investigations. Despite India's claims to the contrary, Article 15.3 addresses the circumstances under which an authority may cumulate the effects of imports that "are simultaneously subject to countervailing duty

[150] India First Written Submission, para. 142; India Responses to First Panel Questions, Question 34.
[151] ITC Sunset Determinations, pp. 10-20 and 20-42 (Exhibit USA-10); ITC Injury Determinations, at pp. 3-26 (Exhibit IND-9).
[152] ITC Sunset Determinations, pp. 10-20 and 20-42 (Exhibit USA-10).
[153] ITC Injury Determinations, pp. 3-26 (Exhibit IND-9).
[154] The Commission determined that subject imports from Argentina would have no likely discernible impact on the domestic industry and, therefore, the Commission terminated the reviews with respect to subject hot-rolled steel imports from Argentina. ITC Sunset Determinations, pp. 13-14 (Exhibit USA-10). The Commission also determined 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 Determinations, pp. 20 (Exhibit USA-10).
[155] *US – Carbon Steel (AB)*, para. 87; *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.
[156] U.S. First Written Submission, paras. 82-169; U.S. Responses to First Panel Questions, Questions 56-61, 62-64 and 74.

investigations." Article 15.3 does not address cumulation with dumped imports, nor does it preclude the cumulation of these imports. Moreover, as the United States explained in its response to the Panel question 56, it is not possible, as a practical matter, for an authority to disentangle the effects of dumped imports from those of subsidized imports. As the United States pointed out[157], the difficulty presented by India's approach can be seen from the fact that in many investigations, significant volumes of subject imports are both dumped and subsidized, as was the case in the hot-rolled steel investigations and reviews. In this situation, other investigating authorities, such as the Canadian International Trade Tribunal and the Australian Customs and Border Protection Service, have expressed the view that it is impossible to "disentangle" the injurious effects of the dumped and subsidized imports.[158] Indeed, at the hearing, in its oral statement, and in response to Panel question 32, India acknowledged that it is not arguing that an authority must disentangle the effects of imports that are both dumped and subsidized.[159] By taking such a position, India implicitly acknowledges the validity of the positions expressed by the CITT and Australian Customs, as well as by the United States in this dispute.

91. The impracticality of India's approach arises when subsidized imports and dumped imports are in the market and simultaneously affecting the industry.[160] In this situation, the injurious effects of all subject imports in the market will be compounded with respect to the pricing and sales levels of the affected domestic industry. Specifically, when subject imports, both subsidized and dumped, are materially injuring the affected domestic industry at the same time, the pricing levels of these subject imports will produce more significant price depression or suppression than might have occurred in the absence of one of the groups of unfairly traded imports. Accordingly, when both subsidized imports and dumped imports are in the market simultaneously, their effects are so closely intertwined that it is impossible to unravel them in order to allocate specific or discrete portions to the dumped imports or the subsidized imports.[161]

92. Finally, India is incorrect in asserting that the United States in this dispute has stated or implied that disentanglement is possible.[162] India's assertion is based on a misunderstanding of a discussion in the U.S. first written submission of volume trends and underselling levels of the subject imports in the steel investigations at issue in this dispute. In this portion of the U.S. submission, the United States was responding to India's partial portrayal of the record. In particular, the United States pointed out that the record of its original investigations showed the volume of subject imports found to be both dumped and subsidized represented 40% of all cumulated subject imports; that they represented nearly half of import growth during the period; and that they undersold the domestic like product in the same percentage of comparisons as the

[157] U.S. Responses to First Panel Questions, Question 56.
[158] *See* citations in U.S. Responses to First Panel Questions, Question 56.
[159] India Responses to First Panel Questions, Question 56.
[160] U.S. Responses to First Panel Questions, Question 56.
[161] *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).
[162] India claimed at the hearing and in its response to Panel questions that the United States itself demonstrated in its first written submission that it is possible to "disentangle the effects of subsidized and dumped imports. India First Opening Statement, para. 21; India Responses to First Panel Questions, Question 32.

subject imports that were only found to be dumped.[163] The United States further explained that the record data showed that the volumes of imports that were both dumped and subsidized, such as those from India, had an exacerbating adverse effect on the domestic industry during the period of investigation. Contrary to India's assertion, nothing in this explanation suggests that it was possible to disentangle the effects of these imports, primarily because such an approach is neither possible as a practical matter nor required by the SCM Agreement.

C. Conclusion

93. In sum, India has no basis for its claims under Article 15 of the SCM Agreement that cumulation of unfairly traded imports in original investigations and sunset reviews are inconsistent, as such or as applied, with Article 15 of the SCM Agreement. With respect to sunset reviews, India's claims must fail because Article 15 does not apply to sunset reviews. And with respect to investigations, India's claims have no merit because the cumulation of dumped and subsidized imports is consistent with the text of Article 15 of the SCM Agreement, when read in the context of Article VI of the GATT 1994 and Article 3 of the AD Agreement, and in light of the object and purpose of the SCM Agreement. Moreover, cumulation is fully consistent with the views expressed by the Appellate Body relating to the policies underlying cumulation.[164]

VII. Public Body

94. We have set out in the U.S. first written submission an interpretation of the term "public body" in Article 1.1(a)(1), based on a proper interpretation of that provision given its text, and in light of its context and the object and purpose of the SCM Agreement.[165] Specifically, we have explained that the term public body refers to any entity controlled by the government such that the government can use the entity's resources as its own. In this section we demonstrate that the evidence on record in this dispute with respect to the NMDC and the SDF Managing Committee satisfies not only this interpretation of the term public body, but would satisfy any interpretation of that term, given the GOI's extensive involvement in and control over each entity, as well as the nature of the functions that each entity performs in India.

A. The United States Complied With Article 1 of the SCM Agreement in Finding that the SDF Managing Committee Was a Public Body

95. The United States has shown in the U.S. first written submission[166], our statements during the first substantive meeting with the Panel[167], and our responses to the Panel's written questions[168], that Commerce's finding that the SDF Managing Committee is a public body is

[163] U.S. First Written Submission, paras. 148-49.
[164] "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 Fittings (AB)*, para. 116.
[165] U.S. First Written Submission, section IX.A.1.
[166] U.S. First Written Submission, paras. 526-556.
[167] U.S. First Opening Statement, paras. 25-29.
[168] U.S. Responses to First Panel Questions, paras. 5-7 and 119-121.

consistent with Article 1.1(a)(1), and that India's claims to the contrary are in error. As demonstrated below, under any conceivable standard, the SDF qualifies as "a government or any public body" under Article 1 of the SCM Agreement.

