UNITED STATES – COUNTERVAILING DUTY MEASURES

ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

(DS436)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

October 8, 2013

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. At this stage of the proceedings, the United States and India have both presented their cases and have had the opportunity to respond to the many questions put to them by the Panel thus far. In this statement, we will seek to clarify further some of the issues in this dispute. In particular, we will focus on India's arguments regarding the U.S. measures governing benefit both "as such" and "as applied", Commerce's specificity determinations, SDF loans as "direct transfers", cumulation of dumped and subsidized imports, and the interpretation and application of the U.S. "facts available" measures.

I. The U.S. regulation, 19 CFR 351.511(a)(2), is "as such" consistent with Article 14(d)

A. Tier I and Tier II of the U.S. regulation are fully consistent with the first sentence of Article 14(d)

2. The United States will begin by addressing India's arguments that Tiers-I and II of the U.S. regulation are 'as such' inconsistent with Article 14(d) of the SCM Agreement. Specifically, in its second written submission, India continues to argue that Article 14(d) requires that remuneration be assessed from the perspective of the government provider of a good or service and that such an assessment necessarily precedes the calculation of benefit under Article 14(d). In India's view, remuneration to the government is "adequate" whenever the price is set by the government in accordance with allegedly commercial considerations, even if below the market rate.

3. For the reasons described extensively in the U.S. first written submission, responses to Panel's questions, and in the U.S. second written submission, India's position has no basis in the text of the SCM Agreement and is not supported by the findings in prior panel or Appellate Body reports. In short, India's entire mode of analysis is premised on a step that simply does not exist in the text of Article 14. The United States will not repeat those arguments here today as our prior submissions show that this issue is straightforward. Rather, we will limit our comments to addressing the points raised by India on this issue in its second written submission.

4. In its second written submission, India focuses its arguments on three textual points. First, India argues that structural differences between subparagraphs (b)-(c) and (d) of Article 14 contemplate a threshold step in Article 14(d) distinct from the "precise calculation method using an external benchmark" contained in subparagraphs (b) and (c). The United States has addressed this alleged structural distinction in paragraphs 9 -16 of the U.S. second written submission. India has no basis for this distinction, and the United States would refer the Panel to those comments in response.

5. Second, in noting that the terms "remuneration" and "benefit" are different words, India asks the Panel to accord separate "meaning to . . . the term *remuneration* and the fact that the U.S. law under challenge fails to look into the question of the *adequacy of remuneration* prior to calculating benefit."[1] This argument has no merit. As already explained in the U.S. first written submission, while remuneration and benefit are distinct terms, they are related.[2] The fact that the first sentence of Article 14(d) uses both terms does not mean that they are assessed from the

[1] India Second Written Submission, para. 14.
[2] U.S. First Written Submission, para. 44.

perspective of different entities. Rather, the title to Article 14 make clear that when the financial contribution at issue is the provision of goods by a government, "benefit" is defined by the concept of "benefit to the recipient."[3]

6. Third, in paragraph 15 of its second written submission, India notes that Article 14(d) relates to two different subsidy programs—both the purchase and provision of goods or services.[4] India argues that the U.S. approach to assessing the adequacy of remuneration where the government is the purchaser of goods, is somehow inconsistent with the U.S. approach when the government acts as the seller. In particular, India argues that the U.S. position would mean that "for government purchase of goods, benefit will be calculated by calculating the cost to the beneficiary, i.e., the producer of the goods and not based on the market price of the product." India's argument is confusing, and to the extent it has any content, it lacks any merit. The argument seems premised on India's statement that the U.S. equates the term "remuneration" with "cost to beneficiary." India is incorrect. With respect to government purchases of goods, the United States does not interpret Article 14(d) to require a cost to beneficiary analysis. Rather, where the government is the purchaser of goods, the comparison would be between the price the government paid for the product, and the price for which the recipient (of the benefit) could have sold the same product to another purchaser. In short, India is incorrect that the benefit determination for government purchases is in any way inconsistent with the benefit determination for government sales.

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[3] U.S. First Written Submission, para. 44.
[4] India Second Written Submission, para. 15.

7. As the United States has continually emphasized throughout its submissions, the essence of the benefit to the recipient analysis 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. This determination involves assessing whether the *recipient* obtained something "on terms more favorable than those available on the market."[5]

B. Tier I and Tier II are 'as such' consistent with the second sentence of Article 14(d)

8. Turning now to India's argument with respect to the consistency of the U.S. regulation with the second sentence of Article 14(d), the United States takes note of India's apparent abandonment of its prior argument that the phrase "prevailing market conditions" in Article 14(d) should be substituted for the phrase "commercial considerations" in Article XVII:1(b) of the GATT 1994.[6] For the first time, India expresses agreement with the United States that concept of "prevailing market conditions" is different from "commercial considerations."[7]

9. In its second written submission, India adopts a new argument: namely, that an assessment of prevailing market conditions requires an assessment of whether the behavior of the provider in some undefined sense can be commercially justified. In paragraph 18 of its second written submission, for example, India states that it "sees no reason as to why government providers of goods cannot be entitled to behave in the same way as private players when it comes

[5] U.S. Second Written Submission, para. 7; U.S. First Written Submission, paras. 37-49.
[6] India Second Written Submission, para. 19.
[7] India Second Written Submission, para. 19.

to selling goods or services."[8] This argument, like India's abandoned Article XVII argument, has no merit. In fact, India's position, if adopted, would amount to a radical departure from the text of the Agreement.

10. First, India's argument assumes that for the purposes of the SCM Agreement, governments and private bodies should be treated equally. This simply is not true. Members (acting through government, public bodies, funding mechanisms, or entrusted or directed private bodies) are bound by the disciplines of the SCM Agreement, and private entities are not. Moreover, Members may confer economic resources that result in negative impacts on other Members, and it is for this very reason that certain Member actions in the economic sphere are subject to the disciplines of the SCM Agreement. With respect to Article 14 specifically, the SCM Agreement ensures that the government prices are at least equivalent to market prices between private parties. This is why Article 14 contemplates a benchmark analysis which compares a government price to that which is available on the market. As the Appellate Body said in *Canada – Aircraft*, "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been conferred,' because the trade distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market."[9]

11. Second, in proposing that the price-setting behavior of governments be justified by undefined economic considerations, India seeks to carve out an unprecedented exception in the

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[8] India Second Written Submission, para. 18.
[9] *Canada – Aircraft (AB)*, para. 157.

