

***UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN HOT-  
ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA  
(DS437)***

**FIRST WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**May 3, 2013**



I.	INTRODUCTION .....	1
II.	Preliminary Ruling Requests .....	1
A.	Requirements of the DSU .....	1
1.	General Requirements .....	1
2.	Inclusion of a Brief Summary of the Legal Basis of the Complaint .....	2
3.	Procedural Fairness Considerations.....	3
4.	Examination on the Face of the Panel Request .....	3
B.	India’s Claims Under Article 11 of the SCM Agreement.....	3
C.	India’s Claims with Respect to the 2013 Sunset Review.....	6
III.	The U.S. Regulation for Determining the Benefit When Goods Are Provided by a Government for Less Than Adequate Remuneration Is Consistent with Article 14(d) of the SCM Agreement.....	7
A.	The U.S. Regulation for Determining the Benefit When Goods or Services Are Provided by a Government for Less Than Adequate Remuneration (19 C.F.R. § 351.511(a)) .	7
B.	The Article 14(d) Guidelines for the Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient .....	10
C.	The U.S. Regulation is Not Inconsistent with the First Sentence of Article 14(d) .....	12
D.	The U.S. Regulation is Not Inconsistent with the Second Sentence of Article 14(d)....	14
1.	Section 351.511(a)(2)(i)-(iii) of the U.S. Regulation Makes Determinations In Relation to Prevailing Market Conditions Rather than “Commercial Considerations” .....	14
2.	The Hierarchy of Section 351.511(a)(2)(i)-(iii) Emphasizes “Prevailing Market Conditions” and Only Resorts to an Assessment of “Market Principles” When Actual Market-Determined Prices or World Market Prices are Unavailable .....	16
E.	Article 14 Does Not Require the Application of a Specific Benchmark .....	17
F.	The U.S. Regulation Properly Uses Competitively Set Prices in the Benchmark.....	18
G.	Tier II of the U.S. Regulation – World Market Price – is Consistent with Article 14(d)	19
H.	Tier II of the U.S. Regulation Does Not Require the Countervailing of “Comparative Advantage” .....	20
IV.	Section 351.511(a)(2)(iv) Provides for Adjustments When Determining The Adequacy of Remuneration Consistent with Articles 14(d), 19.3, and 19.4 of the SCM Agreement .....	20
A.	The U.S. Regulation for the Use of Delivered Prices (19 C.F.R. § 351.511(a)(2)(iv)) .	21
B.	The U.S. Regulation for the Use of Delivered Prices is Not Inconsistent with Article 14(d) of the SCM Agreement .....	21
C.	The U.S. Regulation for the Use of Delivered Prices is Not Inconsistent with Article 19.3 and 19.4 of the SCM Agreement .....	22
V.	The Cumulation Provisions of the U.S. Statute Are Not Inconsistent, As Such, With Article 15 of the SCM Agreement .....	23

A.	The U.S. Statute Governing Cumulation of Subsidized and Dumped Imports In Original Investigations Is Not Inconsistent, As Such, With Article 15 of the SCM Agreement.....	23
B.	BACKGROUND.....	24
1.	The U.S. Statute’s Provisions Governing Cumulation in Original Investigations .....	24
2.	The Provisions of the U.S. Statute Governing Cumulation in Sunset Reviews .....	25
C.	STATEMENT OF FACTS .....	27
1.	The Commission’s Preliminary Determinations .....	27
2.	The Commission’s Final Phase Determinations.....	28
3.	The Commission’s Sunset Reviews of the Hot-Rolled Steel Orders .....	31
4.	India Misreads Article 15.3 and Fails to Place the Text of the Article Within the Appropriate Context.....	33
5.	India’s Other Textual Arguments Are Flawed.....	39
6.	Conclusion .....	41
D.	The U.S. Statute Permitting Cumulation of Subsidized and Dumped Imports In Sunset Reviews Is Also Not Inconsistent, As Such, With Article 15 of the SCM Agreement .....	41
1.	The Cumulation Requirements of Article 15.3 Are Not Applicable in the Sunset Review Context, as India Claims.....	41
2.	Even If Article 15.3 Were Applicable in the Sunset Context, India’s As Such Challenge Fails Because the U.S. Statute Does Not Mandate Cumulation of Dumped and Subsidized Imports in Sunset Reviews .....	44
3.	Conclusion .....	45
VI.	The Commission’s Cumulation Determinations in the Hot-Rolled Steel Investigations and Sunset Reviews Are Not Inconsistent, As Applied, With Article 15 of the SCM Agreement.....	45
A.	The Commission’s Decision to Cumulate The Dumped and Subsidized Imports In Its Original Injury and Sunset Determinations Was Not Inconsistent, as Applied, with Article 15 of the SCM Agreement .....	45
B.	The Commission Properly Evaluated The Relevant Factors Bearing on the State of the Industry, as Required by Article 15.4 of the Agreement .....	47
VII.	THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT “AS SUCH” WITH ARTICLE 12.7 OF THE SCM AGREEMENT .....	50
A.	Neither the U.S. Statute Nor Commerce’s Regulation Requires WTO Inconsistent Action With Respect to the Use of Facts Available .....	50
B.	The U.S. Measures Regarding Facts Available are Not Inconsistent with Article 12.7 of the SCM Agreement .....	53
1.	Overview of US Laws .....	54
2.	The U.S. Measures are Consistent with Article 12.7 of the SCM Agreement .....	55
C.	India has not presented a “rule or norm” of “general and prospective application” that is inconsistent with Article 12.7 .....	60

1.	A Claim Based on Commerce’s “Approach” to Facts Available Is Not Within the Panel’s Terms of Reference .....	61
2.	India Has Not Identified a “Measure” That May Be Challenged “As Such” .....	61
3.	India Has Not Demonstrated That Commerce’s Approach to Facts Available is Inconsistent With Article 12.7 of the SCM Agreement.....	63
VIII.	COMMERCE’S APPLICATION OF FACTS AVAILABLE WAS CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT .....	65
A.	Commerce’s Use of “Adverse Inferences” In Selecting From Among the Available Facts To Determine the Amount of the Benefit Was Fully Consistent With the SCM Agreement.....	65
B.	Commerce’s Facts Available Determinations in the 2008 Administrative Review Are Fully Consistent with Article 12.7 of the SCM Agreement .....	69
1.	2008 Administrative Review – Factual Background.....	69
C.	Commerce’s Facts Available Determinations in the 2006 Administrative Review Are Fully Consistent With Article 12.7 .....	77
1.	2006 Administrative Review – Factual Background.....	77
D.	Commerce’s 2013 Sunset Review Determination On Hot-Rolled Steel Products Is Not Within the Panel’s Terms of Reference .....	82
IX.	COMMERCE ACTED CONSISTENTLY WITH ARTICLES 1.1, 1.2, 2 AND 14 WITH RESPECT TO THE PROVISION OF HIGH GRADE IRON ORE BY NMDC.....	85
A.	India Has Not Demonstrated That Commerce Acted Inconsistently With Article 1.1(a)(1) of the SCM Agreement .....	85
1.	India’s Public Body Claims are Founded on an Erroneous Interpretation of the SCM Agreement and Therefore Must be Rejected .....	85
2.	India has Failed to Demonstrate that Commerce’s Finding with Respect to NMDC was Inconsistent with Article 1.1(a)(1) of the SCM Agreement .....	109
3.	In the Alternative, the Record Evidence was Sufficient to Demonstrate that NMDC was Exercising or Vested with Governmental Authority .....	109
B.	Commerce’s Specificity Determination Concerning the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Is Not Inconsistent with Articles 1 and 2 of the SCM Agreement, and Is Substantiated on the Basis Of Positive Evidence .....	112
1.	The Proper Interpretation of Article 2.1 and 2.4 of the SCM Agreement .....	113
2.	Article 2.1(c) of the SCM Agreement Does Not Require an Investigating Authority or Panel to Follow India’s Proposed Order of Analyzing De Facto Specificity .....	115
3.	Article 2.1(c) of the SCM Agreement Does Not Bar a De Facto Specificity Finding Simply Because the “Inherent Characteristics” of a Product Provided for LTAR Result in the Product Being Used by Only Certain Enterprises.....	118
4.	Commerce Determined that the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Was De Facto Specific to a Limited Number of Certain Enterprises That Used Iron Ore.....	120

5.	Commerce’s Determination that the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Was De Facto Specific to Certain Enterprises That Used Iron Ore Is Supported by Positive Evidence and Is Not Inconsistent with Article 2.4 of the SCM Agreement.....	121
6.	The United States Was Not Required to Address Explicitly the Diversification of India’s Economy or the Length of Time That High-Grade Iron Ore Was Sold for LTAR.	121
C.	Commerce’s Determinations that the NMDC’s Sales of High Grade Iron Ore Conferred a Benefit Are Not Inconsistent With Article 14(d) of the SCM Agreement .....	124
1.	The Iron Ore Benchmarks Used By Commerce By Review .....	125
2.	Commerce was not required by Article 14(d) of the SCM Agreement to determine whether NMDC prices adequately remunerated the NMDC.....	127
3.	Commerce Did Not Fail To Consider Relevant Indian Domestic Price Information	128
4.	In The 2006 Administrative Review, Commerce Properly Declined To Use The Indian Market Price For DR-CLO Lump Iron Ore For Essar and JSW Because Do So Would Have Resulted In The Unauthorized Disclosure Of Confidential Information Pursuant To Article 12.4 Of The SCM Agreement .....	129
5.	Commerce’s Use of World Market Prices, Including Freight, Import Duties and Delivery Charges, As Benchmarks For Determining the Benefit For LTAR Sales of Iron Ore Is Consistent With Article 14(d) of the SCM Agreement.....	130
6.	Commerce Properly Relied on World Market Prices in the Absence of Domestic Prices and Properly Made No Adjustment for an Alleged Effect on Comparative Advantage That Was Not Supported By Any Record Evidence.....	132
7.	Commerce Properly Included All Charges for Delivering the Iron Ore to the Steel Mills in the Prices Being Compared .....	133
8.	Commerce Properly Excluded the <i>Tex Report</i> NMDC Prices to Japan From the Iron Ore Benchmark .....	135
9.	The United States Has Performed Its Obligations In Good Faith .....	136
10.	Conclusion .....	137
X.	Commerce’s Determinations That the Provision of Captive Mining Rights for Iron Ore and Coal Constitutes a Financial Contributions, are Specific to Certain Enterprises, And Provide Benefits To The Recipients Are Not Inconsistent with Articles 12.5, 1.1, 1.2, 2, and 14 of the SCM Agreement .....	137
A.	Commerce Properly Determined That the GOI Provided Captive Mining Rights for Iron Ore Based on Information on the Record .....	138
B.	Commerce’s Determination That the Granting of Mineral Rights to Iron Ore and Coal was a Good Provided for Less Than Adequate Remuneration Is not Inconsistent with Article 1.1(a)(iii) of the SCM Agreement.....	140
1.	Iron Ore and Coal Deposits are “Goods” within the Meaning of Article 1.1(a)(1)(iii)	140

2.	Captive Mining Leases “Provide” Iron Ore and Coal .....	141
C.	Commerce’s Determinations that The GOI Provided Captive Mining Rights for Iron Ore and Coal to Certain Enterprises Were not Inconsistent with Article 2 of the SCM Agreement.....	144
1.	Article 2 of the SCM Agreement.....	145
2.	India Has A “Captive” Iron Ore Mining Program Which Is De Facto Specific To A Limited Group Of Industries.....	146
3.	Commerce’s Determinations That The GOI’s Provision Of Coal Through The Granting Of Captive Mining Rights Was De Jure Specific Is Not Inconsistent With Article 2 Of The SCM Agreement.....	147
D.	Commerce’s Determinations that The GOI Provided Mining Rights For Iron Ore and Coal at Less Than Adequate Remuneration Are Consistent With Article 14(d) of the SCM Agreement.....	148
1.	Commerce’s Benefit Calculations for Captive Mining Rights.....	149
2.	Commerce Properly Calculated Benefit with respect to the Recipients.....	149
3.	India’s Other Claims are Misplaced .....	150
E.	Conclusion.....	151
XI.	THE UNITED STATES COMPLIED WITH ARTICLES 1, 14, AND 22 OF THE SCM AGREEMENT WITH REGARD TO ITS FINDINGS RELATING TO THE SDF PROGRAM IN THE CHALLENGED DETERMINATIONS .....	152
A.	Commerce’s Finding was Consistent with a Proper Interpretation of “Public Body” under Article 1.1(a)(1) of the SCM Agreement.....	152
1.	The SDF Managing Committee is a Public Body Controlled by the GOI .....	153
B.	Commerce’s Finding was Consistent with the Interpretation of “Public Body” Set Out by the Appellate Body .....	154
1.	The SDF Managing Committee and the JPC Performed Government Functions When They Levied and Redistributed Funds To Implement GOI Policies in the Steel Sector ....	154
2.	The GOI Exercised Meaningful Control Over the SDF Managing Committee .....	156
C.	The SDF Loans Constituted “A Direct Transfer of Funds” Within the Meaning of Article 1.1(a)(1)(i).....	158
1.	Commerce Was Not Required to Determine Whether the GOI “Entrusts or Directs” the SDF Managing Committee to Make Financial Contributions Because the SDF Managing Committee Is Not a Private Body .....	160
D.	Commerce’s Benefit Calculations In the Challenged Proceedings Were In Accordance With Article 14(b) of the SCM Agreement .....	161
1.	Article 14(b) of the SCM Agreement .....	161
2.	The Reserve Bank of India’s Published Prime Lending Rate Was A “Comparable” Lending Rate Within the Meaning of Article 14(b) of the SCM Agreement .....	163

3.	Commerce Properly Declined to Provide Credits For Alleged Expenses When Calculating Benefit .....	166
XII.	THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 AND 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDY ALLEGATIONS EXAMINED IN ADMINISTRATIVE REVIEWS.....	168
A.	Terms of Reference .....	168
B.	Background .....	169
C.	India’s Claims Related to Articles 11, 13, 21 and 22 of the SCM Agreement are based on an Erroneous Interpretation of the SCM Agreement .....	170
1.	The Text of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 Demonstrates That These Provisions are Limited in Application to the Original Investigation.....	172
2.	The Interpretation that Articles 11, 13 and 22 of the SCM Agreement Apply Only to an Original “Investigation” is Consistent with the Findings of Panels and the Appellate Body	173
D.	Commerce’s Determination to Examine Additional Subsidies During Administrative Reviews Was Not Inconsistent with Articles 21.1 and 21.2 of the SCM Agreement .....	175
XIII.	Commerce’s Determinations Were Not Inconsistent with Article 22.5 of the SCM Agreement.....	176
A.	In Relation to the SDF Programs .....	177
B.	In Relation to the Provision of High Grade Iron Ore by the NMDC .....	178
C.	In Relation to Captive Mining Rights for Iron Ore and Coal.....	178
XIV.	CONCLUSION .....	178

## TABLE OF REPORTS

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<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
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<i>US – Zeroing II (EC) (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Zeroing (Japan) (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

**TABLE OF EXHIBITS**

<b>Exhibit No.: USA-</b>	<b>Description</b>
1	<i>Uruguay Round Agreement Act – Statement of Administrative Action: Agreement on Subsidies and Countervailing Measures</i> , H.R. Rep. 103-316 (1994)
2	<i>Countervailing Duties (Final Rule)</i> , 63 F.R. 65348 (November 25, 1998)
3	19 C.F.R. § 351.511
4	<i>Issues &amp; Decision Memorandum for 2008 Administrative Review</i> (July 19, 2010)
5	19 U.S.C. § 1677(7)(G)
6	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)
7	Certain Hollow Structural Sections Exported from the People's Republic of China, the republic of Korea, Malaysia, Taiwan, and the Kingdom of Thailand, Report to the Minister No.177 (Australian Customs and Border Protection Service, June 7, 2012)
8	19 U.S.C. § 1677(24)
9	19 U.S.C. §1675a
10	Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Final), USITC Pub. 3956 at 10-11 (October 2007)
11	19 USC §1675b
12	19 U.S.C. § 1677e
13	19 C.F.R. § 351.308
14	<i>Antidumping Duties; Countervailing Duties; Final Rule</i> , 62 Fed. Reg. 27296 (May 19, 1997)
15	<i>Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia</i> , 64 Fed. Reg. 73155 (Dec. 29, 1999)
16	<i>Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy</i> , 67 Fed. Reg. 3163 (Jan. 23, 2002)
17	<i>Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy</i> , 67 Fed. Reg. 3163; <i>Issues &amp; Decision Memorandum</i> (Jan. 23, 2002)
18	<i>Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran</i> , 70 Fed. Reg. 54027 (Sep. 13, 2005)
19	<i>Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran</i> , 70 Fed. Reg. 54027; <i>Issues &amp; Decision Memorandum</i> (Sep. 13, 2005)
20	<i>Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies</i> ,