96. India has made great efforts to make simple facts opaque, but the relevant facts with regard to the SDF Program are simple and straightforward. The GOI used its power to regulate or control the steel sector in India with the goals of making it productive, efficient, and in order to foster technological progress.[169] The GOI effectuated these goals through the SDF Program generally, and the SDF Managing Committee specifically.

97. The GOI established the SDF Program and its constituent committees for the purpose of levying and distributing funds in order to modernize the steel sector, and to ensure that there was a steady supply of certain types of iron and steel in line with government goals. Thus, India's integrated steel producers were required to increase the prices for the products they sold.[170] Specifically, steel producers could only sell products at the prices set by the JPC; the JPC increased the prices for certain steel products and mandated that the additional funds paid by consumers and collected by producers as a result of these increases "was to be remitted to the SDF."[171] The proceeds collected from consumers from the mandated price increases were remitted to the SDF by each of the member steel producers.[172] Companies that contributed to the fund were eligible to take out long-term loans at advantageous rates.[173]

98. Regarding the operation of the SDF Program, the GOI explained that although JPC handled the "day-to-day affairs of the SDF, such as overseeing and administering the SDF loans," *the SDF Managing Committee was the ultimate decision-maker "regarding the issuance, terms and waivers of SDF loans"*.[174] The GOI therefore exercised direct control over all key lending decisions through its complete control of the SDF Managing Committee. As shown in its final determination, Commerce found that the SDF Managing Committee was composed entirely of senior GOI officials, including the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel.[175]

99. Significantly, loans were only authorized where the funds were to be used in projects that furthered the GOI's policy goals for the steel sector. During the investigation, GOI officials explained that a key factor in deciding whether to grant particular loans was "whether the project

[169] Investigation Verification Report of GOI Responses (Exhibit USA-74); *see also* GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at internal exhibit 20: "Ministry of Steel Notification of 1978 (March 20, 2001)" (Exhibit USA-75).
[170] Investigation Final Determination, 66 Fed. Reg. at 49,637 (Exhibit IND-8); *see also* GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p. 2 (Exhibit USA-75).
[171] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), pp. 2-3 (Exhibit USA-75).
[172] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), pp. 2-3 (Exhibit USA-75).
[173] Investigation Verification Report of GOI Responses, p. 2 (Exhibit USA-74).
[174] Investigation Verification Report of GOI Responses, p. 3 (Exhibit USA-74) (emphasis added); *see also* Investigation Issues and Decision Memorandum, at Comment 1 ("Department's Position") (Exhibit IND-7).
[175] Investigation Verification Report of GOI Responses, at p. 3 (Exhibit USA-74) (emphasis added); *see also* Investigation Issues and Decision Memorandum, at Comment 1 ("Department's Position") (Exhibit IND-7).

is beneficial for the Indian steel industry as a whole," whether the particular project "fosters technological development," and "the effects on domestic suppliers of inputs."[176] Accordingly, the GOI's role in the economy generally, and the steel sector in particular, was such that it directed certain market activities – such as pricing – both by providing benefits and placing demands on integrated steel producers through the SDF Managing Committee and JPC.

100. Based on the foregoing, Commerce found that the SDF Managing Committee made all final decisions on loans, including setting the terms and approving waivers of SDF loans.[177] Because this committee decided whether or not to provide loans to Indian steel companies at advantageous rates, and because this committee was composed exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own.

101. In the alternative, Commerce's determination is consistent with a finding that the SDF Managing Committee is a public body even under the standard set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties* because, as described above: 1) the SDF Managing Committee took actions that constituted "exercising government functions," including mandatory levying of funds from consumers and redistribution of these funds in furtherance of the GOI's policy to support and develop the steel sector, and 2) the GOI exerted meaningful control over the SDF and its constituent committees as they performed these government functions.

102. Thus, Commerce's determination that the SDF Managing Committee was a government entity that provided a direct transfer of funds to Indian steel producers correctly reflects the definition in Article 1.1(a)(1)(i).

B. The NMDC Is a Public Body within the Meaning of Article 1.1(a)(1) of the SCM Agreement

103. As demonstrated in the U.S. first written submission,[178] our statements during the first substantive meeting with the Panel,[179] and our responses to the Panel's written questions,[180] India has not demonstrated that Commerce erred in finding that the NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

104. India continues to misrepresent Commerce's determination that the NMDC is a public body by erroneously claiming that the determination is solely based on the fact that the GOI owns the NMDC.[181] As was demonstrated in the U.S. first written submission, Commerce specifically analyzed the evidence of ownership and control in making its finding that the

[176] Investigation Verification Report of GOI Responses, p. 4 (Exhibit USA-74).
[177] Investigation Verification Report of GOI Responses, at p. 3 (Exhibit USA-74) (emphasis added); *see also* Investigation Issues and Decision Memorandum, at Comment 1 ("Department's Position") (Exhibit IND-7).
[178] *See, e.g.,* U.S. First Written Submission, paras. 377-387.
[179] *See, e.g.,* U.S. First Opening Statement, paras. 25-29.
[180] *See* U.S. Responses to First Panel Questions, paras. 8-10.
[181] *See* India First Opening Statement, para. 29; *see also,* India First Written Submission, paras. 231-237.

NMDC was a public body.[182] In particular, 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[183]; 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[184]; 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."[185] In addition to this evidence from the 2004 administrative review, in 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.[186]

105. Based on this evidence, Commerce stated that NMDC was "governed by" – or controlled by – the GOI in its determinations, and found that the subsidies provided by NMDC were countervailable.[187] Therefore, India cannot deny that Commerce made its "public body" determination based on a finding of government control as well as government ownership. India's consistent refrain that Commerce made its decision based solely on government ownership is incorrect.