SCM Agreement. In India's view, governments have a sovereign right to set prices for goods or services as far below the market rate as they choose, provided this price-setting behavior can be justified on some sort of basis. For example, in paragraph 18 of its second written submission, India says that "[f]rom a commercial perspective, it is not necessary for [a] player to charge prices similar to others in order to gain higher returns; rather, it is very valid commercial behavior for [a] player to reduce its prices in proportion to its reduced costs in order to capture a larger share of the market."[10] India's argument is circular – a true commercial benchmark is just that – it reflects actual behavior in the marketplace. India would replace a true commercial benchmark, based on actual commercial behavior in the market, with some hypothetical benchmark based on whatever India would deem to be "commercial" behavior. Furthermore, India presents no bounds to its theory. For example, India's interpretation would seemingly allow a government to justify a less-than-market-price which results in driving private entities out of business on the basis that "commercial considerations" led the government to desire to expand its market share.

12. Third, India refers to this carve out from the disciplines of the SCM Agreement as an "inherent right" of governments to subsidize in any manner that they choose. In its second written submission, India states that:

> Every sovereign nation is entitled to determine its own policies that best suits its interest, including by way of grant of subsidies and this *inherent* sovereign right exists, irrespective of whether the SCM Agreement expressly recognizes it or not . . . a sovereign country can continue to grant the financial contribution with

[10] India Second Written Submission, para. 18.

the legitimate expectation that its program will not be countervailed by another country.[11]

13. The simple answer to India's argument is that this dispute is not about what types of subsidies governments may or may not, under whatever authority, determine to provide. Rather, in the case of application of countervailing duties, the issue is whether an importing Member may adopt countervailing measures when subsidies have been provided and are causing injury to the importing Member's domestic industry. India exercised its inherent sovereign right in agreeing to the disciplines of the SCM Agreement, and thus has agreed that other WTO Members may countervail subsidies it provides that cause injury to another Member's industry.

C. The hierarchical structure of the U.S. regulation and Tier-II of the U.S. regulation *per se* are consistent with Article 14(d)

14. The United States notes that India's second written submission is largely repetitive of its previous submissions in arguing that the hierarchical structure of the U.S. regulation[12] is inconsistent with Article 14(d), and also in its arguments as they pertain to Tier-II of the U.S. regulation *per* se.[13] In paragraph 27 of its second written submission, India further argues that the United States has neglected to respond to India's specific challenge to the relationship between Tier-II and Tier-III of the U.S. regulation. While the United States has responded fully to India's claims in its previous submissions, and, in particular paragraphs 22 – 37 of the U.S. second written submission, the United States offers the following additional comments on the structure of the regulation.

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[11] India Second Written Submission, para. 24.
[12] Section 351.511(a)(2)(i)-(iii)
[13] India Second Written Submission, paras. 21-35.

15. In brief, both the United States and India agree that benefit calculations performed under Tier-III of the U.S. regulation are consistent with Article 14(d) of the SCM Agreement. India, however, argues that the regulation's preference for the application of a Tier-I or Tier-II analysis for the calculation of benefit is inconsistent with Article 14(d) insofar as it precludes the application of a Tier-III analysis. India's objections are without merit; they are based on India's flawed interpretation of the first sentence of Article 14(d), and India's oft-repeated, and unsupportable, insistence that the adequacy of remuneration be assessed from the perspective of the provider of the benefit.

16. Under the Article 14(d) guidelines, the adequacy of remuneration is assessed from the perspective of the recipient of the financial contribution and the hierarchical structure of the U.S. regulation is fully-consistent with this principle. In *Canada – Aircraft*, for example, the Appellate Body observed that "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." The U.S. regulation, therefore, appropriately begins with Tier-I, a preference for actual arm's length prices between private parties in the market of the economy of provision. It is only when such prices are not available that the U.S. regulation requires that an investigating authority make a determination based on out-of-country private transactions or world market prices under Tier-II. World market prices are those which are based on actual, private, arm's-length transactions for the goods or services in question, and adjusted to reflect the prevailing market conditions of the country in question. In the rare instances where neither in-country nor world market prices are available, the U.S. regulation contemplates a third type of analysis under Tier-III. Where there are no market prices available,

Commerce can evaluate the government price in accordance with "market principles" based on factors other than actual market-based sales transactions. These may include a determination of whether the government-administered price is consistent with industry cost and price-setting practices and approaches.

17. The crux of India's concern with the hierarchical structure of the U.S. regulation is its view that a government price that may be adequate under Tier-III should not be countervailed under another method, such as Tier-I or Tier-II. India has no basis for this concern. In particular, India fails to appreciate that the concept of "market principles" identified in Tier-III cannot controvert findings of benefit made under Tier-I or Tier-II of the regulation. If remuneration is less than adequate based on a comparison with actual arm's length prices between private parties, then a benefit has been conferred and, in such instances, the government price cannot be consistent with market principles. Application of the U.S. regulation will never lead to a result where remuneration which has been found to be inadequate under Tier-I or Tier-II will somehow be found to be adequate under Tier-III.

18. With respect to the concerns raised in paragraphs 30 through 33 of India's second written submission regarding whether the provisions contained in Tier-II allow for the possibility of adjustments for prevailing market conditions, India is incorrect in its characterization of both the U.S. regulation and statute.[14] The United States directs the Panel to the U.S. response to Panel question 43, where the United States has explained in detail how world market prices under Tier-II of the U.S. regulation are adjusted to account for prevailing market conditions in the

[14] 19 U.S.C. 1677(5)(E)(iv).

county of provision. This adjustment is consistent with the Article 14(d) guidelines and the findings of the Appellate Body in *US – Softwood Lumber IV*.[15]

II. The mandatory inclusion of delivered prices under 19 CFR 351.511(a)(2)(iv) is "as such" consistent with Article 14(d)

19. In paragraphs 36 through 45 of its second written submission, India continues to argues that the mandatory inclusion of delivery charges under subsection (iv) of the U.S. regulation is "as such" inconsistent with Article 14(d) of the SCM Agreement. The United States has addressed India's "as such" challenges to the regulation extensively in its previous submissions.[16] In summary, the use of delivered prices under the U.S. regulation ensures that the adequacy of remuneration is determined in relation to the prevailing market conditions in the country of provision in accordance with Article 14(d), and that a meaningful apples-to-apples comparison between the government price and the market price is made at the same point in the distribution chain. In this statement today, we will take the opportunity to respond to the factually incorrect statements that India now makes in its second written submission with respect to delivered prices.

20. First, in paragraph 38 India states that, "for reasons unknown and unsubstantiated, the United States assumes that the term 'delivery charges' covers only import duties." This statement is factually incorrect. As explained in detail in response to the Panel's questions 44 and 47, the term 'delivery charges' includes not only import duties (where appropriate) but, more

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[15] *US – Softwood Lumber IV (AB)*, para. 96; U.S. Response to Panel's Question 43.

[16] *See* U.S. First Written Submission, paras. 76-80; U.S. Responses to Panel's Questions 44, 47, 48 and 50; U.S. Second Written Submission, paras. 29-46.

specifically, all of the delivery charges incurred by the producer to physically get the input to the producer's facility for use, which could include freight, import duties, or taxes.