	<i>Draft Anti-Dumping Code, TN.64NTB/W/16 (3 March 1967)</i>
21	<i>Anti-Dumping Code, L/2812 (12 July 1967)</i>
22	<i>Kennedy Round Anti-Dumping: Canada Comments (21 Feb 1967)</i>
23	<i>Tokyo Round Subsidies Code</i>
24	<i>Tokyo Round Subsidies Code: Canada Comments</i>
25	<i>Memorandum to the File, “Phone Conversation with Counsel for Tata Steel Limited” (April 23, 2009)</i>
26	<i>Results of Redetermination Pursuant to Court Remand in Essar Steel Limited v. United States (Jan. 10, 2013)</i>
27	<i>Essar Steel Limited v. United States, Slip Op. 13-48 (Apr. 9, 2013)</i>
28	<i>Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 74 Fed. Reg. 5821 (Feb. 2, 2009)</i>
29	<i>Certain Hot-Rolled Carbon Steel Products from India: Partial Rescission of Countervailing Duty Administrative Review, 74 Fed. Reg. 26847 (June 4, 2009)</i>
30	<i>February 25, 2009 Letter from Tata Steel Limited to Commerce (Feb. 25, 2009)</i>
31	<i>Memorandum to the File “Sales by Tata during the POR” (March 27, 2009)</i>
32	<i>GOI April 23, 2009 Response</i>
33	<i>Commerce July 30, 2009 Supplemental Questionnaire to the GOI</i>
34	<i>GOI August 10, 2009 Supplemental Questionnaire Response (2008 AR)</i>
35	<i>Commerce August 21, 2009 Supplemental Questionnaire to the GOI</i>
36	<i>GOI September 4, 2009 Response</i>
37	<i>Commerce September 10, 2009 Supplemental Questionnaire to the GOI</i>
38	<i>GOI September 24, 2009 Response</i>
39	<i>19 C.F.R. § 351.525</i>
40	<i>Memorandum to File from Gayle Longest (December 31, 2009)</i>
41	<i>19 C.F.R. § 351.102</i>
42	<i>Beker Indus. v. United States, 7 CIT 313, 315 (1984)</i>
43	<i>Hynix Semiconductor, Inc. v. United States 27 CIT 1469, 1471 (2003)</i>
44	<i>Neuweg Fertigung v. United States, 797 F. Supp. 1020, 1022 (CIT 1992)</i>
45	<i>19 U.S.C. § 1516a</i>
46	<i>Commerce’s February 6, 2009 Questionnaire</i>
47	<i>Initiation of Antidumping and Countervailing duty Administrative Reviews and Requests for Revocation in Part, 72 Fed. Reg. 5005 (Feb. 2, 2007)</i>
48	<i>Commerce’s February 2, 2007 Questionnaire, at 14, Section F</i>
49	<i>GOI Initial Questionnaire Response-2006 Administrative Review, at “P-Steel Development Fund (SDF) Loans,” (April 23, 2007)</i>
50	<i>The Report of the “Expert Group” on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore, p. 79, (“DANG Report”) (attached to 2006 New Subsidies Allegation (JSW))</i>
51	<i>Memorandum to the File from Kristen Johnson, November 14, 2007</i>
53	<i>November 8, 2007 GOI Response for JSW</i>
54	<i>November 14, 2007 Letter from Commerce to the GOI</i>
55	<i>November 28, 2007 Letter from Commerce to the GOI</i>

56	GOI's April 23, 2007 Submission
57	<i>Commerce's September 18, 2007 Supplemental Questionnaire</i>
58	<i>Commerce's November 1, 2007 Supplemental Questionnaire to JSW</i>
59	<i>Commerce's Memorandum "JSW Steel Limited New Subsidy Allegations" (September 27, 2007)</i>
61	<i>Commerce's September 27, 2007 New Subsidy Questionnaire to JSW</i>
62	<i>Commerce's November 8, 2007 Supplemental Questionnaire</i>
63	<i>Certain Hot-Rolled Carbon Steel Flat Products From India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine; Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders, 78 Fed. Reg. 15703 (Mar. 12, 2013)</i>
64	<i>The New Shorter Oxford English Dictionary (1993)</i>
65	<i>Oxford English Dictionary Online (2009)</i>
66	<i>2004 Verification Report of Government of India Responses (January 3, 2006)</i>
67	<i>India's May 5, 2008, Questionnaire Response (2007 AR)</i>
68	<i>India's September 2, 2005, Supplemental Questionnaire Response(2004 AR), New Subsidy Allegations</i>
69	<i>2004 New Subsidies Allegation, p. 4, Exhibit 7 (May 2, 2005)</i>
70	<i>Statement of Reasons Concerning the making of final determinations with respect to the dumping and subsidizing of Certain Aluminum Extrusions Originating In or Exported From the People's Republic of China, March 3, 2009, 4218-26 CV/124</i>
71	<i>National Mineral Policy, Report of the High Level Committee ("Hoda Report"), at 143 (attached to 2006 New Subsidies Allegation (Tata))</i>
72	<i>GOI 2006 Verification Report</i>
73	<i>Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany, 62 Fed. Reg. 54990, 54993 (October 22, 1997)</i>
74	<i>Investigation Verification Report of GOI Responses</i>
75	<i>Ministry of Steel Notification of 1978 (March 20, 2001)</i>
76	<i>19 C.F.R. § 351.505</i>
77	<i>Memorandum to the File re: India's Prime Lending Rate (2006 AR) (November 28, 2007)</i>
78	<i>First Review New Subsidies Allegation, (May 19, 2003)</i>
79	<i>Memorandum to the File re: 2006 New Subsidy Allegations Memorandums, (December 31, 2009)</i>
80	<i>First Review Initiation</i>
81	<i>2004 Initiation</i>
82	<i>2007 Initiation</i>
83	<i>19 U.S.C. § 1671a</i>
84	<i>19 U.S.C. § 1673a</i>
85	<i>19 U.S.C. § 1673b</i>

## **I. INTRODUCTION**

1. The *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) represents a balance between “disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies.”<sup>1</sup> Applying U.S. laws and regulations consistent with the SCM Agreement, the U.S. Department of Commerce (“Commerce”) determined that the Indian government, at both the central and state levels, provided a wide range of subsidies to Indian manufacturers of hot-rolled steel products. The U.S. International Trade Commission (“ITC”) further determined that those subsidies resulted in material injury to the industry of the United States.

2. India claims that these determinations, and in some cases, the laws and regulations on which they were based, are inconsistent with the SCM Agreement. The United States will demonstrate in this submission and over the course of the proceedings before the Panel that India is incorrect. The United States believes that India’s claims are without merit and that the Panel should find that the U.S. laws, regulations, and determinations that are properly within its terms of reference are not inconsistent with the covered agreements.

## **II. Preliminary Ruling Requests**

3. India raises claims in its First Written Submission that are outside the Panel’s terms of reference. Specifically, raises claims under Article 11 of the SCM Agreement, in sections XII.C.1 and 2 of its First Written Submission, which were not included in its panel request pursuant to Article 6.2 of the DSU and which failed to present the problem clearly, and which therefore also are outside the Panel’s terms of reference. India also raises claims, in Section XI.A.9 of its First Written Submission, regarding a Sunset Review determination issued by the Department of Commerce on March 14, 2013, long after the Panel was established. These claims are therefore outside the Panel’s terms of reference. Accordingly, for the reasons set out below, the United States respectfully requests that the Panel find that India’s claims in the aforementioned sections of its FWS are outside the Panel’s terms of reference. As noted below, the United States is respectfully requesting that the Panel make findings on these terms of reference issues as a preliminary matter, in keeping with paragraph 7 of the Working Procedures of the Panel.

### **A. Requirements of the DSU**

#### **1. General Requirements**

4. Article 6.2 of the DSU “serves a pivotal function in WTO dispute settlement.” It provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify

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<sup>1</sup> *US – Softwood Lumber IV (AB)*, para. 95.

the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....

5. The Appellate Body has found that fulfillment of the requirements of Article 6.2 “is not a mere formality.”<sup>2</sup> It must be met on the face of the panel request at the outset of the proceeding.<sup>3</sup> Compliance with Article 6.2 requires a case-by-case analysis, considering the request “as a whole, and in light of the attendant circumstances.”<sup>4</sup>

6. The Appellate Body has observed that Article 6.2 has “two distinct requirements,”<sup>5</sup> namely:

- a) identification of the specific measures at issue; and
- b) the provision of a brief summary of the legal basis of the complaint.<sup>6</sup>

7. These elements comprise the “matter referred to the DSB,” which is the basis for a panel’s terms of reference under Article 7.1 of the DSU.<sup>7</sup> “[I]f either of them is not properly identified, the matter would not be within the panel’s terms of reference.”<sup>8</sup>

8. The question of whether a claim falls within a panel’s terms of reference is a threshold issue, distinct from the merits of the claim. Therefore, “questions pertaining to the identification of the ‘measures at issue’ and the ‘claims’ relating to alleged violation of WTO obligations, set out in a panel request, should be analyzed separately.”<sup>9</sup>

## **2. Inclusion of a Brief Summary of the Legal Basis of the Complaint**

9. Regarding the second requirement, a brief summary of the legal basis “must be sufficient to present the problem clearly.”<sup>10</sup> Such a summary must “plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.”<sup>11</sup>

10. At a minimum, a brief summary of the legal basis “must be sufficient to present the problem clearly.”<sup>12</sup> Such a summary must “plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.”<sup>13</sup>

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<sup>2</sup> *Australia – Apples (AB)*, para. 416.

<sup>3</sup> *China – Raw Materials (AB)*, para. 230, quoting *EC – LCA (AB)*, para. 640.

<sup>4</sup> *US – Carbon Steel (AB)*, para. 127.

<sup>5</sup> *Australia – Apples (AB)*, para. 416. See also *China – Raw Materials (AB)*, para. 219; *EC – LCA (AB)*, para. 786; *US – Carbon Steel (AB)*, para. 125.

<sup>6</sup> *Australia – Apples (AB)*, para. 416.

<sup>7</sup> *Australia – Apples (AB)*, para. 416.

<sup>8</sup> *Australia – Apples (AB)*, para. 416.

<sup>9</sup> *EC – Customs Matters (AB)*, para. 131.

<sup>10</sup> *EC – Customs Matters (AB)*, para. 131.

<sup>11</sup> *US – OCTG from Argentina (AB)*, para. 162. See also *China – Raw Materials (AB)*, para. 220.

### 3. Procedural Fairness Considerations

11. Article 6.2 of the DSU serves a pivotal due process function for the responding party and possible third parties.<sup>14</sup> Without the safeguards of Article 6.2, the responding party may not be “made aware of the claims presented by the complaining party, sufficient to allow it to defend itself.”<sup>15</sup> Similarly, other Members may not be able to make an informed decision as to whether to become a third party. Moreover, those Members who are third parties may not be made aware of the claims presented sufficient for them to prepare their positions.

### 4. Examination on the Face of the Panel Request

12. The Appellate Body has stressed that “it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.”<sup>16</sup> Such an examination “must be objectively determined on the basis of the panel request as it existed at the time of filing” and be “demonstrated on the face” of the panel request.<sup>17</sup>

13. In other words, if a panel request fails to provide the basis on which “to determine with sufficient clarity what ‘problem’ or ‘problems’ were alleged to have been caused by which measures,” the claimant has “failed to present the legal basis for [the] complaint[] with sufficient clarity to comply with Article 6.2 of the DSU.”<sup>18</sup> As the Appellate Body recently made clear in *China – Raw Materials*, a deficient summary of the legal basis of the complaint means that a claim will not fall within a panel’s terms of reference.<sup>19</sup>

### B. India’s Claims Under Article 11 of the SCM Agreement

14. In its submission, India makes three claims pursuant to subparagraphs of Article 11 of the SCM Agreement. It claims that the United States breached:

(a) “Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies”<sup>20</sup>;

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<sup>12</sup> *US – OCTG from Argentina (AB)*, para. 162. See also *China – Raw Materials (AB)*, para. 220.

<sup>13</sup> *US – OCTG from Argentina (AB)*, para. 162. See also *China – Raw Materials (AB)*, para. 220.

<sup>14</sup> The Appellate Body has repeatedly found that the requirements of Article 6.2 “ensure due process by informing the respondent and third participants of the matter brought before a panel.” See, e.g., *US – Zeroing (Japan) (Article 21.5) (AB)*, para. 108; *US – Zeroing II (AB)*, para. 161; *US – Carbon Steel (AB)*, para. 126; *EC – Bananas III (AB)*, para. 142; *China – Raw Materials (AB)*, para. 219.

<sup>15</sup> *Thailand – H-Beams (AB)*, para. 95.

<sup>16</sup> *EC – Bananas III (AB)*, para. 142.

<sup>17</sup> *US – Carbon Steel (AB)*, para. 127.

<sup>18</sup> *China – Raw Materials (AB)*, para. 231.

<sup>19</sup> *Id.*, para 171; *Dominican Republic – Cigarettes (AB)*, para. 120.

<sup>20</sup> India First Written Submission, heading XII.C.1.

(b) “Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies”<sup>21</sup>; and

(c) “Article 11.1 by failing to ‘Initiate’ an investigation into the New Subsidies”<sup>22</sup>

15. By contrast, India’s panel request states, under the heading “In connection with other issues”, that the United States has acted inconsistently with:

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

16. The Appellate Body has observed that “the legal basis of the complaint” cannot be “summarily identified; the identification must ‘present the problem clearly.’”<sup>23</sup> Where a treaty article contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article in a panel request does not reveal which one, or more, of those obligations is at issue. The Appellate Body has also found that while “[a] party’s later submissions may be referenced where the meanings of the terms used in the panel request are not clear on their face... the content of these subsequent submissions ‘cannot have the effect of curing the failings of a deficient panel request’.”<sup>24</sup>

17. Article 11 of the ASCM, entitled “Initiation and Subsequent Investigation”, contains 11 subparagraphs, and numerous disparate obligations relating to everything from initiation to sufficiency of the evidence to customs clearance to duration of the investigation. In its panel request, India not only fails to identify the relevant subparagraph(s) to which its claim might refer, but includes a description of the claim which also fails to identify or reference, even by implication, a specific obligation within Article 11. That is, the description of the claim raised by India states that Article 11 was breached “*because no investigation was initiated or conducted*”, suggesting that the United States failed to initiate or conduct an investigation *at all* with respect to new subsidies programs. Article 11 governs the way in which an investigation must be initiated and performed. But Article 11 does not contain an obligation *that an investigation be initiated*.<sup>25</sup>

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<sup>21</sup> India First Written Submission, headin XII.C.2.

<sup>22</sup> India First Written Submission, headin XII.C.4.

<sup>23</sup> *Korea – Dairy Products (AB)*, para. 120.

<sup>24</sup> *EC – Fasteners (China)*, para. 562, quoting *EC LCA (AB)*, para. 642; *EC – Bananas III (AB)*, para. 143; and *US – Carbon Steel (AB)*, para. 127.

<sup>25</sup> To the extent that this obligation exists as an independent requirement, that requirement would be found in Article 10 of the ASCM, which states that “countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement”. India has not raised this claim, and has raised Article 10 of the ASCM in its panel request and FWS only as a consequential claim, and “[t]o the extent that the imposition of countervailing duties on the subject product by the United States is not in accordance with the SCM Agreement”. See India’s FWS, para. 640.

18. With respect to claims a and b, above, these claims are nowhere referenced in India’s panel request, nor does the panel request list the specific provisions cited in India’s FWS. Accordingly, these claims are outside the Panel’s terms of reference – India’s panel request failed to reference them or “present the problem clearly.”

19. As noted above, where a provision of a WTO Agreement contains multiple obligations, a Member’s panel request must make more than a “cursory reference” to the WTO provision at issue in order to satisfy its obligations under Article 6.2 of the DSU. In this case, as already discussed, Article 11 of the ASCM contains numerous obligations spread over 11 subparagraphs. Despite this fact, India’s panel request does not include any reference to a specific subparagraph, and contains only the description noted above that “no investigation was initiated or conducted to determine the effects of the new subsidies”.

20. In its submission, however, India has raised two specific claims under Articles 11.1-11.2 and Article 11.9 claiming the United States breached these provisions “by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies”.<sup>26</sup> The description included in India’s panel request was not only insufficient to clearly present the problem which India now raises in its FWS, the description in the panel request would affirmatively lead the reader to believe that the panel request does not include the additional claims raised in its FWS. That is, India’s panel request alleges that “no investigation was initiated or conducted”, whereas the additional claims raised allege that the United States erred “*by initiating investigation* into NMDC and TPS programs in 2004” despite an insufficient written application. The sufficiency of the evidence in an application is a distinct issue and claim than the issue of whether an investigation was initiated. The distinct nature of the sufficiency of the evidence in an application is demonstrated by the fact that it is the topic of a distinct provision of Article 11 from the provision cited by India as the basis for its claim concerning the failure to initiate an investigation.

21. Such a situation raises the due process concerns articulated repeatedly by the Appellate Body that without the safeguards of Article 6.2, the responding party may not be “made aware of the claims presented by the complaining party, sufficient to allow it to defend itself.”<sup>27</sup> Based on India’s panel request, the United States could not have anticipated that India would bring these two claims since they are not articulated in its panel request, much less which specific subparagraphs and obligations contained in Article 11 of the ASCM India would raise. Nor could other Members who were deciding whether to become third parties have read the panel request and understood this would be within the matter being referred to the panel. Similarly, the panel request did not present the problem clearly to third parties so they could begin to prepare their positions.

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<sup>26</sup> India FWS, heading XII.C.1. Heading XII.C.2 contains a consequential claim that is substantively identical, but uses slightly different language: “The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.”

<sup>27</sup> *Thailand – H-Beams (AB)*, para. 95. See also, e.g., *US – Zeroing (Japan) (Article 21.5) (AB)*, para. 108; *US – Zeroing II (AB)*, para. 161; *US – Carbon Steel (AB)*, para. 126; *EC – Bananas III (AB)*, para. 142; *China – Raw Materials (AB)*, para. 219.

22. Even for the claim raised by India in its FWS that most closely matches the language used in its panel request, claim c) above, the panel request failed to present the problem clearly. The panel request failed to identify which provision of Article 11 was at issue. And as discussed above, although the multiple paragraphs in Article 11 represent distinct obligations, none of them contains an obligation to initiate an investigation. Rather, Article 11.1 together with Article 11.6 limits the basis on which an investigation can be initiated. As a result, India failed to comply with the requirements of Article 6.2 of the DSU “to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”

23. Having failed to properly include them in its panel request, India’s additional claims under Articles 11.1-11.2 and Article 11.9, at sections XII.C.1 and XII.C.2 of India’s FWS, do not form part of the “matter referred to the DSB”, and therefore, they are outside the Panel’s terms of reference.