106. Moreover, even in the event that this Panel determines that the Appellate Body's interpretation in *US – Antidumping and Countervailing Duties* of what constitutes a "public body" is correct, the evidence clearly demonstrates that the NMDC performs a "government function" in India. In addition to the evidence of ownership and control discussed above, the United States identified in its first written submission evidence that the NMDC performs an Indian government function.[188] In particular, the Indian government, *i.e.*, the state and federal governments, owns all the mineral resources on behalf of the Indian public.[189] The Indian federal government has the final approval of the granting of mining leases for iron ore.[190] Therefore, being the owner of all of the mineral resources in India, it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore. The GOI specifically established the NMDC to perform part of this function, *i.e.*, "developing all minerals other than coal, petroleum oil and atomic minerals."[191] During Commerce's on-site

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[182] *See, e.g.,* U.S. First Written Submission, paras. 378, 381-383, and 385-386.
[183] India's September 2, 2005, Supplemental Questionnaire Responses, p.2 A.2.a, and p.4.A.3.a (Exhibit US-68); 2004 Verification Report of Government of India Response, p. 4 (January 3, 2006) (Exhibit USA-66)*;see also,* India's April 23, 2007, Questionnaire Response (2006 AR), p. 41 (Exhibit USA-49).
[184] 2004 Verification Report of Government of India Response, p. 5-6 (January 3, 2006) (Exhibit USA-66); *see also,* India's April 23, 2007, Questionnaire Response (2006 AR), p. 41 ("two Government Directors from Ministry of Steel, Government of India." (Exhibit USA-49).
[185] 2004 New Subsidies Allegation, Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).
[186] India's May 5, 2008, Questionnaire Response (2007 AR), at II-41 (Exhibit USA-67).
[187] 2004 Preliminary Determination, 71 Fed. Reg. at 1516 (January 10, 2006) (Exhibit IND-17); 2006 Preliminary Determination, 73 Fed. Reg. at 1586 (January 9, 2008) (Exhibit IND-32); 2007 Preliminary Determination, 73 Fed. Reg. at 79796 (December 30, 2008) (Exhibit IND-37).
[188] *See* U.S. First Written Submission, para. 385.
[189] *The Report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore* ("*DANG Report*"), p. 79 (attached to 2006 New Subsidies Allegation (JSW)) (Exhibit USA-50) (Under Indian law, the state governments own the minerals in the land, however, for iron ore, which is listed as a Schedule 1 mineral, the federal Indian government must approve all mining leases.).
[190] *DANG Report*, at p. 79 (attached to 2006 New Subsidies Allegation (JSW)) (Exhibit USA-50).
[191] 2004 New Subsidies Allegation, at internal Exhibit 6, p. 2 (May 2, 2005) (Exhibit USA-69).

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.[192] While the NMDC mines other minerals, the NMDC operates several iron ore mines and sells the iron ore it obtains from those mines.[193] Because the NMDC is exploiting public resources on behalf of the Indian government, the owner of the resources, the NMDC is performing a government function in India.

107. As the Panel identified in Question 73 to the parties, there is additional evidence demonstrating that even the GOI considers the NMDC to be a public body. According to the NMDC's website, the NMDC was accorded the status of a "schedule-A Public Sector Company by the GOI 'Mini Ratna' in 'A' category in its categorization of public enterprises".[194] As the United States answered in response to Panel Question 73, while not specifically referenced in Commerce's determination, this evidence further demonstrates that the GOI does consider the NMDC to be a "public" enterprise and "Public Sector Company", and that it therefore exercises a governmental function.

108. All of the foregoing shows that record evidence demonstrating the NMDC to be a "public body" within the meaning of Article 1.1(a)(1), whether the focus is on ownership and control or the performance of government functions, was substantial. India has not successfully rebutted the U.S. arguments in this respect, or identified any evidence to contradict the evidence analyzed by Commerce in making its determination. Therefore, the Panel should reject India's claim that Commerce acted inconsistently with Article 1.1(a)(1) in finding that NMDC was a public body.

VIII. The SDF Loans Constituted "A Direct Transfer of Funds" Within the Meaning of Article 1.1(a)(1)(i)

109. As explained in the U.S. first written submission[195] and answers to Panel questions[196], the facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers over which the GOI, through the SDF Managing Committee, had complete control. India has attempted to call this finding into question by presenting the transfer of funds to steel companies as a discrete and isolated action performed by the JPC, wholly divorced from the decision by the SDF Managing Committee that the funds should be transferred. India's argument draws artificial distinctions between the constituent committees of the SDF program, and would lead to a situation in which the managers of a company, for example, should be considered one entity, and the directors another. There is no basis in the SCM Agreement for drawing such artificial distinctions and no basis in the record evidence before Commerce for it to have made such a finding.

[192] 2004 Verification Report, p. 9 (Exhibit USA-66).
[193] India's September 2, 2005, Supplemental Questionnaire Response (2004 AR), New Subsidy Allegations, at pp. A.2.(b) and (c) (Exhibit USA-68).
[194] 2004 New Subsidies Allegation, at internal Exhibit 6, p. 2 (May 2, 2005) (Exhibit USA-69).
[195] U.S. First Written Submission, section XI.C.
[196] U.S. Responses to First Panel Questions, Question 40, para. 7.

110. Article 1.1(a)(1)(i) of the SCM Agreement in part defines a subsidy as existing if "there is a financial contribution by a government or any public body," such as where "a government practice involves *a direct transfer of funds (e.g. grants, loans*, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees). . . ."[197] The Appellate Body in *US – LCA (Second Complaint)* found that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient."[198]

111. Commerce determined that the SDF made a financial contribution, and that it directly transferred funds to steel producers in the form of loans at advantageous terms, reflecting subparagraph (i) of that provision.[199] And the facts on the record demonstrate that, contrary to India's claims, the SDF funds operated as a tax, and that once collected by the JPC, the funds were in the complete control of the GOI and, in particular, the SDF Managing Committee. First, the funds were collected by imposing a mandatory levy, or tax, on consumers through the sales of certain steel products sold by the participating Indian steel producers.[200] Second, the contributions to the SDF Program sourced from these levies were not voluntary, and the integrated steel producers did not determine the amounts to be levied and paid into the SDF fund.[201] Rather, under the direction of the SDF Managing Committee, the JPC determined the amounts to be levied and sequestered the resulting funds, and then the SDF Managing Committee directed the redistribution of those funds to steel producing entities and steel-related projects in accordance with the GOI's goals for the steel sector.[202] Thus, the SDF Managing Committee determined the ultimate allocation and use of these funds, and therefore effectively controlled them.