21. Second, India continues to argue in paragraph 39 of its second written submission that an apples-to-apples comparison could be completed at the ex-works level. As the United States has already explained in response to the Panel's questions 44 and 48, as well as in paragraphs 29 – 37 of the U.S. second written submission, whether a subsidy exists does not depend on whether the contract terms are ex-works or delivered. An ex-works price does not include the costs incurred by the purchaser for getting a purchased input to its factory door and, therefore, is not reflective of the prevailing market conditions for that input from the perspective of the recipient. To compare prices at the ex-works level would not reflect the prevailing market conditions 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 in obtaining the good and setting the market negotiated price. Moreover, such an approach would not fulfill 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.[17]

22. Third, India states in paragraph 40 that "the 'delivered prices' of a domestic government provider can never be equal to or higher than such a benchmark price that includes international freight and import duties." This simply is not true. Indeed, India provides no evidence to support such a categorical statement. Benchmark prices are assessed on a case-by-case basis and it is the prevailing market conditions in the country of provision, including the costs of

[17] *Canada – Aircraft (Panel)*, para. 9.112.

transportation, which dictate the market rate. As explained in response to the Panel's question 48, as well in in paragraph 31 of the U.S. second written submission, if a government mine (without other domestic competitors) were acting like a private body in the market, it would take advantage of its proximity to domestic purchaser and maximize its profits by charging the same delivered price (including transportation costs) as the market price (including transportation costs and, where appropriate, international freight) that the domestic purchaser would have to pay to obtain the same good from a foreign source. To set the price lower than what a purchaser could otherwise obtain on the market would be to give up something of value and thereby confer a benefit.

23. Moreover, India's statement is divorced from reality. As explained in the U.S. response to question 44 as well as in paragraph 33 of the U.S. second written submission, the market conditions of India during the period of review were such that an Indian company actually paid to have Brazilian iron ore shipped and imported into India rather than buying it from an Indian producer. The fully delivered cost represents the actual cost to that company of the foreign ore and, as such, reflects the prevailing market conditions in India.

24. Fourth, in paragraph 41, India incorrectly argues that the use of the phrase "other conditions of sale" following the word "transportation" in the second sentence of Article 14(d) indicates that transportation itself is considered a condition of sale. On this basis, India concludes that "an adjustment on account of transportation (which is also a condition of sale) could only be made if such condition of sale is the prevailing market condition in the country of provision." India's argument is based on a flawed assumption. Namely, India assumes that "conditions of sale" in Article 14(d) are equivalent to the contractual terms of sale. This is

incorrect. In fact, India appears to be confused about what these terms mean. The non-exhaustive list of "prevailing market conditions for the good or service in question in the country of provision" in Article 14(d) includes price, quality, availability, marketability, transportation and, as India correctly points out, other conditions of purchase or sale. Thus, contrary to India's line of argument, the terms "availability" and "marketability", for instance, are not terms typically found in negotiated contracts. While contractual terms of sale and purchase may provide evidence of prevailing market conditions they are not dispositive, which is why the Article 14(d) guidelines direct investigating authorities to consider other conditions of purchase or sale in assessing whether the recipient of the financial contribution is better off than it would have been absent that financial contribution. Rather, the prevailing market conditions establish the benchmark against which the remuneration obtained by the government for the particular transaction in question is tested.

25. Fifth, in both paragraphs 42 and 43 (in addition to others) India mischaracterizes the United States as making a "cost to exporter" (or "cost to producer") analysis. This is incorrect. The United States, consistent with Article 14 of the SCM Agreement, is making a benefit to the recipient analysis by comparing the prices that the recipient actually would pay for the benchmark product and the government product.

26. Sixth, in paragraph 43 of its second written submission, India argues that "[n]either the SCM Agreement nor the Appellate Body permits the United States to make adjustments to the benchmark for 'making available' the goods to the producer-exporter." In our previous submissions the United States has explained the reasons why the benchmark analysis must be performed at the fully delivered level in the distribution chain in accordance with the Article

14(d) guidelines. In response to India, we would also observe that the term "availability" is specifically included in the non-exhaustive list of prevailing market conditions identified in the second sentence of Article 14(d). For India to argue that adjustments to the benchmark with respect to "availability" are not contemplated in the text of the SCM Agreement is incorrect.

27. Finally, with respect to India's arguments in paragraph 44 regarding considerations of comparative advantage, the United States has fully addressed India's misuse of this macroeconomic concept in paragraphs 38 – 46 of the U.S. second written submission.[18] India's arguments are without merit.

III. The imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC is fully consistent with Articles 1.1, 2.1(c) and 2.4 of the SCM Agreement

A. The sale of iron ore by NMDC was *de facto* specific in accordance with Article 2.1(c) of the SCM Agreement

28. Turning now to India's claims related to specificity, to recall, India argues that *de facto* specificity may only be determined under Article 2.1(c) where a subsidy is granted or enjoyed by a few enterprises as compared to a larger universe of similarly-situated entities otherwise capable of using that subsidy. This "comparative subset" argument simply is incorrect and India's previous arguments on this point have been adequately addressed in our previous submissions.[19] We will not restate those points here but, rather, offer the following observations with respect to the arguments India has raised in its second written submission to support its flawed approach.

[18] U.S. Second Written Submission, paras. 38 – 46.
[19] U.S. First Written Submission, paras. 388 – 428, 500 – 504; U.S. Response to Panel's Question 70; U.S. Second Written Submission, paras. 63-67.

29. First, the United States takes issue with India's characterization of the U.S. position on the meaning of Article 2.1 of the SCM Agreement. Specifically, in its second written submission India makes a variety of claims about the nature of Articles 2.1(a)-(b) and concludes that "[e]ven the United States does not dispute any of India's conclusions as it relates to Articles 2.1(a)-(b). The United States only appears to disagree with this conclusion being applied to Article 2.1(c)."[20] This is incorrect. As clearly presented in our previous submissions, the United States disagrees with India's interpretation of Article 2.1 of the SCM Agreement.[21] While we will not belabor all those points here, we will reiterate that passages of Appellate Body reports and selected negotiating documents of the SCM Agreement relied on by India to support its positions do not clarify the meaning of Article 2.1(c). They do not address *de facto* specificity nor do they address specificity in the context of a financial contribution in the form of a provision of goods or services.