### C. India’s Claims with Respect to the 2013 Sunset Review

24. At section XI.A.9 of its FWS, India raises claims under Article 12.7 with respect to a “2013 sunset review determination”. We understand India to refer to Commerce’s final results in the most recent sunset review for Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, and Thailand. This sunset review was initiated on November 1, 2010, and the final results regarding continued subsidization were issued by Commerce on March 14, 2013.<sup>28</sup> The United States requests that the Panel find these claims to be outside its terms of reference because this sunset review determination was not included in India’s request for consultations or its request for the establishment of a panel. Indeed, this determination could not have been included in India’s consultation or panel requests because the determination to which we understand India refers – it is necessary to infer the determination since no specific reference to the finding or its publication was made by India – was issued on March 14, 2013, nearly a year after India requested consultations in this dispute, eight months after India submitted its request for the establishment of a panel, and one month after the composition of this Panel.

25. India may not expand the matter in this dispute beyond those measures upon which consultations were requested and held between the Parties. Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request “including identification of *the measures at issue* and an indication of the legal basis for the complaint” (emphasis added). If a panel is subsequently requested, the panel’s terms of reference are determined by the complaining party’s request for the establishment of a panel, which pursuant to Article 6.2 of the DSU, must “identify *the specific measures at issue*” (emphasis added).

26. The import of these requirements is that a measure which is not included in a panel request is outside the terms of reference of the panel, and a panel will not have the authority to make findings upon it. The Appellate Body reiterated this consequence recently, stating:

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<sup>28</sup> We also note that no determination has yet been made with respect to injury in this sunset review, and therefore the review has not been completed. This being the case, no countervailing duty is now “in force” pursuant to this determination.

It is well established that, where a panel request fails to identify a particular measure or fails to specify a particular claim, such a measure or claim will not form part of the matter covered by the panel's terms of reference. Moreover, as noted above, a complainant's submission during the panel proceedings cannot cure a defect in a panel request.<sup>29</sup>

27. India nowhere refers to the initiation of this sunset review in its request for consultations or establishment of a panel, despite the fact that this review was initiated before India submitted either request. Therefore, the final results of the 2013 sunset review fall outside the Panel's terms of reference.

### **III. The U.S. Regulation for Determining the Benefit When Goods Are Provided by a Government for Less Than Adequate Remuneration Is Consistent with Article 14(d) of the SCM Agreement**

28. India claims that the U.S. regulation for determining the benefit when goods or services are provided by a government for less than adequate remuneration – specifically, 19 C.F.R. § 351.511(a)(2)(i)–(iii) – is inconsistent “as such” with Article 14(d) of the SCM Agreement.<sup>30</sup> India raises six arguments as part of its “as such” claim. In general, India's position is based on the mistaken view that adequacy of remuneration is to be calculated with respect to the provider of the financial contribution, using a standard (“in accordance with commercial considerations”) other than that provided in Article 14(d) of the SCM Agreement (“in relation to prevailing market conditions”).

29. After discussing the U.S. regulation and the proper interpretation of Article 14(d), the United States will address each of India's six arguments, and explain why India's attempts to rely on a standard other than that contained by Article 14 should be rejected.

#### **A. The U.S. Regulation for Determining the Benefit When Goods or Services Are Provided by a Government for Less Than Adequate Remuneration (19 C.F.R. § 351.511(a))**

30. The U.S. regulation challenged by India, 19 C.F.R. § 351.511(a)(2)(i)–(iii), implements U.S. statutory provisions set out at 19 U.S.C. § 1677(5)(E). Passed as part of the Uruguay Round Agreement Act, 19 U.S.C. § 1677(5)(E) was drafted to make U.S. law consistent with Article 14 of the recently concluded SCM Agreement. In relevant part, 19 U.S.C. § 1677(5)(E) provides:

#### **(E) Benefit conferred**

<sup>29</sup> *EC – LCA (AB)*, para. 790; citing *Australia – Apples (AB)*, para. 416; *EC – Bananas III (AB)*, para. 143; and *US – Carbon Steel (AB)*, para. 127.

<sup>30</sup> India First Written Submission, paras. 15-85.

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including ...

(iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.<sup>31</sup>

31. This statutory language is taken nearly word-for-word from Article 14(d) of the SCM Agreement: in short, the statute requires that the U.S. Department of Commerce determine whether a financial contribution in the form of government provision of goods confers a benefit by determining whether the provision was made for less than adequate remuneration, as determined in relation to prevailing market conditions, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale.<sup>32</sup>

32. The U.S. regulations at Section 351.511 implement this statute. Section 351.511 provides, in relevant part, that where goods or services are provided by a government, a benefit is conferred on the recipient to the extent that such goods are provided for less than adequate remuneration. Section 351.511(a)(2) defines “adequate remuneration” and provides:

(2) “Adequate Remuneration” defined -

(i) *In general.* [Commerce] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price from actual transactions in the country in

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<sup>31</sup> 19 U.S.C. § 1677(5)(E) (Exhibit USA-4)

<sup>32</sup> In this regard, the United States recalls the Appellate Body’s statement that it would “expect that measures subject to ‘as such’ challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member’s international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations.” (*US – OCTG (AB)*, para. 173). That observation is particularly apt in this instance where the statute and the regulation at issue were both adopted to implement the results of the Uruguay Round, including Article 14 of the SCM Agreement. *See Uruguay Round Agreement Act – Statement of Administrative Action: Agreement on Subsidies and Countervailing Measures*, H.R. Rep. 103-316, at 927 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4240 (Exhibit USA-1): (“With respect to the provision of goods or services, current law relies on a standard of ‘preferentiality’ to determine the existence and amount of a benefit. Section 771(5)(E)(iv) [which became 19 U.S.C. § 1677(5)(E)] replaces this standard with the standards from Article 14 of the Subsidies Agreement – ‘less than adequate remuneration’ (in the case of the provision of goods or services) and ‘more than adequate remuneration’ (in the case of the procurement of goods.”); *see also Countervailing Duties (Final Rule)*, 63 F.R. 65348, 65377 (November 25, 1998) (Exhibit USA-2).

question. Such a price could include prices stemming from actual imports or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, [Commerce] will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.

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

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

(iv) *Use of delivered prices.* In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, [Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.<sup>33</sup>

33. The U.S. regulation establishes a “three tier” hierarchy in determining whether remuneration for government provision of goods is adequate. “Tier I” involves the comparison of the “government price to a market-determined price of actual transactions in the country in question.”<sup>34</sup> The first tier, therefore, employs a benchmark based on the market-determined price of actual transactions in the country of provision.<sup>35</sup> The regulation requires that the benchmark be “in relation to prevailing market conditions” by making the comparison on the basis of prices from actual transactions, in light of product similarity, quantities sold, and other factors affecting comparability.<sup>36</sup>

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<sup>33</sup> 19 C.F.R. § 351.511(a)(2) (Exhibit USA-3).

<sup>34</sup> 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

<sup>35</sup> The provision does not restrict the selection of a benchmark to a *private* price, and includes an example of a non-private price (a price based on a “competitively run government auction”) which could be used as a benchmark. (19 C.F.R. § 351.511(a)(2)(i)) (Exhibit USA-3).

<sup>36</sup> 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

34. “Tier II” of the regulatory hierarchy provides for situations in which there are no internal market-determined prices (*e.g.*, domestic sales, auctions, or imports) for the good in the country in question. The regulation provides that in the absence of any useable actual market-determined prices, Commerce may compare the government price to a “world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question.”<sup>37</sup> The use of a world market price reflects prevailing market conditions because world market prices are generally available in any country, particularly when the input at issue is a commodity product like iron ore or coal.

35. Finally, under “Tier III,” in situations where there are neither actual nor world market prices to use as benchmarks, the regulation provides that Commerce may analyze the government price by conducting an analysis of whether the government price is consistent with market principles.<sup>38</sup>

36. At Section 351.511(a)(2)(iv), the regulation addresses the adjustments appropriate to ensure that both the benchmark price and the government price reflect all of the costs associated with getting the input to the factory for use in production of the product in question. These adjustments ensure that the benchmark price and the government price are compared at the same point in the distribution chain and reflect the actual cost in the country in question to the producer of obtaining the input for use in production.<sup>39</sup>

**B. The Article 14(d) Guidelines for the Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient**

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

For the purpose of Part V, 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. Furthermore, any such method shall be consistent with the following guidelines:

\* \* \*

- (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market

<sup>37</sup> 19 C.F.R. § 351.511(a)(2)(ii) (Exhibit USA-3).

<sup>38</sup> 19 C.F.R. § 351.511(a)(2)(iii) (Exhibit USA-3).

<sup>39</sup> This section of the regulation is discussed in relation to India’s challenge in section IV.B, below.

conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

38. The *chapeau* of Article 14 refers to “any method” used by an investigating authority “to calculate the benefit to the recipient,” and describes the subparagraphs of Article 14 as “guidelines.” The Appellate Body has explained that “[t]he reference to ‘any’ method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”<sup>40</sup> Moreover, the Appellate Body has emphasized that the provisions of Article 14 are “guidelines,” and has stated that “the use of the term ‘guidelines’ in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as ‘rigid rules that purport to contemplate every conceivable factual circumstance’.”<sup>41</sup>

39. The guidelines in Article 14 are to be used in calculating the “benefit” conferred pursuant to Article 1.1 of the SCM Agreement. It is well-established that the term “benefit” as used in the SCM Agreement refers to an advantage or something that “makes the recipient ‘better off’ than it would otherwise have been, absent that [financial] contribution.”<sup>42</sup> The Appellate Body has explained that to determine whether a financial contribution makes a recipient “better off,” it is necessary to look to the market: “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 favourable than those available to the recipient in the market.”<sup>43</sup> In other words, a proper comparison to the market is central to a benefit analysis.

40. Concerning the “adequacy of remuneration” standard that applies to benefit calculations with respect to the government provision of goods, the Appellate Body has stated that “private prices” are the preferred benchmark:

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

<sup>40</sup> *US – Softwood Lumber IV (AB)*, para. 91.

<sup>41</sup> *US – Softwood Lumber IV (AB)*, para. 92.

<sup>42</sup> *Canada – Aircraft (AB)*, para. 157.

<sup>43</sup> *Canada – Aircraft (AB)*, para. 157.

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.”<sup>44</sup>

41. As noted, Article 14 requires that the method (or methods) used to calculate benefit be set out in law or regulation and be consistent with the guidelines set out in Article 14(a)-(d). In the context of an “as such” claim, India must demonstrate that Section 351.511(a)(2)(i)-(iii) of the U.S. regulations will *necessarily* be applied in a manner inconsistent with Article 14(d).<sup>45</sup> As demonstrated below, India has failed to do so.

### **C. The U.S. Regulation is Not Inconsistent with the First Sentence of Article 14(d)**

42. India argues that Section 351.511(a)(2)(i)-(iii) is inconsistent “as such” with the first sentence of Article 14(d). India’s argument is based on the premise that adequacy of remuneration is to be determined with respect to the *provider* of the financial contribution rather than the recipient.<sup>46</sup> As explained below, India’s interpretation is based on a flawed reading of the text, and has already been specifically considered and rejected by the Appellate Body. In contrast to India’s argument, Section 351.511(a)(2)(i)-(iii) is consistent with a proper interpretation of Article 14(d) because it establishes methodologies for determining the adequacy of remuneration in relation to the *recipient* of the financial contribution.

43. India offers two arguments as to why the first sentence of Article 14(d) should be read to require that adequacy of remuneration be determined with respect to the provider of the financial contribution. Both arguments are based on a misreading of the text.

44. First, India notes that Article 14(d) refers both to “benefit” and to “remuneration,” and argues that this means that – though the terms are “related” – they are “not intended to be the same.”<sup>47</sup> From this observation, India appears to conclude that “benefit” is intended to be determined with respect to the recipient, while “remuneration” is to be determined with respect to the provider.<sup>48</sup> The United States agrees that the terms “benefit” and “remuneration” are related, but not the same. The United States does not agree, however, that this leads to the conclusion that “benefit” and “remuneration” must be determined with respect to different entities. The text of Article 14(d) makes clear that when the financial contribution at issue is the provision or purchase of goods by a government, “benefit” is defined by the concept of “adequacy of remuneration.” It is not “circular,” as India states,<sup>49</sup> for Article 14(d) to define

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<sup>44</sup> *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).

<sup>45</sup> *US – OCTG (AB)*, para. 172 (“an ‘as such’ claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct – not only in a particular instance that has occurred, but in future situations as well – will *necessarily* be inconsistent with that Member’s WTO obligations.”) (emphasis added).

<sup>46</sup> India First Written Submission, paras. 21-32.

<sup>47</sup> India First Written Submission, para. 23.

<sup>48</sup> India First Written Submission, paras. 23-24.

<sup>49</sup> India First Written Submission, para. 23.

“benefit” in terms of adequacy of remuneration.<sup>50</sup> Since the terms can and should be interpreted as “related” – that is “adequate remuneration” as a guideline for the calculation of “benefit” – without being considered “the same,” the premise of India’s argument fails.

45. Second, India argues that because, in the first sentence of Article 14(d), the phrases “the provision of goods ... by a government” and “the provision is *made* for ... ” precede the phrase “adequate remuneration,” the adequacy of the remuneration is to be determined with respect to the provider.<sup>51</sup> India again misreads Article 14. The phrases referred to by India do not describe “remuneration.” Rather, the phrases set out the type of financial contribution – “the provision of goods or services or purchases of goods by a government” – to which the guidelines in paragraph (d) apply.<sup>52</sup> As the Appellate Body has stated, describing the type of financial contribution is necessarily done by reference to “the action of the granting authority.”<sup>53</sup> It does not, therefore, “naturally follow”<sup>54</sup> – as India argues – that because the agreement defines the type of financial contribution to which an adequacy of remuneration determination is to be made by reference to the action of a granting authority (*i.e.*, “the provision of goods made by a government”), that the adequacy of remuneration is likewise to be determined by reference to the provider, rather than the recipient, of the good.

46. To the contrary, India’s interpretation contravenes the text, particularly the title and *chapeau* of Article 14. The title of Article 14 states that the provision concerns “calculation of the amount of a subsidy *in terms of the benefit to the recipient.*”<sup>55</sup> As the *chapeau* to Article 14 makes clear, an investigating authority must provide for a methodology in law or regulation that allows it to calculate “the benefit to the recipient.” India, in contrast, argues for a methodology of calculating benefit based on “cost to government”<sup>56</sup> – a proposition already considered and rejected by the Appellate Body.<sup>57</sup>

47. Moreover, India’s interpretation of “less than adequate remuneration” as referring to the cost to the government or of providing the good in question would mean Article 14 has no language to describe how benefit to the recipient should be calculated. Such a result is clearly inconsistent with the title and *chapeau* of Article 14.

48. Finally, India’s interpretation is inconsistent with Article 1.1 of the SCM Agreement. India suggests that an investigating authority (or a panel) must consider “cost to government” as a criterion additional to financial contribution and benefit before finding the existence of a

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<sup>50</sup> See, *US – Softwood Lumber IV (AB)*, para. 84.

<sup>51</sup> India First Written Submission, paras. 24-25 (emphasis original).

<sup>52</sup> The four paragraphs of Article 14 all begin in a similar manner: Article 14(a) (“government provision of equity capital ... ”); Article 14(b) (“a loan by a government ... ”); Article 14(c) (“a loan guarantee by a government ... ”); Article 14(d) (“the provision of goods or services or purchases of goods by a government ... ”).

<sup>53</sup> *Canada – Aircraft (AB)*, para. 156.

<sup>54</sup> India First Written Submission, para. 25.

<sup>55</sup> SCM Agreement, Art. 14 (emphasis added).

<sup>56</sup> See, *e.g.*, India First Written Submission, para. 27.

<sup>57</sup> *Canada – Aircraft (AB)*, paras. 154-155.

subsidy.<sup>58</sup> In contrast, Article 1.1 states that “a subsidy shall be deemed to exist” where there is “a financial contribution by a government or any public body” and “a benefit is thereby conferred.”<sup>59</sup> There is not an additional “prong of the analysis”<sup>60</sup> focused on cost to government.<sup>61</sup>

49. In contrast to India’s interpretation, and as explained above, Section 351.511(a)(2)(i)-(ii) of the U.S. regulation calculates the benefit from the provision of goods by a government by determining adequacy of remuneration with respect to the recipient. The U.S. regulation is therefore not inconsistent with the first sentence of Article 14(d).

#### **D. The U.S. Regulation is Not Inconsistent with the Second Sentence of Article 14(d)**

50. India next argues, at Section II.B.2 of its submission, that the U.S. regulation is inconsistent with the second sentence of Article 14(d) because the determinations made under Tier I and Tier II of the U.S. regulation do not reflect “commercial considerations” or “market principles.”<sup>62</sup>

##### **1. Section 351.511(a)(2)(i)-(iii) of the U.S. Regulation Makes Determinations In Relation to Prevailing Market Conditions Rather than “Commercial Considerations”**

51. India argues that Section 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 relation to prevailing market conditions.”<sup>63</sup> India argues that “in relation to prevailing market conditions” actually means “in accordance with commercial considerations.”<sup>64</sup>

52. India, however, has no basis for this argument – in the text of the agreement, or otherwise. The second sentence of Article 14(d) states:

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<sup>58</sup> See, India First Written Submission, para. 26 (“while inadequacy of ‘remuneration to the provider of goods’ is a *condition sine qua non* to determine the existence of ‘benefit to the recipient’, the mere inadequacy of ‘remuneration to the provider of goods’ in itself is insufficient to prove that there is a ‘benefit to the recipient.’”).