112. India, in its submissions, attempts to obscure these straightforward facts. India has presented inconsistent arguments regarding whether the funds collected from steel consumers were "consumer funds" or "producer funds."[203] Most recently, in its response to the Panel's questions, India has argued that the extra SDF price element collected from steel consumers constituted steel producers' "profits," and became part of the Indian steel producers' own funds when the purchase price was paid by consumers – and therefore were not analogous to a tax, as Commerce determined.[204]

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[197] SCM Agreement, Article 1.1(a)(1)(i) (emphasis added).
[198] *US – LCA (Second Complaint) (AB)*, para. 614. (emphasis added)
[199] Investigation Verification Report of GOI Responses, p. 3 (Exhibit USA-74); Investigation Issues and Decision Memorandum, Comment 1 (Exhibit IND-7).
[200] Investigation Issues and Decision Memorandum, Comment 1 (Exhibit IND-7).
[201] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p. 2 (Exhibit USA-75).
[202] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p. 2 and internal Exhibits 20-22 (Exhibit USA-75).
[203] *See* India First Written Submission, para. 477, where India argues that "participating steel producers contributed their own funds to the SDF Program…". Subsequently, as noted by the Panel in question #3 to India, during the first substantive meeting with the parties, India contended that the SDF funds came from "customers." As discussed above, in its response to Panel questions, India has proposed a third argument---that the SDF funds came from consumers but became "profits" as soon as steel producers received them. *See* India Responses to First Panel Questions, Question 3, p. 1.
[204] India Responses to First Panel Questions, Question 3.

113. However, India ignores that this *GOI-mandated* levy can no more constitute a profit for steel producers than a government-determined sales tax collected on the sale of those goods could constitute profit. As explained above, the GOI required a levy to be added to the price of certain steel products, and also mandated that this levy be deposited in the SDF Fund after it had been collected by the producers. Thus, this levy, although it was collected as an extra price element, was never an extra *profit* amount determined by steel producers and intended for their use as they deemed necessary. Rather, it was a tax-like element mandated by the GOI and earmarked for the government-controlled SDF Fund.

114. Indeed, India acknowledges in its response to Panel questions that both the decision to add an additional element to the price of a particular product, as well as the amount to be added, was determined by the JPC.[205] Nevertheless, India argues that because membership on the JPC included representatives of the integrated steel producers, "the additional element of price intended to cater to the SDF cannot be considered as materially different from the manner in which any commercial company would make profits."[206] However, India's interpretation leads to the absurd result that Indian steel producers allowed a committee consisting, *inter alia*, of representatives from their *competitors*, to determine the "profit margins" on certain steel products. Further, such an interpretation leads to the result that Indian producers voluntarily allowed their "profits" to be distributed to competitors to further their competitors' technological development.

115. India ignores the facts as presented to Commerce. Quite simply, the SDF levy was never intended to increase producer profits. Rather, the GOI mandated that the JPC collect the funds, and then the SDF Managing Committee directed the redistribution of those funds to entities and projects in accordance with the GOI's goals for the steel sector.[207] Thus, India has not demonstrated that Commerce erred, and the record evidence does not support India's contention that the SDF levy, once paid by consumers, became producer funds or profits.

116. We also note that India does not argue that once the funds were remitted to the SDF, producers owned or could control these funds or could invest them profitably as they chose. To the contrary, India has indicated that the Indian producers "suffered the cost of lost opportunity in terms of the interest revenue on such funds."[208] This only serves to underscore the fact that the steel producers did not determine the amounts to be collected from consumers and remitted to the SDF program and did not own or control the funds that had been collected, either individually or through association with the JPC.

117. In any event, Appellate Body findings do not support the proposition that any direct transfer of funds must be accomplished through the transfer of ownership of the relevant funds from the government to the recipient. Rather, as noted above, a direct transfer of funds may be found whenever there is "conduct on the part of the government by which money, financial

[205] India Responses to First Panel Questions, Question 3.
[206] India Responses to First Panel Questions, Question 3.
[207] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p.2 and internal exhibits 20-22 (March 19, 2001) (Exhibit USA-75).
[208] India First Written Submission, paras. 477-478.

resources, and/or financial claims are *made available to a recipient*."[209] In this case, through the consumer levy, SDF funds are "made available" to recipient companies by the SDF Managing Committee.

118. Thus, Commerce's determination that the SDF Managing Committee was a government entity that provided a direct transfer of funds to Indian steel producers was reasoned and adequate, and was supported by the record evidence. Based on the foregoing, India has not shown that Commerce acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement in making its determination.

IX. The U.S. Measures Regarding Facts Available Are Not Inconsistent "As Such" with Article 12.7 of the SCM Agreement

119. As demonstrated in the U.S. first written submission,[210] our statements during the first substantive meeting with the Panel,[211] and our responses to the Panel's written questions,[212] India's claim that the U.S. measures governing facts available are inconsistent with Article 12.7 of the SCM Agreement is in error.

120. India has cited several of Commerce's determinations in an effort to show the United States takes the approach of "systematically drawing adverse inferences in all cases of non-cooperation"[213]. India has not made this showing. Further, in making its argument, India wrongly relies upon the decision in *U.S.-Zeroing (EC)* where the Appellate Body observed that evidence to prove the existence of a rule or norm may include proof of the systematic application of the challenged rule or norm.[214] In *U.S.-Zeroing*, however, there was no statutory provision at issue in the dispute. The challenge in that case pertained to the continued application of zeroing, making evidence of systematic application arguably relevant to the issue.[215]

121. Despite these arguments, however, India has clarified that "it is not challenging the 'systematic application' as a measure", but rather is challenging the statutory and regulatory provisions themselves.[216] Indeed, India cannot argue otherwise, given that its panel request does not include a challenge to Commerce's "practice", but to the U.S. statute and regulation.

122. India bears the burden to demonstrate that section 1677e(b) of the U.S. statute, and section 351.308(c) of Commerce's regulations, *as such*, are inconsistent with Article 12.7 of the SCM Agreement. India has not done so, and its claims therefore must fail.

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[209] *US – LCA (Second Complaint) (AB)*, para. 614 (emphasis added); *see also*, European Union Third Party Written Submission, para. 152.
[210] U.S. First Written Submission, paras. 159-283.
[211] U.S. Opening Statement at the First Panel Meeting, paras. 30-37.
[212] U.S. Responses to First Panel Questions, paras.93-106, and 128-132.
[213] India Responses to First Panel Questions, Question 37, citing to Exhibit IND-71.
[214] India Opening Statement at the First Panel Meeting, para.8 (citing to *US – Zeroing (EC) (AB)*, para.198).
[215] *US – Zeroing (EC) (AB)*, para. 190 (the Appellate Body stated "the zeroing methodology . . . is not expressed in writing" (citing to the Panel Report, para 7.104)).
[216] India Responses to First Panel Questions, Question 37.