30. Second, India is also incorrect in arguing that the text of Article 2.1(c) somehow mandates an order of analysis whereby an investigating authority is required to first apply the principles under Articles 2.1(a)-(b) before Article 2.1(c). This issue is fully addressed in the U.S. response to Panel question 70.[22]

31. Third, there is no basis in Article 2.1(c) to support India's contention that the inherent characteristics of a good cannot limit its utility. India's attempts to discredit the Panel's findings in *Softwood Lumber IV* on this point are without merit. In *Softwood Lumber IV*, the Panel

[20] India Second Written Submission, para. 167.
[21] U.S. First Written Submission, paras. 388 – 428, 500 – 504.
[22] U.S. Response to Panel's Question 70.

correctly found that in respect of the provision of goods with limited utility due to inherent characteristics, "it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only."[23] This finding recognizes that goods differ from money because while money is fungible, goods may have limited utility. Iron ore is such a good. There is no exception in the SCM Agreement allowing governments to provide goods, which, by their nature are of limited use, for less than market value. This language simply does not exist anywhere in the text of the SCM Agreement and India cannot support such an exception here.

32. Fourth, India argues that in a *de facto* specificity analysis under Article 2.1(c), failure to require that a comparative subset of eligible entities be identified would result in "every form of supply of goods to be specific in all cases." This statement is incorrect.[24] Further, India's parade of horribles set out in paragraph 174 of its second written submission has no persuasive force. Contrary to India's categorical assertions, specificity is assessed on a case-by-case basis and, under Article 2.1(c), will only be found where certain enterprises constitute a discrete segment of the economy of the Member granting the subsidy.[25] And, as the U.S. has previously pointed out, India's proposed interpretation requiring the identification of a comparative subset of eligible entities would result in an interpretation whereby Members would be permitted to subsidize the provision of any inputs whose use is limited to certain enterprises. While India, in its second written submission, "vehemently disagrees" that its interpretation would lead to such a perverse result, India does not explain, and cannot explain, why this is the case.

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[23] *US – Softwood Lumber IV (Panel)*, para. 7.116.
[24] India Second Written Submission, para. 174.
[25] *US – Upland Cotton (Panel)*, para. 7.1151.

B. The United States fully noted and responded to the arguments India raised in section VII.C.2 of India's first written submission

33. In paragraph 179 of its second written submission, India argues that the United States has not appreciated the distinct nature of India's arguments contained in section VII.C.2 of its first written submission —that for a subsidy to be found specific under the first factor in the second sentence of Article 2.1(c), the iron ore must be used by a "limited number" within the set of "certain enterprises", where the term "certain enterprises" refers to all the beneficiaries of the program in question. India is incorrect. The United States does understand India's argument, which collapses as a logical matter into India's other specificity arguments, and has no merit. India's two specificity arguments are effectively the same: for both, India argues that the text of Article 2.1(c) requires that an investigating authority not only identify certain enterprises which are receiving the subsidy but also those eligible enterprises that are not. The United States has addressed fully these arguments in its prior submissions. In particular, the United States has shown in its submissions that for findings of *de facto* specificity under Article 2.1(c), an investigating authority need only determine 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."[26]

[26] U.S. First Written Submission, paras. 388 – 428, 500 – 504; *US – Upland Cotton (Panel)*, para. 7.1151; *US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.

C. The United States took into account the mandatory factors listed in Article 2.1(c) of the SCM Agreement

34. In its second written submission, India continues to confuse the obligation of an investigating authority to take account of the factors identified in the second sentence of Article 2.1(c) with some sort of requirement—not found in Article 2.1—that the authority's determinations must include a separate discussion of each factor. As described in paragraphs 420-428 of the U.S. first written submission, in response to the Panel's question 70, as well as in paragraphs 66-67 of the U.S. second written submission, the United States met its obligation under Article 2.1 to take "account" of both the economic diversification of the Indian economy and the duration of the program in determining that the GOI provision of iron ore for less than adequate remuneration was *de facto* specific to a limited number of certain enterprises that used iron ore. Having done so, there was no additional obligation or requirement under Article 2.1 for the determination to contain a separate discussion of each factor.

35. One additional point the United States would like to address is India's argument that the United States has "shirked" its obligations under the SCM Agreement, simply because the United States has noted that none of the interested parties, including the GOI, raised these issues during the challenged administrative proceedings.[27] This argument makes no sense. A Member does not and cannot "shirk" obligations by, as here, pointing out relevant facts on the record in a dispute. The United States has observed that the fact that interested parties did not raise these issues is indicative of their relevant impact on the outcome of the determination, and explains in

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[27] India Second Written Submission, para. 186.

part why there was no call for the authority's determination to include a separate discussion of these factors.

IV. The sale of iron ore by NMDC conferred a benefit within the meaning Article 14(d) of the SCM Agreement

A. The United States considered all evidence on the record and used in-country benchmarks where appropriate

36. Turning now to India's "as applied" claims against the U.S. imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC, in its second written submission India again repeats arguments that the United States fully addressed in its previous submissions. Nonetheless, the United States wishes to highlight the following positions:

37. First, India is incorrect that the explanations of the United States are *ex-post facto* rationalizations of the determination.[28] The determinations on the record in this dispute contain complete and persuasive explanations for why Commerce determined that Indian steel companies received countervailable subsidies. What India is doing here is highlighting unpersuasive or inapposite elements of the factual record, overstating their importance, and arguing that the authority should have responded to such mischaracterizations of the record evidence. In effect, India argues that the authority was required to respond to mischaracterizations of record evidence that were not made until India's submissions in this proceeding. For example, with respect to the price list described in paragraphs 192-193 of India's second written submission, during the administrative proceeding at issue, none of the

[28] India Second Written Submission, paras. 188-189.

parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks. India raises this argument only now. As explained in the U.S. first written submission in paragraphs 439-445 and again in the U.S. second written submission in paragraphs 52-53, the alleged pricing, party identification, and iron content information contained in these documents was incomplete. This data was therefore insufficient to be used in a Tier-I analysis which, contrary to India's assertions in paragraph 193, very clearly requires that a benchmark price be based on data from actual imports or actual sales.

38. Second, India incorrectly states that the United States starts with the presumption that all government prices (even prices not under challenge) are suspect and ought to be rejected without any examination.[29] Specifically, India takes issue with the U.S. rejection of a price quote from NMDC to a Japanese steel maker on the same basis arguing that "the United States cannot be allowed to presume that *all* government prices will *always* be tainted."[30] It appears that India has ignored paragraph 66 of the U.S. first written submission, in which the United States explains that the United States does not always reject the use of government prices as benchmarks if the government prices are determined to be set by the market. For example, a government price set by a competitively run government auction is explicitly included as a possible benchmark under Tier I of the U.S. regulation.

39. Third, the United States takes issue with India's apparent new argument that Article 12.1 of the SCM Agreement requires an investigating authority to affirmatively use all information submitted by interested parties in calculating a benchmark, regardless of that information's

[29] India Second Written Submission, para. 192.
[30] India Second Written Submission, para. 199.

veracity or usability.[31] In addition to being incorrect, the United States notes that India did not raise an Article 12.1 claim in its panel request. That claim is therefore outside the Panel's terms of reference, even aside from the fact that it would be untimely to raise arguments for the first time in its second written submission.