<sup>59</sup> See also, *EC – LCA (AB)*, para. 708.

<sup>60</sup> India First Written Submission, para. 27.

<sup>61</sup> Additionally, it is instructive to compare India’s analytical structure for determining benefit at paragraphs 25-29 of its first written submission to the analysis of the Appellate Body in *EC – LCA (AB)*, para. 834. While the Appellate Body conducts that analysis under Article 14(b), rather than Article 14(d), the arguments India makes in favor of a “cost to government” standard would apply to Article 14(a)-(d) equally. Nowhere in the Appellate Body’s analysis under Article 14(b) does it suggest that a panel is to consider whether the cost to the government or public body of making a loan is more or less than the return it received on the loan. Rather, the Appellate Body states “[t]here is a benefit—and therefore a subsidy—where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market.”

<sup>62</sup> India First Written Submission, paras. 33-63.

<sup>63</sup> India First Written Submission, paras. 33-57.

<sup>64</sup> India First Written Submission, paras. 36-37.

The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Nothing in this text states or implies that “prevailing market conditions” means “in accordance with commercial considerations.”

53. Rather than basing its argument on the actual text of Article 14(d), however, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation are inconsistent with text taken from Article XVII:1(b) of the GATT 1994: “in accordance with commercial considerations.”<sup>65</sup> India’s argument with respect to Article XVII of the GATT 1994 turns on the observation that the inclusive list of factors an investigating authority is to consider as part of “prevailing market conditions” under Article 14(d) is the same as the inclusive list of factors relevant to a Member’s obligation to ensure its state trading enterprises (“STE”) make purchases or sales in accordance with “commercial considerations.”<sup>66</sup> India’s interpretation is incorrect and should be rejected.

54. The text of Article 14(d) establishes the guidelines an investigating authority must follow when calculating a subsidy in terms of benefit. The Appellate Body has cautioned against assuming that the *same terms* in different agreements be given the same meaning.<sup>67</sup> It cannot, therefore, be assumed that *different terms* in different agreements are to be given the same meaning simply because some of the factors relevant to both are the same. The Appellate Body has also cautioned panels and parties against reading words into the agreement that are not there.<sup>68</sup> India has nevertheless asked the Panel to do just that. In contrast to India’s interpretation, the correct interpretation of Article 14(d) will rely on the actual text contained in that article.

55. All terms to the treaty must be given meaning, and where separate terms are used, these different terms must be given different effect. Clearly, “prevailing market conditions” are not the same as “commercial considerations.” To suggest, as India does<sup>69</sup>, that the terms should be given the same meaning because the negotiators of the SCM Agreement included the same list of factors for Article 14(d) as for Article XVII:1(b) is implausible: had Members intended that benefit be calculated on the basis of “commercial considerations” they would have used that term (available since 1947). Instead, Members used a different term – “prevailing market conditions” – and that is the term that must be interpreted by the Panel.

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<sup>65</sup> See, e.g., India First Written Submission, para. 58 (“the evaluation as to whether a price is adequate in relation to the prevailing market conditions will involve a study as to whether the price in question is based on commercial considerations.”).

<sup>66</sup> India First Written Submission, paras. 36-37, 44. In both articles, the inclusive list of factors is “price, quality, availability, marketability, transportation, and other conditions of purchase or sale.”

<sup>67</sup> *EC – Asbestos (AB)*, para. 89.

<sup>68</sup> See, e.g., *India – Quantitative Restrictions (AB)*, para. 94 (“To interpret the sentence as proposed by India would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so.”). The Appellate Body has also stated that, where provisions have “different functions and contain different obligations,” the text cannot have the same meaning. (*China – Raw Materials (AB)*, para. 337).

<sup>69</sup> India First Written Submission, paras. 44-45.

56. The choice to use different terms was, of course, not accidental. Rather, reflecting that Part V of the SCM Agreement is focused on addressing the harm to domestic industry of competing against imports from firms receiving subsidies, Article 14 “sets forth guidelines for calculating the amount of a subsidy in terms of ‘benefit to the recipient,’” and accordingly the “focus” of a benefit inquiry “should be on the recipient and not on the granting authority.”<sup>70</sup> In contrast, Article XVII:1 imposes an obligation on Members to regulate the conduct of STEs so that they operate in a manner that is non-discriminatory and so that they make purchases and sales solely in accordance with commercial considerations.<sup>71</sup> Article XVII does not address subsidies or the calculation of subsidy benefits. Thus, while the inclusive list of factors in Article 14(d) of the SCM Agreement and Article XVII:1(b) is the same, the focus of the inquiry – the benefit received through a financial contribution as compared to the conduct of an STE – is necessarily different.

57. In contrast to India’s interpretation, Commerce applies the correct “prevailing market conditions” standard. As directed by statute, Commerce is to determine “adequacy of remuneration . . . in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.”<sup>72</sup> As it must be, the U.S. regulation is consistent with this statutory direction. Consistent with the list of prevailing market condition factors in Article 14(d), the U.S. regulation states that, in selecting the transactions for determining adequacy of remuneration, “the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.”<sup>73</sup> The U.S. regulation is therefore not inconsistent with the second sentence of Article 14(d).<sup>74</sup>

## **2. The Hierarchy of Section 351.511(a)(2)(i)-(iii) Emphasizes “Prevailing Market Conditions” and Only Resorts to an Assessment of “Market Principles” When Actual Market-Determined Prices or World Market Prices are Unavailable**

58. India also argues that a comparison of prices – even if in relation to prevailing market conditions – is inconsistent with Article 14(d) if not made on the basis of “market principles.”<sup>75</sup> In equating the term “market principles” with the term “prevailing market conditions,” India repeats the error of substituting language not included in Article 14(d) for the guidelines actually set out in that article.

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<sup>70</sup> *Canada – Aircraft (AB)*, paras. 154-155.

<sup>71</sup> *See, Korea – Beef (Panel)*, para. 757 (on the purpose of the inquiry under Article XVII(a) and (b)).

<sup>72</sup> 19 U.S.C. § 1677(5)(E) (Exhibit USA-4).

<sup>73</sup> 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

<sup>74</sup> At times, India mischaracterizes Commerce regulations as only amounting to a comparison of prices. (*See* India First Written Submission, para. 50). As explained above, while Commerce does compare prices, the text of the law and regulation makes plain that Commerce is required to do so in light of prevailing market conditions – including the factors listed in Article 14(d) – in order to ensure comparability of prices.”

<sup>75</sup> India First Written Submission, para. 59; *see, generally*, paras. 58-63.

59. India argues that the hierarchical approach of Section 351.511(a)(2)(i)-(iii), by reserving an analysis of whether the government price is based on “market principles” to Tier III, prevents an analysis of whether the government price is based on “market principles” if there is a first or second tier market price available.<sup>76</sup> “Market principles” is a term India takes from Tier III of the U.S. regulation.<sup>77</sup> While Tier III is consistent with Article 14(d), it is not treaty text: “market principles” is not the standard *all* methodologies for calculating benefit must meet. As discussed, the relevant guideline is “prevailing market conditions.”

60. The U.S. regulation, including each of the three tiers and the order of these tiers, is fully consistent with the guideline in Article 14(d) that the adequacy of remuneration is to be determined in relation to prevailing market conditions. Tier I (domestic market prices) and Tier II (world market prices) of the U.S. regulation are market-determined prices that relate to prevailing market conditions. Where domestic market or world market prices are available for use, the comparison of those benchmark prices to the government price is, as is required by Article 14(d), an analysis based on prevailing market conditions. In situations where there are neither useable actual nor world market, Commerce may then analyze the government price by conducting an analysis of whether the government price is consistent with market principles. The hierarchy of section 351.511(a)(2)(i)-(iii) is therefore consistent with the Article 14(d) guidelines.<sup>78</sup>

#### **E. Article 14 Does Not Require the Application of a Specific Benchmark**

61. India argues that Article 14(d) establishes an “affirmative sovereign right ... to provide goods for ‘adequate’ remuneration without products originating from its territory having to face the prospect of CVD measures.”<sup>79</sup> India misinterprets the text. Article 14 establishes procedural guidelines for Members’ investigating authorities to follow when calculating the amount of subsidy in terms of benefit. It can be said that Article 14 establishes that a Member’s products, when subject to a CVD investigation, will have the existence and amount of benefit analyzed using a methodology consistent with the parameters set out in Article 14. To the extent the methodology or methodologies employed by an investigating authority are consistent with Article 14, this obligation has been satisfied; there is no additional “affirmative sovereign right” set out in the agreement. As discussed above, Section 351.511(a)(2)(i)-(iii) of the U.S. regulations is consistent with Article 14(d).

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<sup>76</sup> India First Written Submission, paras. 61-62.

<sup>77</sup> See, 19 C.F.R. § 351.511(a)(2)(iii) (directing the Secretary to “measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.”) (Exhibit USA-3).

<sup>78</sup> See, *US – Softwood Lumber IV (AB)*, para. 90. As stated by the Appellate Body, Article 14(d) “emphasize[s] 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” since “private prices in the market of provision will generally represent an appropriate measure of the ‘adequacy of remuneration’ for the provision of goods.” The Appellate Body also noted that, where in-country private prices are distorted, an out-of-country benchmark may be used. (*US – Softwood Lumber IV (AB)*, para. 103).

<sup>79</sup> India First Written Submission, para. 66; see, generally, India First Written Submission, paras. 64-72.

62. India also appears to argue that an investigating authority must employ multiple methodologies for determining benefit for each financial contribution.<sup>80</sup> Article 14 contains no such requirement. The requirement in Article 14 is that “any ... method” used by an investigating authority must be consistent with the guidelines listed in Article 14. As the Appellate Body has stated, “[t]he reference to ‘any’ method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”<sup>81</sup> Since India has not demonstrated that either Tier I or Tier II are inconsistent “as such” with Article 14(d), there is no basis for concluding that the United States has an obligation to apply Tier III in every investigation.

#### **F. The U.S. Regulation Properly Uses Competitively Set Prices in the Benchmark**

63. India argues that Tier I and Tier II of the U.S. regulation, by excluding government prices from the benchmark in some circumstances, are inconsistent “as such” with Article 14(d).<sup>82</sup> India argues that this is because “price” is one of the factors to be considered as part of “prevailing market conditions,” and that this “price” refers to all prices, including government prices.<sup>83</sup> India has incorrectly interpreted Article 14(d).

64. India appears to argue that the price of the financial contribution at issue should be included in the benchmark price.<sup>84</sup> This is clearly incorrect. The term “benefit” requires a comparison of the financial contribution received by the recipient to what it would otherwise receive on the market.<sup>85</sup> As such, the financial contribution at issue must be excluded from the benchmark.

65. Moreover, it would also be incorrect to argue that the benchmark price must include government prices for transactions other than those connected to the financial contribution at issue. As discussed, Article 14(d) concerns adequacy of remuneration as a method for calculating benefit. As the Appellate Body has stated, “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 favourable than those available to the recipient in the market.”<sup>86</sup> In this context, the “marketplace” is “a sphere in which goods and services are exchanged between willing buyers and sellers” such that “the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of

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<sup>80</sup> India First Written Submission, para. 68 (“India submits that once a government price is ‘adequate’ within the meaning of Article 14(d) as per one method that is consistent with Article 14(d) of the SCM Agreement, the US cannot be permitted to conclude to the contrary simply because the price in question may be lower than the benchmark price.”).

<sup>81</sup> *US – Softwood Lumber IV (AB)*, para. 91 (emphasis original).

<sup>82</sup> India First Written Submission, paras. 73-76.

<sup>83</sup> India First Written Submission, para. 73.

<sup>84</sup> See, India First Written Submission, para. 75.

<sup>85</sup> *Canada – Aircraft (AB)*, para. 157.

<sup>86</sup> *Canada – Aircraft (AB)*, para. 157; see also, *US – LCA (AB)*, para. 690.

the supply and demand of both sellers and buyers in that market.”<sup>87</sup> It is for this reason that, under Article 14(d), “prices of similar goods sold by private suppliers in the country of provision are the primary benchmark” for calculating benefit.<sup>88</sup>

66. Consistent with the text of Article 14(d), and the Appellate Body guidance related to that article, both Tier I and Tier II of the U.S. regulation rely on market-determined prices. Tier I states that the benchmark “could include prices stemming from actual transaction between private parties, actual imports, or ... actual sales from competitively run government auctions.”<sup>89</sup> Tier II uses a benchmark based on “world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question.”<sup>90</sup>

67. Finally, to the extent India is suggesting that the U.S. regulation necessarily excludes government prices (other than those for the financial contribution at issue), India is incorrect. India has not demonstrated, as a matter of fact, that the U.S. regulation leads to this result. In fact, the U.S. regulation allows for the inclusion of prices from government sales where those prices are market determined (*e.g.*, a price established through a competitively run government auction).<sup>91</sup> Moreover, Tier I and Tier II allow interested parties to propose benchmark prices from any source and demonstrate that those prices reflect the prevailing market conditions in the country in question. Thus, the U.S. regulation does not limit the benchmark prices to be considered to those prices established between private parties, but may include government prices that are market derived. The U.S. regulation cannot be characterized, therefore, as excluding government prices “as such.”

#### **G. Tier II of the U.S. Regulation – World Market Price – is Consistent with Article 14(d)**

68. India asserts that “the text of Article 14(d) precludes out of country benchmarks.”<sup>92</sup> It argues, therefore, that the U.S. regulation – which, under Tier II, provides for the use of world market prices where there is “no useable market-determined price” – is inconsistent “as such” with Article 14(d). India is incorrect.

69. As discussed, Article 14 establishes “guidelines” to be followed by investigating authorities in developing methodologies used to calculate the amount of benefit. As set out in Article 14(d), adequacy of remuneration is to be “determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.” But, as the Appellate Body has confirmed, it is not the case that only in-country prices may be used. Rather, where in-country private prices are not useable, “an investigating authority may use a

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<sup>87</sup> *EC – LCA (AB)*, 981.

<sup>88</sup> *US – Softwood Lumber IV (AB)*, para. 90. The Appellate Body went on to note that both parties and all third parties to the dispute – including India – agreed “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 transaction in the country of provision.” (*US – Softwood Lumber IV (AB)*, para. 90).

<sup>89</sup> 19 C.F.R. § 351.511(a)(2)(i). (Exhibit USA-3)

<sup>90</sup> 19 C.F.R. § 351.511(a)(2)(ii). (Exhibit USA-3)

<sup>91</sup> 19 C.F.R. § 351.511(a)(2)(i). (Exhibit USA-3)

<sup>92</sup> India First Written Submission, at para. 77; *see, generally*, India First Written Submission, paras. 77-83.

benchmark other than private prices of the goods in question in the country of provision.”<sup>93</sup> A contrary interpretation would mean that where in-country prices do not exist or are not useable, the rights and obligations contained in the SCM Agreement would cease to apply.<sup>94</sup> Such a reading “would frustrate ... the object and purpose of the SCM Agreement.”<sup>95</sup>

70. The U.S. regulation employs a hierarchy wherein, under Tier I, in-country private prices are used. Only if in-country private prices are not useable does the regulation provide for the use of world market prices. The U.S. regulation is therefore not inconsistent with Article 14(d) or with the guidance provided by the Appellate Body on the application of that provision.

#### **H. Tier II of the U.S. Regulation Does Not Require the Countervailing of “Comparative Advantage”**

71. Finally, at Section II.B.6 of its submission, India argues that Tier II of the U.S. regulation “result[s] in countervailing comparative advantages of one country over another” and therefore is not a method that determines whether goods were provided for less than adequate remuneration in relation to prevailing market conditions.<sup>96</sup> As an initial matter, the United States does not agree that, as a matter of economics, the macroeconomic principle of “comparative advantage” is directly relevant to the issues of determining adequacy of remuneration in relation to prevailing market conditions. Rather, what the United States understands India to mean is that there may be factors for which a particular out-of-country benchmark needs to be adjusted before determining adequacy of remuneration in a particular market.<sup>97</sup>

72. India is incorrect, as a matter of fact, that Tier II of the U.S. regulation requires Commerce to countervail – as India puts it – “comparative advantage.” There is nothing in the U.S. regulation that prevents the Department from accepting evidence and argument that an adjustment to the calculation of the amount of subsidy should be made for a factor (such as transportation), and making such an adjustment. Therefore, Tier II is not inconsistent with Article 14(d).

#### **IV. Section 351.511(a)(2)(iv) Provides for Adjustments When Determining The Adequacy of Remuneration Consistent with Articles 14(d), 19.3, and 19.4 of the SCM Agreement**

73. India claims that 19 C.F.R. § 351.511(a)(2)(iv) of the U.S. regulation is inconsistent with Article 14(d) of the SCM Agreement because, by including delivery costs in the benchmark price, the U.S. regulation does not determine adequacy of remuneration in relation to prevailing

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<sup>93</sup> *US – Softwood Lumber IV (AB)*, para. 103; *see also*, *US – AD/CVD (AB)*, para. 446; *US – AD/CVD (Panel)*, paras. 10.16-10.23.

<sup>94</sup> *US – Softwood Lumber IV (AB)*, para. 93.

<sup>95</sup> *US – AD/CVD (AB)*, para. 438.

<sup>96</sup> India First Written Submission, para. 84; *see also*, India First Written Submission, paras. 80-81.

<sup>97</sup> “Comparative advantage” does not exist in a vacuum; it exists because of specific factors, including transportation costs, economies of scale, government policy, technology, capital, skilled labor, education, infrastructure, and institutions *See*, World Trade Report 2010: Trade in Natural Resources (Exhibit IND-50), p. 6.

market conditions.<sup>98</sup> India claims that, consequently, 19 C.F.R. § 351.511(a)(2)(iv) is inconsistent with Article 19.3 and 19.4 because it results in the levying of countervailing duties in excess of the appropriate amount.<sup>99</sup> India appears to misunderstand both Article 14(d) and the U.S. regulation. The United States will briefly discuss section 351.511(a)(2)(iv) of the U.S. regulation before turning to India’s arguments under Article 14(d) and Article 19.3 and 19.4.