123. With respect to the discretionary nature of the U.S. provisions, in its first written submission, the United States demonstrated that Commerce holds discretionary authority with respect to the use of adverse inferences in selecting from among the facts available.[217] India ignores the statements made by Commerce in promulgating the regulation at issue[218], dismisses the cited cases out of hand without explanation[219], and continues to insist that Commerce has drawn adverse inferences "in all cases of non-cooperation."[220] The administrative history speaks for itself. Contrary to India's assertions, the cases cited by the United States document Commerce's exercise of discretion, and thereby demonstrate that Commerce holds discretionary authority under U.S. law.[221] If the provisions at issue somehow mandated the use of an adverse inference in every case, as India seems to claim, then Commerce would be required to apply an adverse inference whenever a party refuses to provide necessary information. As these cases demonstrate, Commerce was not required to, nor did it, use an adverse inference "in all cases of non-cooperation".[222]

124. Indeed, in its response to Panel Question 37, India acknowledges that the language of these provisions is "discretionary". Nonetheless, India contends that a "systematic application" provides the basis to conclude that the provisions themselves violate Article 12.7 of the SCM Agreement.[223] India contends that "the United States cannot circumvent such incompatibility by merely couching its domestic law in discretionary language, but practically doing exactly what was considered inconsistent by the Appellate Body in Mexico-Rice."[224] These grounds, however, cannot support India's "as such" challenge. India's quarrel is not with the U.S. measures "as such", but rather with Commerce's exercise of its discretion in making determinations based upon facts available. To make its case, India provides a list of several cases in which Commerce applied an adverse inference in selecting from among the facts available.[225] India however fails to explain how these instances of application demonstrate that

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[217] U.S. First Written Submission, paras. 167-168.
[218] *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-14).
[219] India Opening Statement at the First panel Meeting, para. 27.
[220] India Responses to First Panel Questions, Question 37.
[221] U.S. Responses to First Panel Questions, n.70 to para. 99.
[222] The challenged provisions also apply to Commerce's anti-dumping duty determinations, in the context of which Commerce has also chosen to exercise its discretion not to use an adverse inference in selecting from among the facts available. *See, e.g.*, 19 C.F.R. § 351.101 on "Scope and Definitions" which provides that "This part contains procedures and rules applicable to antidumping and countervailing duty proceedings under title VII of the Act (19 U.S.C. 1671 et seq.)" (Exhibit USA-99). *See also* Statement of Administrative Action, H.Rept. No. 316, Vol. 1, 103d Cong., 2d Sess. 1994 U.S.C.C.AN. 4040, at 4198 (Exhibit IND-4). Notably, in cases in which a party has failed to provide requested information, but Commerce itself failed to give the party an opportunity to remedy the deficiency as required under section 1677m(d) of the statute, Commerce has exercised its discretion not to use an adverse inference in selecting from among the facts available, notwithstanding the party's failure to cooperate with respect to the information requested. *See Static Random Access Memory From Taiwan*: Notice of Final Determination of Sales at Less Than Fair Value, 63 Fed. Reg. 8909, 8920 (Issues and Decision Memorandum, Comment 7) (Feb. 23, 1998) (Exhibit USA-100); *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission Of Administrative Reviews, Notice of Intent To Rescind Administrative Reviews, and Notice Of Intent To Revoke Order In Part, 69 Fed. Reg. 5950, 5952 (Feb. 9, 2004) (Exhibit USA-101).
[223] India Responses to First Panel Questions, Question 37.
[224] India Responses to First Panel Questions, Question 37.
[225] *See* India Opening Statement at the First Panel Meeting, n. 27 to para. 27 (citing Exhibit IND-71).

the U.S. measures themselves require the use of adverse inferences such that the U.S. measures are themselves inconsistent "as such" with Article 12.7 of the SCM Agreement.

125. In this respect, we draw the Panel's attention to India's response to Panel Question 75. Here, India expressly recognizes that Article 12.7 permits authorities to apply what it terms "adverse facts," provided it is "demonstrated that those 'adverse facts' are the 'most fitting and appropriate' ones."[226] By its response, India implicitly recognizes that a discretionary provision allowing authorities to apply "adverse facts" is permissible under Article 12.7. India fails to explain, however, why the discretion to apply so-called "adverse facts" provided for in the U.S. measures breaches Article 12.7. As the United States explained at the first panel meeting, the application of facts available occurs where certain necessary facts are *not available*. Other facts, therefore, as well as certain inferences, must be used in filling in the gap in the facts before the investigating authority.[227] Without the discretion to use an adverse inference, it is unclear how an authority would otherwise reach a determination in which "the most fitting and appropriate" "adverse facts" are applied.

126. To make its case, India also misinterprets the Appellate Body report in *Mexico-Rice* when it claims the U.S. provisions allow Commerce to do "exactly what was considered inconsistent by the Appellate Body in *Mexico-Rice*."[228] Both the panel and Appellate Body in *Mexico-Rice* found that Article 64 of Mexico's Foreign Trade Act itself was inconsistent with Article 12.7 because the provision prevented the administering authority "from engaging in the reasoned and selective use of the facts available directed by … Article 12.7 of the *SCM Agreement*."[229] For example, under Article 64, the administering authority was required to "determine a countervailing duty on the basis of the highest margin of . . . subsidization" notwithstanding any evidence to the contrary, and to apply that rate even to those parties that cooperated throughout the course of the proceeding.[230] In stark contrast, not only has India failed to identify any language in the U.S. provisions that imposes such a requirement, it acknowledges that such language does not exist. Importantly, India has not identified anything in the *Mexico-Rice* reports that supports the proposition that a discretionary provision allowing the use of an adverse inference as provided for in the U.S. measures is inconsistent with Article 12.7 of the SCM Agreement.