B. <u>The use of delivered prices is not inconsistent with Article 14(d) of the SCM Agreement</u>

40. India's "as applied" challenges to the use of delivered prices in the calculation of benefit for the sale of iron ore by NMDC are identical to the arguments presented in its "as such" challenges to the U.S. regulation, subsection (iv), the paragraph that mandates adjustments for fully delivered prices.[32] As India's arguments are the same, for the same reasons as explained above, these arguments are without merit and are not based on the text of the SCM Agreement. Therefore, India's "as applied" claims on the use of delivered prices must also fail.

V. The imposition of countervailing duties on the grant of captive mining rights for iron ore and coal is consistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement

A. <u>The U.S. determinations that the GOI has a captive mining rights program for iron ore were fully consistent with Article 12.5 SCM</u>

41. Article 12.5 of the SCM Agreement requires that "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based." While India has every

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[31] India Second Written Submission, para. 197.
[32] *See* India Second Written Submission, paras. 14-19.

incentive to deny the existence of a captive mining rights program for iron ore, Commerce satisfied itself as to the accuracy of information contained in the *Hoda* and *Dang* reports—reports commissioned by the GOI that substantiated the existence of a captive mining program—and therefore the U.S. actions fully complied with Article 12.5 of the SCM Agreement. To accuse the United States of having relied on "bare assertions" or of "callousness", as India terms it in its second written submission, is both factually incorrect and inappropriate.[33]

B. The U.S. determinations were consistent with Article 1.1(a)(1)(iii) and the grant of mining rights for iron ore and coal does amount to the provision of the mineral itself

42. In its first written submission, India incorrectly argued that the Government of India did not provide iron ore or coal within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because there is no "reasonable proximate relationship" (as articulated by the Appellate Body in *Softwood Lumber IV*[34]) between the grant of mining rights on the one hand and the availability of the mined iron ore or coal on the other. In its second written submission, India now argues that there is no reasonable proximate relationship because the royalty paid for the grant of mining rights is 9.03 percent of the total costs borne by the miner to enjoy the final minerals.[35] In short, India apparently believes that 9 percent of total costs is not sufficient for a "reasonable proximate relationship" between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other.[36] India's argument makes no sense in the context of a subsidy analysis. Under Article

[33] India Second Written Submission, para. 212.
[34] *US – Softwood Lumber IV (AB)*, para. 71.
[35] India Second Written Submission, paras. 214-271.
[36] India Second Written Submission, paras. 216-217.

1.1(a)(1)(iii), the question regarding financial contribution is whether there was a provision of goods or services by a government or public body. The percentage of total cost represented by the financial contribution is not pertinent to this question.

43. As explained in the U.S. first written submission at paragraphs 488-498, the GOI's grant of mining rights to certain enterprises clearly amounts to the provision of iron ore and coal to those rights holders under Article 1.1(a)(1)(iii). As the Appellate Body has found, when a government provides a right to a good, the government "makes available" the good itself.[37] It is undisputed that the GOI owns the minerals and has absolute control over the grant of mining leases. Whenever the GOI grants a mining lease to an entity, that entity enjoys the exclusive right to the minerals as well as to make use of those minerals. The price that the government charges in providing that exclusive right is not relevant.

44. India also argues that the GOI cannot be said to have provide iron ore or coal to miners if, in addition to royalty payments, miners must bear the costs of exploration, labor, and extraction.[38] This requirement is nowhere in the text of SCM Agreement nor in the *US – Softwood Lumber IV* Appellate Body report. Specifically, the Appellate Body found that:

> what matters, for purposes of determining whether a government "provides goods" in the sense of Article 1.1(a)(1)(iii), is the consequence of the transaction . . . Indeed, as the Panel indicated, the evidence suggests that making available timber is the *raison d'etre* of the stumpage arrangements. Accordingly, like the Panel,

[37] *US – Softwood Lumber IV (AB)*, para. 75; U.S. First Written Submission, para. 491.
[38] India Second Written Submission, para. 216.

> we believe that, by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters.[39]

Analogously, making available iron ore and coal is the *raison d'etre* of the GOI's mining leases. India cannot distinguish this dispute from the facts of *US – Softwood Lumber IV* on the basis of additional costs that a miner must incur to make the minerals marketable. Just as in *US – Softwood Lumber IV*, here too there exists a "reasonable proximate relationship" between the grant of mining rights and the availability of the mined iron ore or coal such that the GOI provides the minerals in accordance with Article 1.1(a)(1)(iii).

C. <u>Captive coal mining rights were granted by the GOI to Tata, providing a financial contribution under Article 1.1(a)(1) of the SCM Agreement</u>

45. In paragraphs 218-219 of its second written submission India continues to argue that the GOI has not provided captive mining rights for coal to Tata Steel within the meaning of Article 1.1(a)(1) because the United States has not proven the non-existence of an alleged exemption to the Coal Mines Nationalization Act and the Ministry of Coal's guidelines for the allocation of captive coal blocks.[40] India's assertions are both circular and baseless. As explained in the U.S. first written submission, Commerce properly determined that the law, as amended, clearly applies to *all coal mining leases*, without exception. It is India that has argued for the existence of an exemption for Tata, but yet has pointed to no evidence on the record of such an exemption. And, contrary to India's assertions, evidence on the record shows that Tata pays royalties to the

[39] *US – Softwood Lumber IV (AB)*, para. 75.
[40] India Second Written Submission, paras. 218-219.

GOI in accordance with *the law* and not to the Raj, which was the terms of Tata's lease prior to the Nationalization Act.[41]

D. India's articulation of the standard of review is inconsistent with Articles 1.2 and 2 of the SCM Agreement

46. In paragraphs 220 through 224 of its second written submission, India asks the Panel to adopt an inappropriate standard of review under Article 2.4 of the SCM Agreement for examining Commerce's *de facto* specificity determinations with respect to the captive mining program for iron ore. As explained in the U.S. first written submission, Article 2.4 requires that "[a]ny determination of specificity under the provision of this Article shall be clearly substantiated on the basis of positive evidence."[42] Whereby "positive evidence" as explained by the Appellate Body, means "that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[43] Therefore, when an investigating authority clearly substantiates, on the basis of positive evidence, that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.4 of the SCM Agreement, based on the principles articulated in Article 2.1(c). This is the accepted standard of review under Article 2.4 of the SCM Agreement.[44]

47. In its second written submission, however, India asks the Panel to apply a novel three-step analysis in examining whether the investigating authority properly determined specificity: "[P]anels must first examine if the evidence used by the competent authority is positive