**A. The U.S. Regulation for the Use of Delivered Prices (19 C.F.R. § 351.511(a)(2)(iv))**

74. Section 351.511(a)(2)(iv) of the U.S. regulation provides that:

[i]n measuring adequate remuneration . . . [Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.<sup>100</sup>

75. In short, the regulation provides that the administering authority, when comparing the price of the government-provided good to the benchmark price, must include all delivery costs in *both* prices. The regulation therefore ensures an “apples-to-apples” comparison of the government price to the benchmark price, recognizing that a good that is being provided by the government as a production input cannot be used unless it is delivered to the producer’s factory.

**B. The U.S. Regulation for the Use of Delivered Prices is Not Inconsistent with Article 14(d) of the SCM Agreement**

76. India argues that adjustments to the benchmark price to reflect delivery charges is inconsistent with the second sentence of Article 14(d) because the resulting benchmark price is not in relation to prevailing market conditions.<sup>101</sup> First, with respect to in-country and out-of-country benchmarks, India argues that adjustment to prices to reflect delivery charges do not reflect the “conditions . . . of sale,” one of the items in the inclusive list of factors comprising prevailing market conditions in Article 14(d).<sup>102</sup> But India ignores both the fundamental purpose of selecting and determining benchmarks, as well as the text of Article 14. First, a benchmark is meaningful when it is based on an apples-to-apples comparison, and that is the reason for the adjustment for delivery charges. Second, the list of factors included in Article 14(d) in fact includes “transportation.” Therefore, adjustment to prices to reflect delivery charges is consistent with the guidance in Article 14(d) that prevailing market conditions includes “transportation.” Moreover, Article 14(d) does not give primacy to any one factor; that is, even if adjustments to price on the basis of delivery charges is not part of “conditions . . . of sale,” that

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<sup>98</sup> India First Written Submission, paras. 86-98.

<sup>99</sup> India First Written Submission, paras. 99-104.

<sup>100</sup> 19 C.F.R. §351.511(a)(2)(iv). (Exhibit USA-3)

<sup>101</sup> India First Written Submission, paras. 88-98.

<sup>102</sup> India First Written Submission, para. 88.

does not mean delivery charges are not a factor relevant to prevailing market conditions.<sup>103</sup> Section 351.511(a)(2)(iv) therefore ensures that, consistent with Article 14(d), adequacy of remuneration is considered in relation to prevailing market conditions, including transportation.

77. India also asserts that, when the benchmark is based on world market prices, adjustments for delivery charges from an out-of-country source will not reflect prevailing market conditions in the country at issue. India is incorrect. The inclusion of delivery charges ensures that a benchmark based on the world market price reflects the terms of making such a price available in that country. On the other hand, if the delivery charges were not included then the world market price may not reflect the prevailing market conditions in the country in question.

78. In addition, India argues that before Commerce may resort to a world market price, it must prove that the prevailing market conditions with regard to the world market are identical to the prevailing market conditions in relation to the goods in the country in question . . .”<sup>104</sup> India is again incorrect. World market prices for fungible commodities are available in the market of any country. However, to reflect the true cost to the purchaser, the cost of the input necessarily includes all the costs of getting the good to the producer’s production facilities.

79. India’s general assertion that world market benchmark prices eliminate the “comparative advantage” in the country of provision is incorrect.<sup>105</sup> As explained above, consideration of what India calls “comparative advantage” requires the consideration of specific factors that affect prevailing market conditions and there is nothing in the regulation that prevents Commerce from considering those factors, including transportation.

80. Finally, India also misunderstands the U.S. regulation. As explained above, the price adjustment set out in section 351.511(a)(2)(iv) of the U.S. regulation applies not just to the benchmark price, but also the government price. Thus, India is incorrect when it states that the “objective” of section 351.511(a)(2)(iv) is to artificially raise the benchmark price in order to find the existence of benefit more easily.<sup>106</sup> Rather, the adjustments ensure that the benchmark price and the government price are compared at the same point in the distribution chain. In contrast to India’s assertion, the “objective” of the regulation is to ensure an accurate comparison of prices. Section 351.511(a)(2)(iv) is therefore not inconsistent with Article 14(d).

### **C. The U.S. Regulation for the Use of Delivered Prices is Not Inconsistent with Article 19.3 and 19.4 of the SCM Agreement**

81. India argues that since section 351.511(a)(2)(iv) of the U.S. regulation is inconsistent with Article 14(d), the calculation of benefit under that section necessarily results in a benefit

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<sup>103</sup> Even if India were to suggest that adjustments to price to reflect delivery charges is not within the meaning of “transportation” as used in Article 14(d), the list of factors in Article 14(d) is inclusive: factors other than those listed in Article 14(d) may be considered as well.

<sup>104</sup> India First Written Submission, para. 94.

<sup>105</sup> India First Written Submission, paras. 96-97.

<sup>106</sup> India First Written Submission, para. 90.

that is more than the amount of subsidy.<sup>107</sup> As India has not demonstrated that section 351.511(a)(2)(iv) of the U.S. regulation is inconsistent with Article 14(d), India has not demonstrated that the section 351.511(a)(2)(iv) is also inconsistent with Article 19.3 and 19.4.

## **V. The Cumulation Provisions of the U.S. Statute Are Not Inconsistent, As Such, With Article 15 of the SCM Agreement**

### **A. The U.S. Statute Governing Cumulation of Subsidized and Dumped Imports In Original Investigations Is Not Inconsistent, As Such, With Article 15 of the SCM Agreement**

82. In its submission, India argues that the cumulation provisions of the U.S. antidumping and countervailing duty statutes are inconsistent, as such, with Article 15 of the SCM Agreement. In India's view, these statutory provisions are inconsistent with Article 15.3 because they permit the Commission to cumulate both dumped and subsidized imports for purposes of its injury analysis in injury investigations, sunset reviews, and changed circumstance reviews.<sup>108</sup> India also asserts that these statutory provisions are inconsistent with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement because they allegedly impermissibly allow the Commission to consider the effects of dumped imports when analyzing the injury caused by subsidized imports in a countervailing duty proceeding.<sup>109</sup>

83. India's claims have no merit. Article 15.3 does not expressly prohibit the cumulation of dumped and subsidized imports in investigations or sunset reviews, as India asserts, but is instead silent on the issue. Moreover, the cumulation of dumped and subsidized imports is fully consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources.<sup>110</sup> In addition, when arguing that cumulation of dumped and subsidized imports in sunset reviews is inconsistent with Article 15.3, India has the mistaken view that the provisions of Article 15.3 are directly applicable to an authority's cumulation decision in sunset reviews. This is a view the Appellate Body has clearly rejected.<sup>111</sup>

84. We address these issues in more detail below. We first address India's claim that the provision of the U.S. statute authorizing the Commission to cumulate subsidized and dumped imports in original injury investigations (19 U.S.C. §1677(7)(G)) is inconsistent, as such, with Article 15 of the SCM Agreement. We then address India's claim that the provision of the U.S. statute authorizing cumulation of subsidized and dumped imports in sunset reviews is inconsistent, as such, with Article 15.

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<sup>107</sup> India First Written Submission, para. 104.

<sup>108</sup> See India First Written Submission, sections IV.B and IV.C.

<sup>109</sup> See India First Written Submission, sections IV.A.3 and IV.B.2.

<sup>110</sup> *EC - Tube or Pipe Fittings (AB)*, para. 116, WT/DS219/AB/R (July 22, 2003).

<sup>111</sup> See, e.g., *US - Carbon Steel (AB)*, paras. 58-92; *US - OCTG from Argentina (AB)*, paras. 301-303; *US - OCTG from Mexico (AB)*, paras. 148-153.

## B. BACKGROUND

85. In its submission, India argues that the U.S. statute<sup>112</sup> provisions governing cumulation in original injury investigations, 19 U.S.C. §1677(7)(G), and in sunset reviews, 19 U.S.C. §1675a(a)(7), are inconsistent, as such, with Article 15 of the SCM Agreement.<sup>112</sup> Accordingly, the United States sets forth the pertinent provisions of these statutory provisions below, as well as the facts underlying the Commission’s injury and likely injury determinations for hot-rolled steel from India.

### 1. The U.S. Statute’s Provisions Governing Cumulation in Original Investigations

86. The provisions of 19 U.S.C. §1677(7)(G) permit the Commission to cumulate subsidized or dumped imports from multiple countries subject to antidumping or countervailing duty investigations if certain criteria are met. Specifically, Section 1677(7)(G)(i) provides that, in original injury investigations:

the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which:

- (I) petitions were filed under section 1671a(b)<sup>113</sup> or 1673a(b)<sup>114</sup> of this title on the same day,
- (II) investigations were initiated under section 1671a(a)<sup>115</sup> or 1673a(a)<sup>116</sup> of this title on the same day, or
- (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under 1671a(a) or 1673a(a) of this title on the same day,

if such imports compete with each other and with domestic like products in the United States market.<sup>117</sup>

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<sup>112</sup> India First Written Submission, paras. 105-151. India also claims that it challenges, on an as such basis, the provisions of the U.S. statute governing cumulation in changed circumstance reviews, citing 19 U.S.C. §1675b(e)(2). Despite India’s assertions, Section 1675b(e)(2) does not govern the cumulation determination in changed circumstances reviews. The provision governing cumulation in changed circumstance reviews is the same U.S. statutory provision which governs cumulation in sunset reviews, i.e., 19 U.S.C. §1675a(a)(7), Exhibit USA-9. Section 1675b(e)(2) has nothing to do with changed circumstance reviews; it is, instead, applicable to certain limited situations involving the conduct of injury investigations for countervailing duty orders that were issued against imports from countries without an injury determination because those countries were not previously entitled to an injury determination under U.S. law because they were not GATT signatories. 19 U.S.C. §1675b(e)(2), Exhibit USA-11. Section 1675b(e)(2) has nothing to do with cumulation in changed circumstance reviews.

<sup>113</sup> Section 1671a(b) is the section of the U.S. statute relating to the filing of a countervailing duty petition and the subsequent initiation of a countervailing duty investigation. 19 U.S.C. § 1671a(b), Exhibit USA-83.

<sup>114</sup> Section 1673a(b) is the section of the U.S. statute relating to the filing of an antidumping duty petition and the subsequent initiation of the antidumping duty investigation. 19 U.S.C. § 1673(b), Exhibit USA-85.

<sup>115</sup> Section 1671a(a) authorizes Commerce to initiate a countervailing duty investigation on its own initiative. 19 U.S.C. § 1671a(a), Exhibit USA-83.

<sup>116</sup> Section 1673a(a) authorizes Commerce to initiate an antidumping duty investigation on its own initiative. 19 U.S.C. § 1673a(a), Exhibit USA-84.

87. Section 1677(7)(G)(ii) provides, however, that the Commission may not cumulatively assess the volume and effect of imports in an injury investigation, if the investigation has been terminated,<sup>118</sup> or if Commerce has made a preliminary negative determination for the imports, unless the administering authority subsequently made a final affirmative determination with respect to those imports before the Commission s final determination is made...<sup>119</sup>

## 2. The Provisions of the U.S. Statute Governing Cumulation in Sunset Reviews

88. Under 19 U.S.C. §1675a(a)(7), the Commission is given discretion to cumulate subject imports from multiple countries in sunset reviews if certain criteria are met. Specifically, Section 1675a(a)(7) provides that, in sunset reviews:

The Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b)<sup>120</sup> or (c)<sup>121</sup> of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.<sup>122</sup>

89. Because Section 1675a(a)(7) provides that the Commission may cumulate subject imports if these criteria are met, cumulation ... is discretionary in five-year reviews.<sup>123</sup> Under Section 1675a(a)(7), however, the Commission may only exercise its discretion to cumulate subject imports from multiple countries in its sunset reviews if the reviews were initiated on the same day, and if the Commission determines that the subject imports are likely to compete with each other and the domestic like product in the U.S. market.<sup>124</sup> Furthermore, under the U.S. statute, the Commission may not cumulate the subject imports from a country with other subject

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<sup>117</sup> 19 U.S.C. § 1677(7)(G), Exhibit USA-5.

<sup>118</sup> 19 U.S.C. §1677(7)(G)(ii)(II), Exhibit USA-5. For purposes of section 1677(7)(g)(ii)(II), an investigation is considered terminated if the Commission finds that imports from the country are negligible, the Commission has previously made a negative determination for imports from the country, or if Commerce makes a negative dumping or countervailing duty determination for imports from the country.

<sup>119</sup> 19 U.S.C. §1677(7)(G)(ii)(I), Exhibit USA-5. Section 1677(7)(G) also contains provisions relating to determinations for countries subject to the Caribbean Basin Economic Recovery Act and any country involved in a free trade agreement with the United States in effect before January 1, 1987. 19 U.S.C. §1677(7)(G)(ii)(III) & (IV), Exhibit USA-5. Neither provision is at issue here.

<sup>120</sup> Section 1675(b) is the provision of the U.S. statute authorizing the Commission and Commerce to conduct a changed circumstance review of an antidumping or countervailing duty order. 19 U.S.C. §1675(b), Exhibit USA-11.

<sup>121</sup> Section 1675(c) is the provision of the U.S. statute authorizing the Commission and Commerce to conduct a sunset review of an antidumping or countervailing duty order. 19 U.S.C. §1675(c), Exhibit USA-11.

<sup>122</sup> 19 U.S.C. §1675a(a)(7) (emphasis added).

<sup>123</sup> Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Review), USITC Pub. 3956 at 10-11 (October 2007) (ITC Sunset Determinations").

<sup>124</sup> 19 U.S.C. §1675a(a)(7); ITC Sunset Determinations at 10-11.

imports if the imports from the country are not likely to have a discernible adverse impact on the domestic industry.<sup>125</sup>

90. Nonetheless, even if these criteria are met, Section 1675a(a)(7) still gives the Commission the discretion to choose not to cumulate imports from the subject countries.<sup>126</sup> In fact, as occurred in the sunset reviews at issue here, the Commission often exercises its discretion not to cumulate subject imports, even when it has found that the subject imports from the countries under review are likely to have a discernible adverse impact on the industry and are likely to compete with each other and the domestic like products.<sup>127</sup>

### C. The “Negligibility” Provisions of the U.S. Statute

91. Finally, in its claims, India argues that Section 1677(7)(G) is inconsistent, as such, with Article 15 of the SCM Agreement because it allows the Commission to cumulate subject imports from countries that satisfy the negligibility test of the U.S. statute on a country-specific basis but do not meet the negligibility test of the statute when aggregated with other individually negligible countries.<sup>128</sup> The negligibility provisions of the U.S. statute cited by India are set forth in 19 U.S.C. §1677(24).

92. Section 1677(24) of the U.S. statute provides that subject imports from a country corresponding to the Commission’s like production definition will be considered negligible:

...if such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes ... the filing of the {antidumping or countervailing duty} petition ..., or ... the initiation of the {antidumping or countervailing duty} investigation....<sup>129</sup>

93. Even if the imports from a subject country meet this standard, however, section 1677(24) provides that these imports will not be considered negligible:

...if the aggregate volume of imports of the merchandise from all countries {meeting the individual country negligibility standard}... with respect to which investigations were initiated on the same day exceeds 7 percent of the volume of all such merchandise imported into the United States during the applicable 12-month period.<sup>130</sup>

<sup>125</sup> 19 U.S.C. §1675a(a)(7); ITC Sunset Determinations at 10-11.

<sup>126</sup> 19 U.S.C. §1675a(a)(7); ITC Sunset Determinations, at 10-11.

<sup>127</sup> ITC Sunset Determinations, at 17-20.

<sup>128</sup> India FWS, paras. 121-127.

<sup>129</sup> 19 U.S.C. §1677(24)(A)(i), Exhibit USA-8.

<sup>130</sup> 19 U.S.C. §1677(24)(A)(ii), Exhibit USA-8. In the case of a countervailing duty investigation involving developing countries, the 3 percent/7 percent test does not apply to imports from the developing countries. Instead, in a countervailing duty investigation, subject imports from developing countries are not deemed negligible if they exceed four percent of total imports, or if the aggregate volumes from the countries with individually negligible imports exceed nine percent of total imports. 19 U.S.C. §1677(24)(B).

94. When applying the 7 percent test, the statute provides that the Commission may not include in its calculation any imports from a country for which the Commission or Commerce has terminated the investigation.<sup>131</sup>

## C. STATEMENT OF FACTS

### 1. The Commission’s Preliminary Determinations

95. After the petitions for imports of hot-rolled steel were filed in November 2000, the Commission instituted its preliminary phase injury investigations for allegedly subsidized imports of hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand.<sup>132</sup> It also instituted its preliminary phase injury investigations for imports of allegedly dumped imports of hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine.<sup>133</sup> Importantly, in the petitions, the petitioners alleged that all of the subsidized imports from Argentina, India, Indonesia, South Africa and Thailand were also dumped by producers in those countries.<sup>134</sup>

96. After completing its preliminary phase investigations for the eleven countries in December 2001, the Commission determined that there was a reasonable indication that an industry in the United States was materially injured by reason of allegedly subsidized imports from of hot-rolled steel from Argentina, India, Indonesia, South Africa, and Thailand.<sup>135</sup> It also determined that there was a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of hot-rolled steel from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine.<sup>136</sup>

97. In these preliminary phase determinations, the Commission found that it was appropriate to cumulate the allegedly subsidized and/or dumped imports of hot-rolled steel from all eleven countries.<sup>137</sup> Among other things, the Commission found that the subject imports from all eleven countries and the domestic hot-rolled steel were generally interchangeable, were generally sold throughout the United States during the period of investigation, and were sold in similar channels

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<sup>131</sup> 19 U.S.C. §1677(24)(A)(iii). The 3 percent/7 percent test is derived directly from the language of Article 5.8 of the AD Agreement, which provides that imports from a subject country shall be “normally” be regarded as negligible if they “account for less than 3 percent of imports of the like product in the importing Member, unless countries which individually account for less than 3 percent of the imports of the like product in the importing Member collectively account for more than 7 percent of imports of the like product in the importing Member.” AD Agreement, Article 5.8.