127. In its effort to equate Commerce's discretionary actions with the mandatory provision at issue in *Mexico-Rice*, India continues to ignore relevant provisions of U.S. law that govern the application of facts available. The challenged provision itself precludes the use of an adverse inference where a party is found to have cooperated in the proceeding.[231] And in making factual findings concerning cooperation, Commerce has recognized that although a party did not provide the necessary information as requested, it did not necessarily fail to cooperate to the best of its

[226] India Responses to First Panel Questions, Question 75.
[227] U.S. Opening Statement at the First Panel Meeting, para. 32.
[228] India Responses to First Panel Questions, Question 37.
[229] *Mexico – Rice (AB)*, para. 297.
[230] *Mexico – Rice (AB)*, paras. 285, 296-298.
[231] 19 U.S.C. § 1677e(b) ("If the administering authority… finds that an interested party has failed to cooperate…") (Exhibit USA-12).

ability.[232] This is precisely why Commerce, as required by section 1677m(d) of the statute, asks the party to explain the reason for not providing the requested information.[233]

128. Further, as the United States has noted, India continues to ignore section (d) of the regulation it has challenged, and section (c) of the challenged statute. These provisions include the first of two important limitations on the use of facts available, and require Commerce to corroborate any secondary information to be applied[234]. Commerce may only use uncorroborated information in making its determinations where corroboration is in fact not "practicable".[235] Apart from that, section 1677m(e) of the statute, which is reflected in section (e) of the challenged regulation, requires Commerce to consider incomplete information in making its determination, provided, *inter alia*, the information that was submitted is timely filed, can be verified, and can be used without undue difficulty.

129. These provisions, taken together, make it possible to obtain the best or "most fitting and appropriate information" as facts available, including those facts selected based upon an adverse inference. For example, contrary to India's assertion,[236] Commerce does not simply apply the highest program-specific rate determined for a cooperating company that used the identical program. Commerce is required to examine all the facts on the record, and to refer to independent sources reasonably at its disposal, to the extent practicable, to ensure that the fact to be applied is not contradicted by other facts on the record, or otherwise found unreliable or not relevant to the uncooperative party. By ignoring the U.S. provisions that govern the use of information in facts available determinations, India has failed to realize that the proper use of such inferences can result in the best, most fitting and appropriate information available in the situation.

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[232] In making its factual findings, Commerce has considered such factors as (1) the experience of the respondent in the proceeding; (2) whether the respondent was in control of the data which Commerce requested; and (3) the extent to which the respondent may benefit from its own lack of cooperation. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France et al*; Final Results of Antidumping Duty Administrative Reviews, 62 Fed. Reg. 2081, 2088 (Jan. 15, 1997) (Exhibit USA-102). In addition, Commerce does not apply an adverse inference when the agency itself has failed to give the party an opportunity to remedy the deficiency by providing the requested information. *See Static Random Access Memory From Taiwan*: Notice of Final Determination of Sales at Less Than Fair Value, 63 Fed. Reg. 8909, 8920 (Issues and Decision Memorandum, Comment 7) (Feb. 23, 1998) (Exhibit USA-100); *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission Of Administrative Reviews, Notice of Intent To Rescind Administrative Reviews, and Notice Of Intent To Revoke Order In Part, 69 Fed. Reg. 5950, 5952 (Feb. 9, 2004) (Exhibit USA-101).

[233] 19 U.S.C. § 1677m(d) requires Commerce to "provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for completion of investigations or reviews under this title." Exhibit USA-89. *See also* U.S. Responses to First Panel Questions, para. 105 (citing to Exhibit USA-89).

[234] 19 C.F.R. § 351.308(d) ("Corroborate means the Secretary will examine whether the secondary information to be used has probative value.") (Exhibit USA-13).

[235] 19 C.F.R. § 351.308(d) (Exhibit USA-13).

[236] India Opening Statement at the First Panel Meeting, para. 46.

X. Article 6.8 and Annex II of the AD Agreement Provide Relevant Context To Interpret Article 12.7 of the SCM Agreement

130. The Appellate Body in *Mexico-Rice* recognized that Annex II of the AD Agreement provides relevant context for understanding the application of facts available under Article 12.7.[237] From the responses to Panel questions, it is also established that the United States and India agree, as do many third parties who have addressed Article 12.7 in this dispute (European Union, Australia, Canada, and China[238]), that Annex II provides relevant context for interpreting Article 12.7 of the SCM Agreement.[239]

131. In this sense, it is also important to recognize that Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement share important elements that are relevant to the interpretation of Article 12.7. Notably, 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 term "facts available." Moreover, both of these provisions "allow authorities to continue with the investigation and make a determination, positive or negative, on the basis of the facts available."[240]

132. Both the AD and SCM Agreements are rooted in an investigatory format that depends upon the participation and cooperation of parties in order to function. Both agreements are equipped with facts available provisions to facilitate authorities in making determinations. Thus, as with Article 6.8, "Article 12.7 of the SCM Agreement is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations."[241] When authorities find it necessary to apply facts available because a party has refused to provide necessary information, Article 12.7 allows authorities to make reasonable inferences based upon the party's behavior. The panel in *EC-DRAMs* recognized that "the possibility of resorting to the facts available and, thus, also the *possibility* of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority."[242] The panel further observed that "[i]f we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the SCM Agreement meaningless and inutile."[243] The *possibility* of drawing "certain

[237] The Appellate Body not only referred to Annex II, but also the evidentiary rules and due process obligations of Article 6 of the AD Agreement and Article 12 of the SCM Agreement in recognizing 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." *Mexico – Rice (AB)*, paras. 291-295.
[238] EU Responses to First Panel Questions, para. 2; Australia Responses to First Panel Questions, para. 1; China Responses to First Panel Questions, paras. 1-6; Canada Responses to First Panel Questions, para. 2 and, in particular, para. 6; *but see*, Turkey Responses to First Panel Questions, para. 1.7 ("Turkey opines that Annex II of the AD Agreement should have equal legal weight both in anti-dumping and countervailing duty investigations since Annex II is the best fitting set of rules and procedures that corresponds to the need to explain how the investigating authority should act if the interested party declines to cooperate in a countervailing duty investigation.")
[239] India Responses to First Panel Questions, Question 75.
[240] *Mexico – Rice (Panel)*, para. 7.238.
[241] *EC – DRAMs (Panel)*, para. 7.61.
[242] *EC – DRAMs (Panel)*, para. 7.61 (emphasis added).
[243] *EC – DRAMs (Panel)*, para. 7.61.

inferences" consistent with Article 12.7, therefore, may be reflected in discretionary provisions in a Member's legislation.