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[41] U.S. First Written Submission, paras. 508-513.
[42] U.S. First Written Submission, paras. 394-396.
[43] *US – Hot-Rolled Steel (AB)*, para. 192.
[44] *US – Anti-Dumping and Countervailing Duties (AB)*, para. 379

evidence, i.e., credible, affirmative, objective and verifiable. Secondly, panels must assess if the competent authority objectively examined the positive evidence. Thirdly, panels must examine the broader legal framework under which the subsidy is granted."[45] In India's view, anything that falls short of this three-step analysis "fails the threshold of positive evidence under Article 2.4 of the SCM Agreement and the objective assessment test of Article 11 of the DSU."[46]

48. India's proposed three-step standard of review is inconsistent with, and unsupported by, the text of the SCM Agreement. It also departs from prior Appellate Body findings. For example, India's third step appears to be taken from a misreading of the Appellate Body report in *US – Large Civil Aircraft*, wherein the Appellate Body's reference to the "broader legal framework" applied to determinations of *de jure* specificity in which there exists a legal framework to evaluate in the first place. Moreover, India's proposed methodology would amount to a *de novo* review of the facts on the record, requiring the Panel to substitute its judgment for that of the regulator. The United States recalls that the Appellate Body has stated that "the standard of review applicable to a panel reviewing a countervailing duty determination precludes a panel from engaging in *de novo* review of the facts of the case 'or substitut[ing] its judgment for that of the competent authorities'."[47] India cannot ask the Panel to do that here.

[45] India Second Written Submission, para. 223.
[46] India Second Written Submission, paras. 223-224.
[47] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379; quoting *US – Steel Safeguards (AB)*, para. 299 (referring to *Argentina – Footwear (EC) (AB)*, para. 121).

E. Mining rights for minerals including iron-ore are available only to certain enterprises

49. In paragraph 225 of its second written submission, India continues to dispute Commerce's *de facto* specificity determination with respect to a captive mining rights program for iron ore on the basis that "the United States has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals."[48] Here too India confuses the difference between *de jure* and *de facto* specificity under Article 2.1(a)-(b) and 2.1(c). Specificity determinations under Article 2.1(c) do not require that an investigating authority identify a specific piece of legislation, regulations, or guidelines pertaining to eligibility or amount of subsidy. We refer the Panel to our previous submissions on this point.[49]

VI. The United States correctly calculated the benefit for a price of extracted iron ore and coal, consistent with Articles 1.1(b) and 14 of the SCM Agreement

50. In paragraph 231 of its second written submission, India argues that the GOI did not "provide" extracted iron ore or coal in accordance with Article 1.1(a)(1)(iii) but rather granted mining rights and that, consequently, the costs incurred by the miner in extracting iron ore and coal cannot form part of the benchmark calculation under Article 14(d). For the reasons explained above[50] and consistent with the Appellate Body's findings in *US – Softwood Lumber IV*, by providing the right to extract iron ore and coal, the GOI provided recipients with iron ore and coal consistent with Article 1.1(a)(1)(iii). Commerce properly constructed the cost of the

[48] India Second Written Submission, para. 225.
[49] U.S. First Written Submission, paras. 391-429, 500-507; U.S. Response to Panel's Question 70; U.S. Second Written Submission, paras. 68-74.
[50] *See also* U.S. First Written Submission, paras. 514-524.

iron ore and coal to Tata and compared this constructed price to a world market price for iron ore and an actual import price for coal in order to determine whether the recipients of the mining rights received something "on terms more favorable than those available in the market."[51] These calculations are fully explained in paragraph 515 of the U.S. first written submission. India's objections to the benefit calculations for mining rights are premised on incorrect interpretations of both Articles 1 and 14 of the SCM Agreement and therefore are without merit.

VII. The Cumulation of Dumped and Subsidized Imports is Consistent with Article 15 of the SCM Agreement

51. India has also challenged U.S. measures permitting the International Trade Commission ("ITC") to cumulate in original investigations and sunset reviews the effects of dumping and subsidization for imports subject to simultaneous trade remedies investigations. As demonstrated in the U.S. written submissions and in the U.S. answers to the Panel's questions, India's claims are unfounded. India's arguments fail because the cumulation of subsidized and dumped imports that are subject to simultaneous injury investigations 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. In addition, with respect to sunset reviews, India's claims under Article 15 of the SCM Agreement have no merit because Article 15 does not apply to sunset reviews.

[51] *Canada – Aircraft (Panel)*, para. 9.112.

A. India's Claims About the Cumulation of Dumped and Subsidized Imports in Injury Investigations Lack Merit

52. At their core, India's claims continue to rest on the basic premise that the text of Article 15.3 does not permit cumulation of subsidized imports with dumped imports. However, Article 15.3 only addresses the circumstances under which an authority may cumulate the effects of imports that "are simultaneously subject to countervailing duty investigations." It does not address whether subsidized imports may be cumulated with dumped imports, nor does it specifically preclude the cumulation of subsidized and dumped imports. In other words, despite India's claims, Article 15.3 does not itself contain any language that would prevent Members from cumulating dumped and subsidized imports in original investigations.

53. Moreover, both the SCM and AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury. As the Appellate Body has explained, "cumulation remains a useful tool for investigating authorities to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…"[52] By identifying this policy as a critical rationale underlying the cumulation provisions of these Agreements, the Appellate Body has acknowledged that injury to the domestic industry might come from several sources simultaneously, and the cumulative impact of those imports needs to be analyzed for an injury determination. Indeed, the Appellate Body

[52] *US – OCTG from Argentina (AB)*, paras. 296-97; *EC –Tube or Pipe Fittings (AB)*, para. 116.

has recognized that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."[53]

54. It is also telling that India has chosen not to challenge the Commission's cumulated examination of the effects of imports that are simultaneously subsidized and dumped,[54] even though this issue was directly presented by the circumstances of the underlying determination. If Article 15.3 permits a cumulated analysis of the effects of imports that are both dumped and subsidized in injury investigations, as India would appear to concede, then Article 15.3 must also permit a cumulated analysis of all unfairly traded imports, whether subsidized or dumped.

55. Moreover, as the United States has explained, it is simply not possible, as a practical matter, for an authority to disentangle or unravel the dumping-related effects of dumped and subsidized imports from their subsidies-related effects, because the effects are precisely the same. Indeed, the investigating authorities of both Canada and Australia have expressly acknowledged the impossibility of performing such a task.