<sup>132</sup> 65 Fed. Reg. 70364 (November 22, 2000).

<sup>133</sup> 65 Fed. Reg. 70364 (November 22, 2000).

<sup>134</sup> Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 (Preliminary) & 731-TA-898-908 (Preliminary), USITC Pub. 3381, at 1-2 & I-1-I-2 (Dec. 2001) (“ITC Preliminary Determinations”).

<sup>135</sup> ITC Preliminary Determinations, at 1-3.

<sup>136</sup> ITC Preliminary Determinations, at 1-3; 66 Fed. Reg. 805 (January 4, 2001).

<sup>137</sup> ITC Preliminary Determinations, at 8-11.

of distribution.<sup>138</sup> Accordingly, the Commission found there was sufficient competition among the imports and the domestic products to cumulate the imports in its analysis.<sup>139</sup>

98. The Commission also found there was a reasonable indication that the cumulated dumped and subsidized imports from the eleven subject countries, including India, were causing material injury to the U.S. hot-rolled industry.<sup>140</sup> The Commission noted that the volume of the cumulated imports had more than doubled over the period and that the subject imports gained nearly six percentage points of market share over the period.<sup>141</sup> The Commission also found that the subject imports generally undersold the domestic products during the period, and that they had both price-depressing and suppressing effects during the period.<sup>142</sup>

99. Finally, the Commission noted that several important indicators of the industry’s condition “remained weak or deteriorated,” even though it believed that the industry’s condition should have improved after the recent imposition of orders covering hot-rolled steel from Brazil and Japan, and a recent suspension agreement for imports from Russia.<sup>143</sup> Accordingly, the Commission determined that there was a reasonable indication of material injury to the industry by reason of hot-rolled imports from India and the other subject countries.<sup>144</sup>

## 2. The Commission’s Final Phase Determinations

100. Commerce issued affirmative final countervailing duty and antidumping determinations for imports from the eleven subject countries in July, September, October and November 2001.<sup>145</sup> It issued affirmative countervailing duty and antidumping determinations for the subject imports from Argentina and its affirmative antidumping determination for the subject imports from South Africa in November 2001.<sup>146</sup> It issued affirmative countervailing duty and/or antidumping duty determinations for imports from the other countries, including India, in September, October and November 2001.<sup>147</sup> Notably, Commerce found that the subsidized imports from Argentina, India, Indonesia, South Africa and Thailand were also dumped by producers in those countries.<sup>148</sup>

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<sup>138</sup> ITC Preliminary Determinations, at 8-11.

<sup>139</sup> ITC Preliminary Determinations, at 8-11.

<sup>140</sup> ITC Preliminary Determinations, at 17-21.

<sup>141</sup> ITC Preliminary Determinations, at 7-18.

<sup>142</sup> ITC Preliminary Determinations, at 18-19.

<sup>143</sup> ITC Preliminary Determinations, at 19-21.

<sup>144</sup> ITC Preliminary Determinations, at 19-21.

<sup>145</sup> *Hot-Rolled Steel Products from Argentina and South Africa*, Inv. Nos. 701-TA-404 (Final) & 731-TA-898 & 905 (Final), USITC Pub. 3446 at I-3 (August 2001) (□□ITC Final Determinations□□); *Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, Inv. Nos. 701-TA-405-408 and 731-TA-899-904 and 906-908 (Final), USITC Pub. 3468 at I-1 (November 2001) (□□ITC Final Determinations II") (Exhibit IND-9).

<sup>146</sup> ITC Final Determinations, at I-3; ITC Final Determinations, at I-1 (August 2001) (□□ITC Final Determinations II") (Exhibit IND-9).

<sup>147</sup> ITC Final Determinations, at I-3-5; ITC Final Determinations, at I-1-2 (Exhibit IND-9). Commerce also issued its countervailing duty determination for South Africa in October 2001.

<sup>148</sup> ITC Final Determinations, at I-3-5; ITC Final Determinations, at I-1-2 (Exhibit IND-9).

101. After Commerce’s issuance of its affirmative antidumping and countervailing duty determinations for imports from these countries, the Commission issued final affirmative injury determinations for imports from all eleven countries.<sup>149</sup> The Commission issued its final determinations for imports from Argentina and South Africa in August 2001, and it issued its final determinations for the other nine countries, including India, in November 2001.<sup>150</sup> In its final determinations, the Commission unanimously found that an industry in the United States was materially injured by reason of the subsidized and/or dumped subject imports from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine.<sup>151</sup>

*a) The Commission’s Cumulation Determination*

102. In its final injury determinations, the Commission found that it was appropriate to cumulate the subsidized and/or dumped imports of hot-rolled steel from all eleven countries, including India, in its injury analysis.<sup>152</sup> Among other things, the Commission found there was a general degree of interchangeability among the imports and the domestic hot-rolled steel, that they were generally sold throughout the United States, that they were generally sold throughout the period of investigation, and that they were sold in similar channels of distribution.<sup>153</sup> Accordingly, the Commission found that there was a reasonable degree of competition among the dumped and/or subsidized imports and the domestic products.<sup>154</sup>

As noted previously, Commerce found that all of the U.S. imports for which it made affirmative countervailing duty findings were also dumped.<sup>155</sup>

*b) The Commission’s Material Injury Determination*

103. The Commission determined that the cumulated imports from the eleven subject countries, including India, caused material injury to the U.S. hot-rolled steel industry.<sup>156</sup> The Commission found that the volume of the cumulated imports rose significantly during the period of investigation, with their cumulated volumes increasing by 203.4 percent during the three full years of the period.<sup>157</sup> The Commission also found that the subject imports undersold the domestic like products significantly during the period, underselling the domestic products in 238

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<sup>149</sup> ITC Final Determinations (Exhibit IND-9).

<sup>150</sup> ITC Final Determinations, at 1-2; ITC Final Determinations II, at 1-2. The Commission issued its final determinations for dumped and subsidized imports from Argentina and dumped imports from South Africa at an earlier date than its other determinations because Commerce issued its final determinations for these countries several months before its other determinations in the investigations. Because the Commission cumulated all the subject countries in both determinations, the Commission adopted the findings made for the subsidized imports from Argentina and the dumped imports from Argentina and South Africa for its analysis in the subsequent determinations for the subject imports from the other countries, including India.

<sup>151</sup> ITC Final Determinations, at 9-14 (Exhibit IND-9).

<sup>152</sup> ITC Final Determinations, at 9-14 (Exhibit IND-9).

<sup>153</sup> ITC Final Determinations, at 9-14 (Exhibit IND-9).

<sup>154</sup> ITC Final Determinations, at 9-14 (Exhibit IND-9).

<sup>155</sup> ITC Final Determinations, at I-1-5 (Exhibit IND-9).

<sup>156</sup> ITC Final Determinations, at 19-26 (Exhibit IND-9).

<sup>157</sup> ITC Final Determinations, at 19-20 (Exhibit IND-9).

of 368 instances, or 64.7 percent of the price comparisons.<sup>158</sup> The Commission concluded that this underselling led to significant volume increases by the subject imports and found that the U.S. industry was forced to cut its prices in response to this price competition.<sup>159</sup> The Commission also found that the pricing data showed that the subject imports had significant depressing and suppressing effects on domestic prices during the period.<sup>160</sup>

104. Finally, the Commission determined that the cumulated imports had a significant impact on the condition of the industry.<sup>161</sup> In its analysis, the Commission specifically explained that it “consider{ed} all relevant factors that bear on the state of the industry in the United States,” including “output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development.”<sup>162</sup> Further, the Commission evaluated the increases and decreases in these factors, including changes in the industry’s production, production capacity, capacity utilization, shipments, employment levels, wages, prices, operating profits, gross profits, book orders, and plant closures throughout the period of investigation.<sup>163</sup> By focusing on these changes over time, the Commission analyzed in detail the industry’s growth over the period.

105. The Commission also evaluated the industry’s return on investment and its ability to raise capital.<sup>164</sup> In its investigation, the Commission obtained detailed data from the industry relating to its financial operations, profitability levels and operating returns, capital and research and development expenditures, and the cost and value of its existing productive facilities.<sup>165</sup> Moreover, the Commission requested the members of the industry to “describe any actual or potential negative effects of imports of hot-rolled steel products from the subject countries on their growth, investment, ability to raise capital, and/or their development efforts,” and the Commission received a significant number of comments from the producers.<sup>166</sup> The responses to these questions were included in the Commission’s report.<sup>167</sup> Finally, the Commission specifically addressed, among other things, the industry’s returns, changes in its productive capacity levels, its production and shipment levels, and its overall financial operations in its analysis.<sup>168</sup>

106. After evaluating these data, the Commission concluded that the significant increases in the volume and market share of the subject imports had significant suppressing and depressing effects on the industry’s prices and had caused a significant deterioration in important aspects of the industry’s condition.<sup>169</sup> Accordingly, the Commission determined that an industry in the

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<sup>158</sup> ITC Final Determinations, at 21-22 (Exhibit IND-9).

<sup>159</sup> ITC Final Determinations, at 21-22 (Exhibit IND-9).

<sup>160</sup> ITC Final Determinations, at 22 (Exhibit IND-9).

<sup>161</sup> ITC Final Determinations, at 23-26 (Exhibit IND-9).

<sup>162</sup> ITC Final Determinations, at 23 (Exhibit IND-9).

<sup>163</sup> ITC Final Determinations, at 23-26 (Exhibit IND-9).

<sup>164</sup> ITC Injury Determination, at 23 (Exhibit IND-9).

<sup>165</sup> ITC Injury Determination, at pp. VI-2 to VI-8 (Exhibit IND-9).

<sup>166</sup> ITC Injury Determination, p. VI-8 & Appendix E (Exhibit IND-9).

<sup>167</sup> ITC Injury Determination, p. VI-8 & Appendix E (Exhibit IND-9).

<sup>168</sup> ITC Injury Determination, at 23-26 (Exhibit IND-9).

<sup>169</sup> ITC Injury Determination, at 19-22 (Exhibit IND-9).

United States was materially injured by reason of subsidized imports of hot-rolled steel products from Argentina, India, Indonesia, South Africa, and Thailand, and by reason of dumped imports of hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine.<sup>170</sup>

*c) Commerce's Orders*

107. After the Commission's affirmative determinations, Commerce issued antidumping duty orders on imports of hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine and countervailing duty orders on imports of hot-rolled steel products from Argentina, India, Indonesia, South Africa, and Thailand in late 2001.

**3. The Commission's Sunset Reviews of the Hot-Rolled Steel Orders**

108. On August 1, 2006, the Commission instituted its five-year or sunset reviews of the countervailing duty orders on hot-rolled steel imports from Argentina, India, Indonesia, South Africa and Thailand, and its sunset reviews of the antidumping duty orders on hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine.<sup>171</sup> In its determinations, which were issued in October 2007, the Commission exercised its discretion not to cumulate the dumped and/or subsidized imports of hot-rolled steel from Argentina, Kazakhstan, Romania, and South Africa with subsidized and/or dumped imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine.<sup>172</sup> The Commission made negative sunset determinations for the subject imports from Argentina, Kazakhstan, Romania, and South Africa, and affirmative sunset determinations for the subject imports from China, India, Indonesia, Taiwan, and Ukraine.<sup>173</sup>

*a) The Commission's Cumulation Analysis*

109. When exercising its statutorily-authorized discretion not to cumulate imports from Argentina, Kazakhstan, Romania, and South Africa with the other countries, including India, the Commission determined that it should not cumulate subsidized and dumped imports from Argentina with imports from the other subject countries because the imports from Argentina were not likely to have a discernible adverse impact on the industry if the orders on the subject imports from Argentina were revoked.<sup>174</sup> The Commission also chose not to cumulate the

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<sup>170</sup> ITC Injury Determination, at 26 (Exhibit IND-9); ITC Injury Determination II, at 4.

<sup>171</sup> Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Review) USITC Pub. 3956 (October 2007) ("ITC Sunset Determinations") (Exhibit IND-9). Commerce previously revoked the antidumping duty order on hot-rolled steel from the Netherlands, effective November 26, 2006. 72 Fed. Reg. 35220 (June 27, 2007). Accordingly, the Commission terminated its five-year review of hot-rolled steel products from the Netherlands, effective June 27, 2007, and considered any imports from the Netherlands to be nonsubject merchandise rather than subject imports. ITC Sunset Determinations at 4, n.9.

<sup>172</sup> ITC Sunset Determinations, at 10-20.

<sup>173</sup> ITC Sunset Determinations, at 20-50.

<sup>174</sup> ITC Sunset Determinations, at 13-14. As previously discussed, the U.S. statute prohibits the Commission from cumulating imports from a subject country with other subject imports in a sunset review if the subject imports from

subject imports from Kazakhstan, Romania, and South Africa with the subject imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine. The Commission found that cumulation was not appropriate because imports from Kazakhstan, Romania and South Africa were not likely to compete under similar conditions of competition with imports from the other six countries, including India.<sup>175</sup>

110. In reaching this conclusion, the Commission noted that producers accounting for the large majority of production in Kazakhstan, Romania and South Africa were owned by Mittal Steel Co., which also owned the significant U.S. producer, Mittal USA.<sup>176</sup> Considered together with other factors, the Commission found that this ownership relationship with a U.S. producer made it likely that the imports from these three countries would compete in a different fashion in the U.S. market than the subject imports from the other six countries.<sup>177</sup> As a result, the Commission found that it was appropriate to exercise its discretion not to cumulate imports from Kazakhstan, Romania, and South Africa with the other six countries, including India.<sup>178</sup>

*b) The Commission’s Affirmative Likely Injury Determinations for Subject Imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine*

111. The Commission made affirmative determinations for the cumulated subject import volumes from China, India, Indonesia, Taiwan, Thailand, and Ukraine.<sup>179</sup> The Commission found that the volumes of the cumulated imports from these countries were likely to increase to significant levels if the orders were revoked.<sup>180</sup> It also found that the cumulated imports from these six countries would likely have significant depressing or suppressing effects on domestic prices in the reasonably foreseeable future if the orders under review were revoked.<sup>181</sup>

112. In its assessment of the impact of these imports on the condition of the U.S. industry, the Commission did not find that the industry was in a weakened condition.<sup>182</sup> During the period of review, the Commission noted that the industry made great strides in improving its efficiency and productivity through consolidations and restructuring, and by reductions in its labor and legacy costs. Nonetheless, the Commission also found that the industry had experienced substantial decreases in its performance levels beginning in the first half of 2007.<sup>183</sup> Given the deterioration in the condition of the industry during the period of review, the Commission concluded that, if the orders were revoked, the significant increases in the volumes of low-priced imports from the cumulated countries that were likely would exacerbate the deterioration in the

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the country in question are not likely to have a discernible adverse impact on the domestic industry. 19 U.S.C. § 1675a(a)(7), Exhibit USA-9; see also ITC Sunset Determinations at 11.

<sup>175</sup> ITC Sunset Determinations, at 17-20. As previously discussed, the U.S. statute makes cumulation discretionary in five year reviews. 19 U.S.C. §1675a(a)(7); ITC Sunset Determinations, at 10-11.

<sup>176</sup> ITC Sunset Determinations, at 17.

<sup>177</sup> ITC Sunset Determinations, at 17-18.

<sup>178</sup> ITC Sunset Determinations, at 17-18.

<sup>179</sup> ITC Sunset Determinations, at 20-42.

<sup>180</sup> ITC Sunset Determinations, at 31-35.

<sup>181</sup> ITC Sunset Determinations, at 35-38.

<sup>182</sup> ITC Sunset Determinations, at 38-42.

<sup>183</sup> ITC Sunset Determinations, at 38-42.

industry's prices, production, shipments, market share, and financial performance that were increasingly in evidence at the end of the period of review.<sup>184</sup>

113. As a result, the Commission determined that revocation of the countervailing duty orders on subject imports of hot-rolled steel from India, Indonesia, and Thailand and revocation of the antidumping duty orders on hot-rolled imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine would likely lead to a continuation or recurrence of material injury within a reasonably foreseeable time.<sup>185</sup>

*c) The Commission's Negative Likely Injury Determinations for Subject Imports from Argentina, Kazakhstan, Romania, and South Africa*

114. The Commission issued negative likely injury determinations for Argentina, Kazakhstan, Romania and South Africa.<sup>186</sup> The Commission found that the volumes of the cumulated subject imports from Kazakhstan, Romania, and South Africa were unlikely to be significant, especially given that producers in these countries were owned by a company, Mittal Steel, that owned a significant U.S. producer of hot-rolled steel.<sup>187</sup> As a result, the Commission also found that the cumulated imports would not likely have significant price effects in the market, and would not likely have a material impact on the industry after revocation of the orders.<sup>188</sup> The Commission also found that the subject imports from Argentina were unlikely to have a material injurious impact on the industry.<sup>189</sup>

*d) Commerce's Continuation Notice for Subject Imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine*

115. As a result of the Commission's determination, Commerce issued, as it typically does, a continuation notice for the antidumping duty orders on subject imports from China, India, Indonesia, Taiwan, Thailand, and Ukraine, and countervailing duty orders on subject imports from India, Indonesia, and Thailand.<sup>190</sup>

**4. India Misreads Article 15.3 and Fails to Place the Text of the Article Within the Appropriate Context**

116. In its submission, India argues that the provision of the U.S. statute governing cumulation in original investigations, 19 U.S.C. §1677(7)(G), is inconsistent, as such, with the provisions of Article 15.3 of the SCM Agreement.<sup>191</sup> According to India, section 1677(7)(G)<sup>192</sup> is inconsistent

<sup>184</sup> ITC Sunset Determinations, at 42.