133. In its response to Panel questions, India – for the first time in this dispute – addresses paragraph 7 of Annex II. India argues that "use of the word 'could' only acknowledges that in cases of non-cooperation, the inferences / conclusions *may* result in findings that are less favourable to the party concerned."[244] India fails, however, to recognize the logical extension of this statement: that inferences or conclusions that *may* result in such findings therefore can properly be reflected in an authority's legislation, as is the case here.

134. Further, in offering its interpretation, India ignores the focus of paragraph 7 of Annex II, which is to establish safeguards when using secondary information, including the requirement to check the information to be used with information from independent sources. The final sentence of paragraph 7 recognizes, however, that despite the application of these safeguards, authorities have the ability to reach conclusions that may be unfavorable to uncooperative parties. The last sentence of paragraph 7 simply *confirms* this fact, rather than establishing or limiting it, saying: "[i]*t is clear, however*, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."[245] This also explains why the panel in *Mexico-Rice* stated that "[t]he final sentence of paragraph 7 of Annex II, in our view, *states the obvious* that in the case of non-co-operation, the result of such use of secondary information could be less favorable to the party than if the party did cooperate."[246] The last sentence of paragraph 7 of Annex II, therefore, does not establish the right of authorities to make determinations unfavorable to uncooperative parties in the AD Agreement, but confirms more broadly that the term "facts available" includes the ability of authorities to apply inferences that could lead to unfavorable results.

135. For the foregoing reasons, in addition to those set forth in the U.S. first written submission, the U.S. statements during the first substantive meeting with the Panel, and the U.S. responses to the Panel's written questions, India has no valid basis for its claims under Article 12.7 of the SCM Agreement.

XI. The United States Did Not Act Inconsistently with Articles 11, 13, 21 or 22 of the SCM Agreement with Regard to New Subsidies Examined in Administrative Reviews

136. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to Commerce's review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. In India's view, then, the United States was required to examine new

[244] India Responses to First Panel Questions, Question 75.
[245] Annex II of the AD Agreement, para. 7 (emphasis added).
[246] *Mexico – Rice (Panel)*, para. 7.238 (emphasis added).

subsidies programs only upon receipt of a complete written application complying with Articles 11.1, 11.2 and 11.9[247]; was required to initiate a new investigation into these programs pursuant to Article 11.1[248]; was required to invite India for consultations regarding its examination of these new programs pursuant to Article 13.1 as a result of its initiation of a new investigation; and was similarly required to issue a public notice upon "initiation" of a new investigation in compliance with Articles 22.1 and 22.2.[249] As a result of Commerce having examined these subsidies programs instead in the context of administrative reviews, India claims that the United States has additionally breached Articles 21.1 and 21.2 of the SCM Agreement. As demonstrated below, and in the U.S. first written submission[250] and responses to the Panel's written questions,[251] India's claims have no merit.

A. Background

137. Before addressing India's arguments, it is useful to consider a more complete description of Commerce's procedures for examining the new subsidies at issue. Commerce examined newly identified subsidies programs during the 2001-2002, 2004, 2006, and 2007 administrative reviews. For each of these administrative reviews, Commerce published a notice of initiation in the *Federal Register*.[252] In each of the administrative reviews in which domestic parties identified new subsidies, domestic parties served copies of the new subsidy allegations on both the GOI and the respondents being reviewed.[253] Commerce required parties submitting the new subsidy allegations to "allege the elements necessary for the imposition of the duty imposed by section 701(a)."[254] Commerce further required that the allegations "be accompanied by information reasonably available to petitioner supporting those allegations."[255] Commerce also found evidence on its own of what appeared to be a subsidy in the reviews at issue for a few of

[247] These claims are covered by the U.S. Request for a Preliminary Ruling. *See* U.S. First Written Submission, section II.B.
[248] This claim is covered by the U.S. Request for a Preliminary Ruling. *See* U.S. First Written Submission, section II.B; U.S. Responses to First Panel Questions, paras. 1-3.
[249] We note that Article 22.7 states that the provisions of Article 22 apply *mutatis mutandis* to the initiation and completion of review proceedings pursuant to Article 21 of the SCM Agreement. India has not claimed that Commerce violated the provisions of Article 22 as they may apply in the context of these administrative reviews, however, but only argues that the United States should have complied with these requirements "upon the initiation of an investigation" into the new subsidies. See India First Written Submission, paras. 616-619.
[250] U.S. First Written Submission, paras. 578-609.
[251] U.S. Responses to First Panel Questions, paras. 84-92.
[252] *See* First Review Initiation (Exhibit USA-80); 2004 Initiation (Exhibit USA-81); 2006 Initiation (Exhibit USA-47); 2007 Initiation (Exhibit USA-82).
[253] First Review New Subsidies Allegation, (May 19, 2003) (Exhibit USA-78); 2004 New Subsidies Allegation, (May 2, 2005) (Exhibit USA-69); Clarification of 2004 New Subsidies Allegation, (June 29, 2005) (Exhibit IND-15B); 2006 New Subsidies Allegation (Essar), Certificate of Service, (May 23, 2007) (Exhibit IND-27); 2006 New Subsidies Allegation (Ispat), Certificate of Service, (May 23, 2007) (Exhibit IND-24); 2006 New Subsidies Allegation (JSW), Certificate of Service, (May 23, 2007) (Exhibit IND-25); and 2006 New Subsidies Allegation (Tata), Certificate of Service, (May 23, 2007) (Exhibit IND-26).
[254] *See, e.g.* 2004 New Subsidies Memorandum, at p. 1 (July 19, 2005) (Exhibit IND-16); *see also* 2006 JSW New Subsidies Allegations Memorandum (Exhibit IND-29); 2006 Tata New Subsidies Allegations Memorandum (Exhibit IND-30). On December 31, 2009, Commerce placed all of the new subsidy memoranda from the 2006 review on the record of the 2008 review. *See* Memorandum to the File re: 2006 New Subsidy Allegations Memorandums, (December 31, 2009) (Exhibit USA-79). *See also* U.S. First Written Submission, para. 582.
[255] 2004 New Subsidies Memorandum, at 1-2 (Exhibit IND-16). *See also* U.S. First Written Submission, para. 582.

the newly examined subsidies, such as the Target Plus Scheme. Where Commerce became aware of these possible additional subsidies, Commerce asked parties further questions regarding their existence and use in questionnaires.