56. As the United States has also pointed out, the impracticality of India's approach is even more apparent when significant volumes of subsidized imports and dumped imports are in the market and simultaneously affecting the industry, as was the case in the hot-rolled steel investigations. In this situation, the injurious effects of all unfairly traded imports in the marketplace are closely intertwined and will be compounded with respect to the pricing and sales levels of the affected domestic industry. Requiring an authority to attempt the un-doable

[53] *US – Anti-Dumping and Countervailing Measures (China) (AB)*, footnote 549.
[54] India Second Written Submission, paras. 48-49.

exercise of separating the adverse price and volume effects of a group of dumped imports from those of dumped and subsidized imports would prevent an authority from properly taking into account the combined injurious impact of all unfairly traded imports that are affecting an industry adversely at the very same time, which is one goal of cumulation in injury investigations.[55]

57. In order for a Member to exercise its right to impose countervailing duty measures, the Member must be able to fully account for the injury experienced by its domestic industry as a result of all unfairly traded imports, because such an approach allows the authority to remedy the unfair trade practices of multiple countries, even when achieved through multiple means. This is fully consistent with the fact that the AD and SCM Agreement both permit the cumulation of unfairly traded imports as a critical aspect of an authority's injury analysis.

58. In sum, a harmonious reading of Article 15 of the SCM Agreement with the AD Agreement, especially when read in conjunction with the unitary approach suggested by the text of Article VI.6(a) of the GATT 1994, means India's claims with respect to cumulation must fail.

B. India's Claims About the Cumulation of Dumped and Subsidized Imports in Sunset Reviews Also Lack Merit

59. Turning to India's challenges to the sunset provisions of the U.S. statute and the Commission's sunset analysis, India's challenges have a simple and fatal problem. India challenged them under Article 15 of the SCM Agreement,[56] which as the Appellate Body has

[55] See *US – OCTG from Argentina (AB)*, paras. 296-97; *EC – Tube or Pipe Fittings (AB)*, para. 116.
[56] India Panel Request, paras. 8, 10(b), and 12(e).

made clear, does not apply to sunset reviews; it only governs injury determinations in original investigations.[57]

60. On a plain reading of the text, Article 15 does not impose any specific obligations on an authority relating to cumulation of imports in a sunset review. The Appellate Body has consistently found that the provisions of the Agreements governing dumping, subsidies, and injury findings in original investigations do <u>not</u> apply to an authority's likely injury analysis in sunset reviews.[58] In *US – Carbon Steel*, the Appellate Body explained that:

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

61. Moreover, the Appellate Body has explained that the sunset provisions of the AD Agreement:

> Do [] not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor do [they] identify any particular factors that authorities must take into account in making such a determination.[60]

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[57] *US – Corrosion-Resistant Steel from Germany (Sunset) (AB)*, paras. 58-92 ; *see also US – Corrosion-Resistant Steel from Japan (Sunset) (AB)*, paras. 123-127; *US – OCTG from Argentina (Sunset) (AB)*, paras. 271-285 & 286-294; *US – OCTG from Mexico (Sunset) (AB)*, paras. 167-173.
[58] *US – Carbon Steel (AB)*, paras. 58-92; *see also US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 123-127; *US – OCTG from Argentina (AB)*, paras. 301-303; *US – OCTG from Mexico (AB)*, paras. 148-153.
[59] *US – Carbon Steel (AB)*, para. 87; *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.
[60] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

In other words, the Appellate Body has consistently rejected claims that the specific requirements governing original investigations under the Agreements must be transposed into the sunset context.[61]

62. In addition, when arguing that *EU – Footwear (China)* stands for the proposition that a sunset review determination is necessarily "tainted" by a WTO-inconsistent original injury investigation, India ignores the fact that there are important analytical and factual differences between the injury investigations and sunset reviews involved in this dispute.[62] Specifically, the Commission's determination in the hot-rolled steel sunset reviews was based on a very different set of imports involving a forward-looking, counterfactual assessment of such imports than the original injury determinations.[63] In short, as the United States explained in response to Panel questions, the original investigation and sunset review were distinct processes with different purposes.[64]

63. Therefore, India has no basis for either an "as such" or "as applied" challenge to the U.S. measures governing cumulation in the context of sunset reviews.

C. <u>India's Claims About Negligibility Have No Basis in the Text of The Agreement</u>

64. Finally, India also mistakenly claims that the aggregated or multiple country "negligibility" analysis permitted by the U.S. statute for subsidies investigations is inconsistent with Article 15.3 because it requires the Commission to perform this analysis on an individual

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[61] *US – Carbon Steel (AB)*, paras. 58-92.
[62] India First Written Submission, para. 142; India Responses to Panel's Question 34.
[63] ITC Sunset Determinations, pp. 10-20 and 20-42 (Exhibit USA-10); ITC Injury Determinations, at pp. 3-26 (Exhibit IND-9).
[64] *US – Carbon Steel (AB)*, para. 87; *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.

and aggregated country basis.[65] India's claims are entirely unfounded. Neither Article 15.3 nor Article 11.9 of the SCM Agreement specifically defines the term "negligibility", which means that the SCM Agreement simply does not define the term in the restricted manner proposed by India. Moreover, the AD Agreement includes the same allegedly country-specific language that is in Article 15.3 of the SCM Agreement on which India relies to make its argument, but goes on to set parameters for "negligibility" findings that explicitly contemplate the same aggregated analysis set forth in the U.S. statute.

65. Given that there is no level of negligibility specified in the SCM Agreement, the U.S. statute's negligibility test is not inconsistent, as such, with the provisions of Article 15.3. Moreover, the fact that the U.S. statute contains the same negligibility test for subsidies investigations as contained for dumping investigations in the AD Agreement demonstrates that it contains a rigorous examination consistent with what Members intended.

VIII. Financial Contribution

66. Regarding the question of whether or not SDF loans are a "direct transfer" of funds under Article 1.1(a)(1) of the SCM Agreement, India argues that the United States has "conflated two different sets of arguments raised by India."[66] By way of clarification, India states that it is arguing that the SDF loans are neither "direct," nor even a "transfer" of funds under the SCM Agreement, because the funds do not move "directly" from the SDF Managing Committee and

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[65] India First Written Submission, paras. 121-127.
[66] India Second Written Submission, para. 245.

because the SDF Managing Committee does not hold title to the funds such that it can "transfer" that title.

67. These arguments are misplaced. A loan made to an entity by a public body is a "direct transfer." Article 1.1(a)(1) itself includes "loans" in its illustrative list of direct transfers. In any event, India does not argue that the SDF loans are not loans. Rather, India's arguments relate to which entity *made* the loan, and whether or not that entity was a public body. Therefore, the whole of India's arguments in paragraphs 245 to 253 of its second written submission seems to miss even India's own point.