<sup>185</sup> ITC Sunset Determinations, at 42.

<sup>186</sup> ITC Sunset Determinations, at 43-49.

<sup>187</sup> ITC Sunset Determinations, at 43-46.

<sup>188</sup> ITC Sunset Determinations, at 46-49.

<sup>189</sup> ITC Sunset Determinations, at 47-49.

<sup>190</sup> 72 Fed. Reg. 73316, 73318 (December 27, 2007).

<sup>191</sup> India First Written Submission, paras. 105-132. The Appellate Body has made clear that "a responding Member's law will be treated as WTO-consistent until proven otherwise." *US – Carbon Steel (AB)*, para. 156-57; *US – Wool Shirts (AB)*, p. 14. When challenging legislation on an "as such" basis, the complaining party has the

with Article 15.3 because it authorizes the Commission to cumulate imports from multiple countries that are subject to simultaneous antidumping and countervailing duty investigations.<sup>193</sup> According to India, Article 15.3 constitutes a “limited exception” to the “country-specific” injury analysis required by the other provisions of Article 15, which purportedly only allow an authority to cumulate imports found to be subsidized in countervailing duty investigations.<sup>194</sup> India argues that, because Article 15.3 does not expressly authorize an investigating authority to cumulate dumped and subsidized imports, it must be read as prohibiting their cumulation.<sup>195</sup>

117. India’s claims on this score are mistaken, and reflect a flawed reading of the text and context of Article 15.3. Despite India’s claims, nothing in the text of Article 15.3 prohibits the cumulation of subsidized imports with imports that are dumped. Instead, Article 15.3 only specifically addresses the conditions under which an authority may cumulate imports from multiple countries that are found to be subsidized. In its entirety, Article 15.3 provides that:

Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.<sup>196</sup>

By using the phrase “such imports,” Article 15.3 makes clear that the only category of imports subject to the criteria contained in Article 15.3 are imports from countries that “are simultaneously subject to countervailing duty investigations.”<sup>197</sup>

118. Article 15.3 only addresses therefore the conditions under which an authority may cumulate imports from multiple countries that are subject to simultaneous countervailing duty investigations. It does not impose an obligation on an investigating authority not to cumulate subsidized imports with imports that are dumped. In fact, it does not address dumped imports at

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burden of establishing that the legislation may only be interpreted in a manner that violates the terms of the WTO Agreement. *See, e.g., US - Steel Plate from India (Panel)*, paras. 7.88 to 7.89; *US - 1916 Act (AB)*, paras. 88-89; GATT Panel Report, *EEC - Parts and Components*, BISD 37S/132, paras. 5.25 and 5.26. Moreover, the party must establish that the statute specifically requires the authority to act in a manner that is inconsistent with the WTO Agreement, and that no other approach is possible under the U.S. statute. *See, e.g., US - Steel Plate from India (Panel)*, paras. 7.88 to 7.89; *US - 1916 Act (AB)*, paras. 88 - 89.

<sup>192</sup> 19 U.S.C. §1677(7)(G) (Exhibit USA-5).

<sup>193</sup> India First Written Submission, para. 107.

<sup>194</sup> India First Written Submission, para. 110.

<sup>195</sup> India First Written Submission, para. 111.

<sup>196</sup> SCM Agreement, Art. 15.3 (emphasis added).

<sup>197</sup> SCM Agreement, Art. 15.3 (emphasis added).

all. Rather, Article 15.3 is silent on the issue of whether cumulation of dumped and subsidized is permissible.

119. In similar circumstances, the Appellate Body has found that the silence of an Agreement on the permissibility of a particular methodological approach does not indicate that the methodology is prohibited.<sup>198</sup> For example, in *US - OCTG from Argentina*, the Appellate Body rejected Argentina's claim that an investigating authority could not cumulate imports from multiple countries in sunset reviews.<sup>199</sup> In that dispute, Argentina argued that the cumulation of imports from multiple countries was not permitted in sunset reviews under the AD Agreement because the practice was not specifically authorized or addressed in the sunset provisions of the Agreement.

120. The Appellate Body rejected Argentina's claim, concluding that, although cumulation was not expressly authorized in sunset reviews, it was permissible because it was consistent with the policies underlying the AD Agreement.<sup>200</sup> In reaching this conclusion, the Appellate Body explained that "the silence of the text on this issue ... cannot be understood to imply that cumulation is prohibited in sunset reviews."<sup>201</sup> Given these statements, the fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped does not, in and of itself, indicate that such an approach is prohibited by the Agreement, as India presumes.<sup>202</sup> India's view that Article 15.3's silence on this matter must be read as prohibiting this practice ignores these Appellate Body findings.

121. India's reading of Article 15.3 also ignores the aim of the cumulation provisions of the SCM Agreements. As the Appellate Body has recognized, the ability to cumulate the injurious effects of unfairly traded imports is an important tool under the SCM and AD Agreements because it allows a Member to provide an appropriate remedy to an industry that is suffering material injury from a variety of unfairly traded import sources. As the Appellate Body explained in *EC - Tube or Pipe Fittings*:

A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those dumped imports originate from various countries. If, for example, the imports from some

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<sup>198</sup> *US - OCTG from Argentina (AB)*, paras. 294-300.

<sup>199</sup> *US - OCTG from Argentina (AB)*, paras. 294-300.

<sup>200</sup> *US - OCTG from Argentina (AB)*, paras. 294-300.

<sup>201</sup> *US - OCTG from Argentina (AB)*, para. 294 (emphasis added).

<sup>202</sup> In its submission, India mistakenly states that the cumulation provisions of Article 15.3 are a "limited exception" to the general rule that injury determinations must be made on a country-specific basis. India reads into Article 15.3 words and concepts that are not part of the text. (India First Written Submission, paras. 109-111.) Article 15 does not contain any language indicating the cumulation provisions are "limited" in scope, nor does it contain a presumption that an authority's injury analysis must usually be made on a country-specific basis. The United States would add that it is quite common for Members to cumulate imports from multiple countries in their injury and likely injury determinations, thus undermining India's views about the presumptively country-specific analysis contained in Article 15.3.

countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not be individually identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, by expressly providing for cumulation in Article 3.3 of the Antidumping Agreement, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.<sup>203</sup>

122. Similarly, an analysis that focused solely on the injurious effects of either dumped or subsidized imports alone when both types of imports are injuring the industry at the same time would necessarily prevent the investigating authority from “adequately taking into account” the injurious effects of all unfairly traded imports, rendering the authority’s injury analysis less than complete. The Appellate Body has in fact recognized that “it may well be the case that the injury {antidumping and countervailing} duties seek to counteract is the same injury to the same industry.”<sup>204</sup>

123. Moreover, the Appellate Body has emphasized these policies in *US - OCTG from Argentina*, a case involving the issue of whether cumulation was permitted in sunset reviews under the AD Agreement. Relying on its statements in *EC - Tube or Pipe Fittings*, the Appellate Body found that an authority could cumulate imports from multiple countries in sunset reviews, even though such an approach was not expressly permitted in the sunset provisions of the AD Agreement.<sup>205</sup> The Appellate Body explained that:

Although *EC – Tube or Pipe Fittings* concerned an original investigation, we are of the view that {its} rationale is equally applicable to likelihood-of-injury determinations in sunset reviews. Both an original investigation and a sunset review must consider possible sources of injury: in an original investigation, to determine whether to impose antidumping duties on products from those sources, and in a sunset review, to determine whether anti-dumping duties should continue to be imposed on products from those sources. Injury to the domestic industry – whether existing injury or likely future injury – might come from several sources

<sup>203</sup> *EC - Tube or Pipe Fittings (AB)*, para. 116 (emphasis added). Although the *EC - Tube or Pipe Fittings* dispute involved the injury provisions of the AD Agreement, the cumulation provisions of the SCM and AD Agreement are nearly identical. Compare AD Agreement, Article 3.3 with SCM Agreement, Article 15.3.

<sup>204</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 549.

<sup>205</sup> *US - OCTG from Argentina (AB)*, paras. 296-97.

simultaneously, and the cumulative impact of those imports would need to be analyzed for an injury determination. . . . Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority’s determination as to whether to impose – or continue to impose – anti-dumping duties on products from those sources.<sup>206</sup>

124. In other words, in *US - OCTG from Argentina* and *EC - Tube or Pipe Fittings*, the Appellate Body has emphasized that cumulation of imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement.<sup>207</sup>

125. The Appellate Body’s reasoning in *US - OCTG from Argentina* and *EC - Tube or Pipe Fittings* regarding cumulation is similarly applicable to a situation where dumped and subsidized imports are having a simultaneous injurious impact on an industry. Notably, the AD and SCM Agreements contain nearly identical provisions governing an authority’s injury analysis in original investigations.<sup>208</sup> Moreover, both Agreements contain nearly identical provision governing cumulation in original injury investigations. Specifically, Article 3.3 states:

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

In light of this language, it is clear that the AD and SCM Agreements both contemplate that an authority may consider the cumulative injurious effects of unfairly traded imports from multiple sources, given that these imports can have a cumulative injurious impact on the domestic industry.

126. Both the relevant context and the object and purpose of the AD and SCM Agreements therefore support the proposition that cumulation on dumped and subsidized imports is consistent with the WTO Agreement. Put another way, India’s proposed interpretation, which would deny Members the ability to provide a remedy to an industry being injured by the cumulative effect of

<sup>206</sup> *US - OCTG from Argentina (AB)*, paras. 296-97 (emphasis added).

<sup>207</sup> *EC - Tube or Pipe Fittings (AB)*, para. 117.

<sup>208</sup> Compare SCM Agreement, Article 15 with AD Agreement, Article 3.

dumped and subsidized imports, would frustrate the purpose of both Agreements. Whenever dumping and subsidization are simultaneously occurring in the market, there will often be cumulative price or volume effects from the dumped and/or subsidized imports. In such a situation, that is, where dumped and subsidized imports from multiple countries are having such a compounding effect on the industry, it is reasonable for an investigating authority to consider the effects of these imports on a cumulated basis in its analysis. Doing otherwise would prevent an investigating 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.<sup>209</sup>

127. India’s reading of the text of the SCM Agreement ignores these concepts. In its submission, India focuses solely on the language of the SCM Agreement without also considering the context of the AD Agreement. In doing so, India has erroneously failed to read the text of Article 15.3 of the SCM Agreement within the context of the WTO Agreement as a whole, including, in particular, the AD Agreement. By focusing solely on the text of Article 15.3 without considering its relationship to the AD Agreement, India has read the cumulation provisions of the SCM Agreement “in willful isolation” from the provisions of the AD Agreement.<sup>210</sup>

128. We note that other Members also perform a single analysis of dumped and subsidized imports when making injury determinations under the SCM and AD Agreements. For example, in its decision on grain corn from the United States, the Canadian International Trade Tribunal (“CITT”) rejected the argument that it should perform separate injury analyses for subsidized and dumped imports.<sup>211</sup> The CITT explained that:

to contend that {the Canadian law} prohibits the Tribunal from considering together the effects of dumping and subsidizing when the same goods are being both dumped and subsidized, or are likely to be both dumped and subsidized, is unreasonable, give the impossibility of separating the effects of dumping from the effects of subsidizing those same goods. Indeed, the dumped and subsidized goods are, in fact, one and the same goods, they are fungible, and their price is attributable, in part, to dumping and, in part, to subsidizing. The effects of dumping and subsidizing, however, are so closely intertwined that it is impossible to unravel them in order to allocate specific or discrete portions to the dumping and the subsidizing. Had Parliament intended not to

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<sup>209</sup> *US - OCTG from Argentina (AB)*, paras. 296-97; *EC - Tube or Pipe Fittings (AB)*, para. 116.

<sup>210</sup> *US – Antidumping and Countervailing Duties (China) (AB)*, paras. 570-571.

<sup>211</sup> See, e.g., *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)

allow the Tribunal to cross-cumulate in such situations, it would have said so clearly and directly.<sup>212</sup>

Similarly, the Australian Customs and Border Protection Service has stated that:

“[i]n the case of concurrent dumping and subsidization, where it is established that the exported goods are both dumped and subsidized, there is no need to quantify separately how much of the injury being suffered is the result of dumping or subsidization.”<sup>213</sup>

129. Based on the foregoing, the Panel should reject India’s claim that the Commission may not cumulate subsidized and dumped imports for purposes of its injury analysis in an original investigation, which is the approach authorized by the U.S. statute.<sup>214</sup>

## 5. India’s Other Textual Arguments Are Flawed

130. India’s other assertions about the consistency of the U.S. statute with Article 15.3 are similarly unpersuasive. For example, India asserts that, under Article 15.3, an investigating authority may only cumulate imports from countries that are found to be subsidized at more than a *de minimis* level in a countervailing duty investigation, which means that imports that are dumped but not subsidized may not be cumulated with subsidized imports.<sup>215</sup> As explained above, the *de minimis* subsidy limitation on cumulation in a countervailing duty investigation only specifically applies to imports that are “simultaneously subject to countervailing duty investigations.”<sup>216</sup> The criteria does not act to limit the types of other unfairly traded imports that made be cumulated with the subsidized imports. Moreover, as previously discussed, India’s argument ignores the fact that the cumulation of dumped and subsidized imports is fully consistent with the aims of the cumulation provisions of the AD and SCM Agreements.

131. India also mistakenly claims that the U.S. statute is inconsistent, as such, with Article 15.3 because it permits the Commission to cumulate imports from any country found to be “negligible” on a country-specific basis if those imports are found not to be negligible when aggregated with other, individually “negligible” countries.<sup>217</sup> According to India, Article 15.3

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<sup>212</sup> 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)

<sup>213</sup> See, e.g., Certain Hollow Structural Sections Exported from the People’s Republic of China, the Republic of Korea, Malaysia, Taiwan, and the Kingdom of Thailand, Report to the Minister No.177 (Australian Customs and Border Protection Service, June 7, 2012) at 87 (“In the case of concurrent dumping and subsidisation, where it is established that the exported goods are both dumped and subsidised, there is no need to quantify separately how much of the injury being suffered is the result of dumping or subsidisation. Customs and Border Protection has examined whether the exports of HSS to Australia, at dumped and subsidised prices, have caused material injury to the Australian industry producing the goods.”) (Exhibit USA-7)

<sup>214</sup> 19 U.S.C. §1677(7)(G) (Exhibit USA-5).

<sup>215</sup> India First Written Submission, paras. 116-120.

<sup>216</sup> SCM Agreement, Art. 15.3.

<sup>217</sup> India First Written Submission, paras. 121-127. Under the U.S. statute, the Commission imports from a country that account for less than three percent of total imports imported into the United States during the 12 months before

only permits an investigating authority to cumulate imports from a specific country if imports from that country alone are found to be non-“negligible.”<sup>218</sup> India asserts that the aggregated or multiple country “negligibility” analysis permitted by the U.S. statute is therefore inconsistent with Article 15.3.<sup>219</sup>

132. Once again, India’s arguments are mistaken. First, neither Article 15.3 nor Article 11.9 of the SCM Agreement<sup>220</sup> specifically defines the term “negligibility” in the manner proposed by India.<sup>221</sup> Moreover, in contrast to the SCM Agreement, the AD Agreement does contain a specific provision defining the term “negligibility,” and this provision makes clear that an authority may perform the same aggregated analysis provided in the U.S. statute.<sup>222</sup> Given that the AD Agreement contains the same language on which India relies to make its argument about the allegedly country-specific nature of the negligibility analysis required by Article 15.3 of the SCM Agreement,<sup>223</sup> a harmonious reading of these two provisions leads to the conclusion that the negotiators did not intend to preclude the type of aggregated analysis permitted by the U.S. statute. Given this, the U.S. statute’s negligibility test is not inconsistent, as such, with the provisions of Article 15.3.

133. Finally, India has no basis for its claim that the U.S. statute is inconsistent, as such, with the provisions of Articles 15.1, 15.2, 15.4 and 15.5. India asserts that the U.S. statute is inconsistent with these provisions because they do not allow an authority to cumulate the effects of subsidized and dumped imports in its analysis, an approach permitted by the U.S. statute.<sup>224</sup> India’s argument is flawed in two critical respects. First, as was discussed previously, the provisions of Article 15.3 do not expressly prohibit such a practice. Moreover, the cumulation of dumped and subsidized imports is fully consistent with the policies underlying the AD and SCM Agreements, especially in a situation in which the subsidized imports in question are also dumped, as they were here. Thus, to the extent that the Panel agrees the cumulation of subsidized and dumped imports is not inconsistent with Article 15.3, it would necessarily be reasonable for an investigating authority to analyze the volume and price effects of subsidized and dumped imports on an industry, as provided under Articles 15.1, 15.2, 15.3, and 15.4.

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the filing of the petition are considered negligible and may not be cumulated with other imports unless, in the aggregate, imports from countries meeting this three percent standard account for seven percent of all imports. 19 U.S.C. § 1677(24)(A)(i) & (ii) (Exhibit USA-8). In the case of developing countries, the tests are four percent and nine percent, respectively. See 19 U.S.C. § 1677(24)(A)(ii).

<sup>218</sup> India First Written Submission, paras. 121-127.

<sup>219</sup> India First Written Submission, paras. 121-127.

<sup>220</sup> Article 11.9 is the provision of the SCM Agreement that provides that, if the imports from a country are found to be negligible, the authority must terminate the investigation for that country.