138. For all possible additional subsidies – whether alleged by domestic parties or discovered by Commerce – Commerce sought information regarding the program or practice from the GOI and the appropriate respondent firm. For all newly examined subsidies, parties were afforded the opportunity to provide Commerce with any information they deemed necessary or relevant to Commerce's examination of the newly identified subsidy. Commerce then examined the information received, as well as other relevant information pertaining to the possible subsidy. Subsequently, for each of the administrative reviews in question, Commerce issued its findings regarding the possible subsidy in the respective preliminary determinations.[5] After issuance of the respective preliminary determinations, Commerce continued to examine each alleged subsidy and, following written and oral submissions of interested parties, issued its findings in the respective final determinations.[6] Commerce did not make a final determination regarding a newly discovered subsidy unless there was sufficient time for all parties to provide comments, and sufficient evidence supporting the countervailability of the program in question. Therefore, India is incorrect when is suggests that Commerce sweeps new subsidy programs into its proceedings without affording an adequate opportunity to interested parties to provide evidence and arguments.

B. Commerce's Examination of Additional Subsidies During Administrative Review Proceedings Was Consistent with the SCM Agreement

139. As explained in the U.S. first written submission, the SCM Agreement sets out a process by which Members may investigate instances of subsidization affecting its domestic producers and, where appropriate, impose duties to countervail those effects.[256] Once duties have been imposed, the SCM Agreement separately allows interested parties to request a "review" of those duties to determine whether they are still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, establishes that an "investigation" and a subsequent "review" of duties imposed pursuant to an investigation are two separate and distinct processes governed by separate provisions of the SCM Agreement. Indeed, panels and the Appellate Body have found this to be the case.[257]

140. Article 21 provides for the review of countervailing duties already in force pursuant to a final determination in an investigation. Article 21.1 provides generally that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Article 21.2 of the SCM Agreement, for its part, provides for the review of "the need for the continued imposition of the duty". Article 12 of the SCM Agreement

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[5] *See* First Review Preliminary Results (Exhibit IND-12); 2004 Preliminary Results (Exhibit IND-17); 2006 Preliminary Results (Exhibit IND-32); 2007 Preliminary Results (Exhibit IND-37).

[6] *See* First Review Final Results (Exhibit IND-14); 2004 Review Final Results (Exhibit IND-19); 2006 Review Final Results (Exhibit IND-34); 2007 Review Final Results (Exhibit IND-39).

[256] *See* U.S. First Written Submission, paras. 584-597.

[257] *See US – Carbon Steel (AB)*, para. 72; *US – OCTG from Argentina (AB)*, para. 294; *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 152; and *US – Zeroing (EC) (Panel)*, para. 7.181.

is incorporated by reference into Article 21, and therefore imposes, in the context of a review proceeding, all the detailed evidentiary rules and procedural protections of that Article. These protections include the requirement, at Article 12.1, that interested parties "be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question", as well as the right, at Article 12.2, "to present information orally".

141. India claims that the United States acted inconsistently with Articles 21.1 and 21.2 of the SCM Agreement when it examined additional subsidies during CVD administrative reviews. India's claim that an investigating authority is prohibited from levying countervailing duties on subsidy programs during review proceedings that were not examined in the original investigation is based on an erroneous interpretation of the SCM Agreement.

142. Contrary to India's claims, Article 21 does not require that reviews examining "subsidization which is causing injury" be limited to the specific subsidy programs in place at the time of the original investigation. Rather, Article 21 requires that a countervailing duty "remain in force only as long as and to the extent necessary to counteract subsidization". The administrative reviews at issue in this dispute examined the level of duty imposed during a particular period of review, to determine whether it was applied only "to the extent necessary to counteract subsidization".

143. Consistent with Article 21, an interested party in U.S. administrative review proceedings may allege, for example, 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 extent to which the duty is "necessary to counteract subsidization" during the period of review.

144. India has recognized the distinction between "investigations" and "reviews" under the SCM Agreement, and acknowledged that there are "categorical distinctions between an original investigation and a review proceeding under Article 21" and that "obligations applicable to original investigations will not necessarily apply to review proceedings."[258]

145. Nonetheless, India glosses over these distinctions – and ignores the text of the SCM Agreement – when it suggests, in response to Panel questions, that "[t]he United States may initiate and conduct the investigation against new subsidies alongside or part of review proceedings covering the old subsidies, while ensuring that the obligations under Articles 11 and 13 are complied with *qua* the new subsidies."[259] While India states that it "is not concerned as to

[258] India First Written Submission, para. 622 (citing to *US – Carbon Steel (AB)*, para. 87; *US – OCTG from Mexico (AB)*, para. 119; *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 106-107).
[259] India Responses to First Panel Questions, Question 35.

whether a separate docket is created for such new subsidy allegations,"[260] that is the practical result of India's claims. Even in its response to a direct question from the Panel, however, India has not explained how its novel interpretation of the SCM Agreement can be supported by the text, much less how it could work in practice.[261]

146. Regardless of its statements to the contrary, India's interpretation would have the effect of requiring an investigating authority to orchestrate multiple proceedings simultaneously, even when the same Member, interested parties and product are at issue. India's position, if adopted, would also allow an exporting Member to receive a zero subsidy margin in every review simply by changing its subsidy programs. The SCM Agreement provides no indication that such a formal change in a Member's subsidization of an industry should prevent the application of a countervailing duty to the imports covered by a review proceeding – where the original investigation has already resulted in a determination to apply a countervailing duty, and the review has uncovered ongoing subsidization providing a benefit to those imports.

147. The SCM Agreement, through Article 12, provides for extensive procedural and evidentiary rules during review proceedings. Thus, Article 21, by incorporating the rules of Article 12, provides for specific rules to ensure procedural fairness in any review proceeding, including one in which new subsidies are alleged. And as explained above, Commerce required that petitioners alleging new subsidy programs submit evidence establishing the elements of a subsidy.[262] Moreover, the fact remains that the SCM Agreement sets out separate rules to govern an investigation and a subsequent review of the determinations made in that investigation. There is no textual or contextual basis for India's proposition that an investigating authority must limit its reviews to the methods of subsidization examined in the original investigation. Rather, Article 21.1 of SCM Agreement requires simply that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." By including in its administrative reviews allegations of additional subsidization programs with respect to the same product and the same companies at issue in the original investigation, Commerce was doing just that.

XII. Conclusion

148. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

[260] India Responses to First Panel Questions, Question 35.
[261] India Responses to First Panel Questions, Question 35.
[262] *See also* U.S. First Written Submission, para. 582.