68. The record shows that India created the SDF, and also created the JPC to manage this fund. In addition, the record shows that the SDF Managing Committee is a committee comprised exclusively of four government officials: 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. These government officials made all the decisions regarding whether a given company would receive a loan and under what terms. They also made all final decisions on loan waivers. In fact, India concedes that the SDF Managing Committee exercises "regulatory authority,"[67] and had a "supervisory role over the JPC."[68]

69. Thus, while the JPC handled much of the day-to-day operations of the SDF fund, Commerce's findings in the investigation were not limited to any specific actions taken by the JPC, as divorced from the operations of the larger program. Rather, the facts demonstrate, and

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[67] India First Written Submission, para. 437.
[68] India First Written Submission, para. 435.

Commerce found, that the SDF Managing Committee controlled the distribution of loans, and was therefore responsible for making the loans available to recipient companies.

IX. U.S. Measures Regarding the Use of Facts Available

70. India claims in its second written submission that the United States "provides almost no substantive defense to India' (sic) claims" against the U.S. facts available provisions set out in paragraph 172 of its first written submission,[69] and that we instead use the discretionary nature of the provisions as a "safe harbor".[70] India's claims are patently wrong, as the United States has demonstrated repeatedly throughout its submissions.

71. First, we find it interesting that India wishes to refer back to the specific arguments listed in paragraph 172 of India's first written submission. Two of the three arguments listed there reflect the panel's interpretation of Annex II to the AD Agreement in *Mexico – Rice*. Specifically, the panel found that the term "best information" in the title to Annex II meant "the most fitting or appropriate information available", and explained that this information can be found after engaging in an "evaluative, comparative assessment" of the available facts. The United States of course was the complaining party in *Mexico – Rice*, and agrees with the importance of Annex II, both directly under the AD Agreement and as context for the comparable facts available provision in the SCM Agreement.

72. India argues in its most recent submission, however, that Annex II should not even apply in the context of the SCM Agreement. India now believes the non-inclusion of a similar Annex

[69] India Second Written Submission, para. 121.
[70] India Second Written Submission, para. 112.

in the SCM Agreement should be "crucially noted", "given significant weightage", and seen as "definitive intent to ensure that the detailed stipulations in Annex II from the AD Agreement are not directly or indirectly brought into the SCM Agreement".

73. In addition to being incorrect, India's argument – if accepted – would mean that the entire legal premise of India's own facts available argument would disappear. India apparently takes this new position because it has realized that the U.S. facts available regulation is fully consistent with Paragraph 7 of Annex II. To recall, Paragraph 7 states that a party's failure to cooperate in an investigation "could lead to a result which is less favourable" to the non-cooperating party. However, if – as India now argues – one actually were to ignore the context provided by Annex II of the AD Agreement, then Article 12.7 of the SCM Agreement – standing alone and without context – provides no basis for India's facts available claim. Rather, on its face, Article 12.7 states that determinations "may be made on the basis of facts available", and provides no explicit limitations. It is the context of Annex II which provides the basis for a breach. In short, India cannot rely on other elements of Annex II for context, while saying at the same time that paragraph 7 of Annex II – which explicitly notes consequences for non-cooperation – should be ignored.

74. In any event, the United States agrees with other Members and the Appellate Body that Annex II of the AD Agreement is important context for interpreting Article 12.7 of the SCM Agreement. As we explained in our opening statement at the first panel meeting, the term "best" facts available – as used in the title of Annex II – refers to the facts that would be derived by an

authority in its application of the protections contained in Annex II to the AD Agreement.[71] Those provisions require an authority to take into account all information submitted that is verifiable and timely, and that can be used in the investigation without undue difficulty. It also prevents an authority from disregarding information that "may not be ideal in all respects", "provided the interested party has acted to the best of its ability".[72] Therefore, the most appropriate facts available for an authority to apply in the absence of the specific facts needed are those facts otherwise available which are most probative, relevant and verifiable. The U.S. measures fully reflect these provisions.

75. Second, with respect to the third of the three bullet points in paragraph 172 of India's first written submission, the United States has consistently disputed India's assertion that the U.S. measures allow the punitive application of facts available. Throughout its submissions, India makes broad, vague claims that Commerce applies the "worst possible inference"[73], and that the U.S. measures "punish non-cooperation"[74], but India fails to demonstrate a factual basis for this assertion.

76. As an example of this, India often refers to examples of application in which Commerce chose the highest subsidy rate found for another cooperating company from the same country, using the same program. The highest rate for a *cooperating* company is far from "the worst possible inference," and far from "punitive." Rather, in those instances, Commerce used a verifiable fact otherwise available – an actual subsidy rate – that reflected circumstances as

[71] *Mexico – Rice (Panel)*, para. 7.166.
[72] AD Agreement, Annex II, para. 5.
[73] India Second Written Submission, para. 103.
[74] India Second Written Submission, para. 104.

similar as possible to those of the non-cooperating company. Rather than being the result of the "worst possible inference," these instances of application represent a reasonable estimation of what the actual subsidy rate of the non-cooperating company might have been, based on the verifiable facts on the record.

77. In reality, however, the non-cooperating party might have benefitted from the subsidy program to a *greater* extent than the parties that chose to cooperate and provide the requested information. By basing its determination upon verifiable facts, Commerce limits the extent of the inference it draws in making determinations based on facts available. Therefore, far from drawing the "worst possible inference", Commerce often may put the non-cooperating party in a *better* position than it would have been in had the party cooperated.

X. 2013 Sunset Review

78. India complains in its second written submission that the United States "offers no substantive response to the findings under challenge from the 2013 sunset review determination". India has no basis for this complaint. The reason that the United States has not provided specific arguments in response to this claim is that India has not raised a single argument as to which findings the Panel should make, has not explained what evidence should be examined, nor described how the WTO Agreement applies. Rather, India simply states: "for substantially the same reasons as enunciated above, the entire set of findings in the 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement". India's claims with respect to the 2013 sunset review are "as applied" claims, which must be demonstrated on the facts. India has raised no arguments, much less informed the Panel and the United States of the

findings it wishes to challenge. India has failed to even submit the measure to which it refers to the Panel as an exhibit.

79. In *EC – Fasteners (China)*, the Appellate Body made clear that:

> "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel. While the DSU, and Article 11 in particular, require a panel to make an objective assessment of the matters that are before it, the panel must turn its attention to and direct its questions at claims and arguments that the parties have articulated."[75]

That is, the party itself must articulate its claims and arguments and cannot simply raise claims for the Panel to substantiate on its own initiative. As the Appellate Body in *EC – Fasteners (China)* stated: "where a complainant has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, a panel may not use its interrogative powers to make good the absence of relevant substantiating arguments and evidence." In any event, the Working Procedures require that "[e]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting".

80. In these circumstances, India has provided no *prima facie* case for the United States to rebut, and India's claims with respect to the 2013 Sunset Review must fail.

XI. Conclusion

81. Mr. Chairman and members of the Panel, this concludes the opening statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.

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[75] *EC – Fasteners (China) (AB)*, para. 522.