<sup>221</sup> SCM Agreement, Arts. 15.3 & 11.9.

<sup>222</sup> Like the U.S. statute, the AD Agreement provides that imports from any individual country that are less than three percent of all imports into the country will be considered “negligible,” unless “countries which individually account for less than 3 percent of the imports ... collectively account for more than 7 percent of imports...” AD Agreement, Art. 5.8 (emphasis added).

<sup>223</sup> In its argument, India contends that a country-specific negligibility analysis is required by Article 15.3 because it provides that cumulation of subsidized imports is not appropriate if the “volume of imports from each country” is negligible. (India First Written Submission, para. 122.) The cumulation provisions of the AD Agreement contain the exact same language, stating that an authority may not cumulate imports from any country if the “volume of imports from each country” is negligible. AD Agreement, Art. 3.3.

<sup>224</sup> India First Written Submission, paras. 128-132.

134. Furthermore, India's argument overlooks the fact that, under Article 15.4, an authority's "examination of the impact of the subsidized imports on the domestic industry shall include an examination of all relevant factors and indices having a bearing on the state of the industry..."<sup>225</sup> Clearly, in a situation in which subsidized and dumped imports are found to be simultaneously injuring the industry, the existence of the dumped imports in the marketplace is a "relevant factor" that must be examined by an authority to assess whether those dumped but non-subsidized imports are exacerbating the injury being caused by the subsidized imports. Such an approach is particularly appropriate in the situation involved here, where all of the subsidized imports are also found to be dumped. In such a situation, it would be anomalous for the Panel to find that an authority could not assess both sets of unfairly traded imports on a cumulated basis, particularly when "conditions of competition between the imported products ... and the domestic like product" indicate that such a cumulated analysis is warranted.<sup>226</sup>

## 6. Conclusion

135. In sum, India's as such challenge to the U.S. statute's provisions governing cumulation in original investigations is deeply flawed. India misreads the specific language of the text of Article 15.3 and ignores the fundamental policies underlying the cumulation provisions of the SCM and AD Agreements, as articulated by the Appellate Body in *US - OCTG from Argentina* and *EC - Tube or Pipe Fittings*. Simply put, India has no textual or policy basis for its claim that section 1677(7)(G) of the U.S. statute is inconsistent, as such, with Article 15. As a result, this Panel should reject its claim.

### **D. The U.S. Statute Permitting Cumulation of Subsidized and Dumped Imports In Sunset Reviews Is Also Not Inconsistent, As Such, With Article 15 of the SCM Agreement**

#### **1. The Cumulation Requirements of Article 15.3 Are Not Applicable in the Sunset Review Context, as India Claims**

136. In its submission, India also argues that the provisions of the U.S. statute governing cumulation in sunset reviews, 19 U.S.C. §1675a(a)(7), are inconsistent, as such, with the provisions of Article 15.3 of the SCM Agreement.<sup>227</sup> According to India, section 1675a(a)(7) conflicts with Article 15.3 of the Agreement because it permits the Commission to cumulate imports likely to be subsidized after revocation of an order with imports likely to be dumped after revocation.<sup>228</sup> Although India concedes that Article 21 of the SCM Agreement – which is the sunset review provision of the Agreement – does not actually address the issue of cumulation in sunset reviews,<sup>229</sup> India claims that the "requirements of Article 15.3 ... have to be complied with even in a sunset review."<sup>230</sup>

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<sup>227</sup> India First Written Submission, paras. 133-150.

<sup>227</sup> India First Written Submission, paras. 133-150.

<sup>227</sup> India First Written Submission, paras. 133-150.

<sup>228</sup> India First Written Submission, paras. 133-150.

<sup>229</sup> India First Written Submission, para. 138.

<sup>230</sup> India First Written Submission, para. 138.

137. Again, India's arguments are flawed in several respects. First, and most importantly, the Appellate Body has rejected the core premise of India's argument, which is that the "requirements of Article 15.3 ... have to be complied with even in a sunset review."<sup>231</sup> The Appellate Body has consistently found that the provisions of the Agreements governing dumping, subsidies, and injury findings in original investigations do not apply to an authority's likely injury analysis in sunset reviews.<sup>232</sup> As the Appellate Body explained in *US – Carbon Steel*, which involved a consideration of the interplay between the investigation and sunset review obligations of the SCM Agreement:

original investigations and sunset reviews are distinct processes with different purposes, "[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."<sup>233</sup>

138. Indeed, in the context of the AD Agreement, the Appellate Body has explained that the sunset provision of the AD Agreement:

does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.<sup>234</sup>

In light of these principles, the Appellate Body has consistently rejected claims that the specific requirements governing original investigations under the Agreements must be transposed into the sunset context.<sup>235</sup>

139. More specifically, the Appellate Body has expressly rejected the claim that the Agreement's specific requirements relating to cumulation in original investigations can be applied directly in sunset reviews.<sup>236</sup> In *US – OCTG from Mexico* and *US – OCTG from Argentina*, the Appellate Body found the cumulation provision of the AD Agreement, are not directly applicable to sunset reviews.<sup>237</sup> The Appellate Body explained that the requirements of

<sup>231</sup> India First Written Submission, para. 138.

<sup>232</sup> *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).

<sup>233</sup> *US – Carbon Steel (AB)*, para. 87; *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 106.

<sup>234</sup> *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

<sup>235</sup> *US – Carbon Steel (AB)*, paras. 58-92 (finding that the *de minimis* subsidy requirements set forth in Article 11.9 of the SCM Agreement are not applicable to the sunset review provisions of Article 21 of the Agreement); see also *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 123-127 (rejecting the idea that an authority must calculate dumping margins in a sunset review in the same manner as it does in antidumping investigations); *US – OCTG from Argentina (AB)*, paras. 271 & 294 (rejecting argument that the specific injury requirements contained in Article 3 of the AD Agreement, including the cumulation requirements, are applicable to a likelihood of injury determination in sunset reviews); *US – OCTG from Mexico (AB)*, paras. 167-173 (rejecting argument that the cumulation provisions of the AD Agreement, set forth in Article 3.3, apply in sunset reviews under Article 11).

<sup>236</sup> *US – OCTG from Argentina (AB)*, paras. 286-294; *US – OCTG from Mexico (AB)*, paras. 167-173.

<sup>237</sup> *US – OCTG from Argentina (AB)*, paras. 286-294; *US – OCTG from Mexico (AB)*, paras. 167-173.

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.”<sup>238</sup> 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.”<sup>239</sup>

140. Given that there is no pertinent difference between the cumulation provisions of the AD Agreement and the SCM Agreement,<sup>240</sup> the Appellate Body has clearly rejected the premise upon which India’s claim is based, when it argues that the requirements of Article 15.3 must be satisfied in a five year review. As the Appellate Body stated in the context of the AD Agreement, the review provisions of the SCM 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.”<sup>241</sup> Accordingly, Article 21.3 imposes no specific limitation on an authority’s cumulation decisions in a sunset review. While it is true that certain conditions are required before cumulating subsidized imports in injury investigations under Article 15.3, the specific injury analyses required in Article 15.3 are not directly applicable under Article 21.3 in a sunset review.

141. India also mistakenly argues that the provisions of Article 15 of the SCM Agreement are applicable in the context of sunset reviews because the term “injury,” which is used in Article 21.3 of the SCM Agreement, is specifically defined within a footnote included in Article 15 of the Agreement.<sup>242</sup> Again, the Appellate Body has previously rejected this very same argument under the AD Agreement.<sup>243</sup> In *US - OCTG from Argentina*, Argentina argued that the use of the term “injury” in the sunset provisions of the AD Agreement necessarily meant that the requirements made applicable to original investigations under Article 3 of the Agreement were also applicable to sunset reviews.<sup>244</sup> The Appellate Body rejected this argument, stating that it “did not follow ... from this single definition of ‘injury’ that all of the provisions of Article 3, {the original investigation provisions of the Agreement,} are applicable to sunset review determinations” under the Agreement.<sup>245</sup> Noting that Argentina “incorrectly equate{d} the *definition* of ‘injury’ with the *determination* of ‘injury,’” the Appellate Body concluded that the use of the term “injury” in the sunset provisions of the Agreement did not suggest that

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<sup>238</sup> *US - OCTG from Argentina (AB)*, paras. 294 & 301; *US - OCTG from Mexico (AB)*, para. 170.

<sup>239</sup> *US - OCTG from Argentina (AB)*, paras. 302 & 280; *US - OCTG from Mexico (AB)*, para. 170.

<sup>240</sup> In *US - Corrosion-Resistant Steel Sunset Review*, the Appellate Body noted that Article 11.3 is virtually textually identical to Article 21.3 of the SCM Agreement and concluded that, given the parallel wording of the two Articles, its prior descriptions of the sunset review provision in the SCM Agreement also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the Anti-Dumping Agreement. (*US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 104, n. 114).

<sup>241</sup> *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

<sup>242</sup> India First Written Submission, paras. 137-140.

<sup>243</sup> *US - OCTG from Argentina (AB)*, para. 276.

<sup>244</sup> *US - OCTG from Argentina (AB)*, para. 276.

<sup>245</sup> *US - OCTG from Argentina (AB)*, para. 277.

investigating authorities are “*mandated* to follow the provisions of Article 3 when making a likelihood of injury determination.”<sup>246</sup>

142. Moreover, even if the provisions of Article 15.3 were to apply to sunset reviews, as India asserts, that Article does itself not preclude the cumulation of subsidized and dumped imports in sunset reviews. As the United States explained previously, Article 15.3 does not preclude the cumulation of dumped and subsidized imports in an investigation or sunset review, as India claims.<sup>247</sup> Moreover, as the United States previously explained, the cumulation of dumped and subsidized imports in sunset reviews is fully consistent with the policies underlying the SCM and AD Agreements, which authorize Members to continue providing relief to industries that are being injured by unfairly traded imports from multiple sources.<sup>248</sup> Given this, India has no textual basis for its claim that the SCM Agreement prohibits the cumulation of subsidized imports with dumped imports in sunset reviews, an approach permitted by the sunset provisions of the U.S. statute.

## **2. Even If Article 15.3 Were Applicable in the Sunset Context, India's As Such Challenge Fails Because the U.S. Statute Does Not Mandate Cumulation of Dumped and Subsidized Imports in Sunset Reviews**

143. Finally, even if India were correct that the provisions of Article 15.3 were applicable to sunset reviews and prohibited the cumulation of likely dumped and subsidized imports, India's as such challenge has no basis because the U.S. statute does not mandate cumulation in sunset reviews. Instead, section 1675a(a)(7) explicitly gives the Commission the discretion not to cumulate any subject imports, whether dumped or subsidized, in a sunset review, even if the statutory standards are met.<sup>249</sup> Specifically, section 1675a(a)(7) provides that, even if the statutory standards for cumulation in sunset reviews are met, the Commission “may” cumulate the subject imports from multiple countries.

144. As the Commission has consistently explained in its sunset determinations, the use of the term “may” in section 1675a(a)(7) makes “cumulation ... discretionary in five-year reviews.”<sup>250</sup> Since Section 1675a(a)(7) vests discretionary authority in the Commission not to cumulate dumped and subsidized imports, even if the statutory standards for cumulation are met, India cannot claim that the U.S. statute necessarily requires that the Commission cumulate subsidized and dumped imports in a sunset review.<sup>251</sup> Because the U.S. statute vests the Commission with the discretion not to cumulate dumped and subsidized imports in a sunset review, India's as such challenge to Section 1675a(a)(7) necessarily fails.

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<sup>246</sup> *US - OCTG from Argentina (AB)*, para. 277-280.

<sup>247</sup> SCM Agreement, Art. 15.3.

<sup>248</sup> *EC - Tube or Pipe Fittings (AB)*, para. 116.

<sup>249</sup> 19 U.S.C. §1675a(a)(7) (Exhibit USA-9).

<sup>250</sup> Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Final), USITC Pub. 3956 at 10-11 (October 2007) (“ITC Sunset Determinations”) (Exhibit USA-10).

<sup>251</sup> See e.g., *US - Steel Plate from India (Panel)*, paras. 7.88 to 7.89; *US - 1916 Act (AB)*, paras. 88-89.

### 3. Conclusion

145. In sum, India has no basis for its claims that the provisions of the U.S. statute governing the cumulation of imports in sunset reviews are inconsistent, as such, with Article 15 of the SCM Agreement. The Appellate Body has consistently rejected India's core argument that the injury requirements applicable to original investigations are also directly applicable in the context of sunset reviews. Moreover, the U.S. statute's provisions permitting the cumulation of dumped and subsidized imports in sunset reviews are consistent with the policies under the cumulation provisions of the SCM and AD Agreements. India's claims to the contrary are deeply flawed and should be rejected by the Panel.<sup>252</sup>

## VI. The Commission's Cumulation Determinations in the Hot-Rolled Steel Investigations and Sunset Reviews Are Not Inconsistent, As Applied, With Article 15 of the SCM Agreement

### A. The Commission's Decision to Cumulate The Dumped and Subsidized Imports In Its Original Injury and Sunset Determinations Was Not Inconsistent, as Applied, with Article 15 of the SCM Agreement

146. India contends that the Commission's original injury and sunset determinations for hot-rolled steel imports from India are not consistent, on an as applied basis, with Article 15 of the SCM Agreement.<sup>253</sup> According to India, the Commission's affirmative determinations for India in the original investigations and sunset reviews of hot-rolled steel imports are inconsistent with Article 15.3 of the SCM Agreement because the Commission cumulated imports from five countries that were subsidized and dumped with imports from other countries that were dumped.<sup>254</sup> By performing its injury and likely injury analyses for cumulated imports of dumped and subsidized imports of hot-rolled steel, India argues that the Commission improperly attributed to the subsidized and dumped imports injury from imports that were only dumped.<sup>255</sup>

147. India's "as applied" challenges to the Commission's injury and likely injury determinations fail for the same reasons that its "as such" challenges fail. In its submission, India argues that the Commission's injury and likely injury determinations for hot-rolled steel from India are inconsistent, as applied, with Article 15 of the SCM Agreement because the Commission improperly cumulated subsidized and dumped imports for purposes of its injury

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<sup>252</sup> India also asserts that the U.S. statute's provision permitting cumulation of dumped and subsidized imports in changed circumstance reviews is also inconsistent, as such, with Article 15 of the SCM Agreement, although it cites the wrong provision of the U.S. statute, 19 USC §1675b(e)(2) (Exhibit USA-11). Rather, the cumulation provision applicable in the context of a changed circumstances review is the same provision applicable to sunset reviews, 19 USC § 1675a(a)(7) (Exhibit USA-9). Since the Commission has never conducted a changed circumstance review for the countervailing duty order on hot-rolled steel from India, it is unclear why India is bringing this challenge. Nonetheless, the United States submits that cumulation in the context of a changed circumstance review is consistent with Article 15 of the SCM Agreement for all the reasons given with respect to cumulation in the sunset review context.

<sup>253</sup> India First Written Submission, paras. 485-506 & 510-521.

<sup>254</sup> India First Written Submission, paras. 485-506 & 510-521.

<sup>255</sup> India First Written Submission, paras. 485-506 & 510-521.

analysis.<sup>256</sup> As the United States has previously explained, however, Article 15.3 does not explicitly or implicitly prohibit the cumulation of dumped and subsidized imports in investigations or sunset reviews, as India contends.<sup>257</sup> Moreover, Article 15.3 does not prohibit the Commission from cumulating dumped and subsidized imports in its sunset determinations. As the Appellate Body has consistently made clear, the specific injury and cumulation requirements of Article 15 do not govern likely injury determinations made in the context of sunset reviews under the AD and SCM Agreements.<sup>258</sup> Moreover, the Commission’s cumulation of dumped and subsidized imports with other dumped imports in its investigation and sunset review was consistent with the policies underlying the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by simultaneous unfairly traded imports from a variety of sources.<sup>259</sup> Given these considerations, India’s “as applied” challenges to the Commission’s original injury and sunset determinations for India fail for the same reasons as its “as such” challenges to the U.S. statute.

148. The United States would like to respond to two other issues raised by India in its submission. First, in its “as applied” claims, India implies that the Commission’s cumulated analysis of both dumped and subsidized imports in its original investigation made the Commission more likely to find the U.S. industry to be harmed by imports from India and other countries whose imports were subsidized. In India’s view, this alleged lack of objectivity is evidenced by the fact that, in the first year of the Commission’s period of investigation (1998), the record showed that imports from the five subsidized subject countries represented “only” 17.62 percent of the total volume of all cumulated imports, both subsidized and dumped.<sup>260</sup>

149. In making this argument, India conveniently ignores several facts. First, India fails to acknowledge that the record showed that, by the final full year of the Commission’s period of investigation (2000), the cumulated subsidized imports became an increasingly significant component of all cumulated subject imports, representing nearly 40 percent of all cumulated imports, dumped and subsidized, in that year.<sup>261</sup> Second, India makes no mention of the fact that the cumulated subsidized imports represented approximately 49.5 percent of the entire growth in all subject imports, subsidized and dumped, during the three full years of the period.<sup>262</sup> Third, India does not mention that the subsidized imports undersold the domestic like product in 61.6 percent of possible price comparisons, which was essentially equal to the level of underselling by all imports, dumped and subsidized, during the period.<sup>263</sup> Given these facts, the record does not show, as India implies, that the Commission made it more likely that it would find injury from the subsidized imports by cumulating them with other dumped imports.

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<sup>256</sup> India First Written Submission, paras. 485-506 & 510-521.

<sup>257</sup> *E.g.*, SCM Agreement, Arts. 15.3 & 21.3.

<sup>258</sup> *See, e.g.*, *US – Carbon Steel (AB)*, paras. 58-92; *US - OCTG from Argentina (AB)*, paras. 301-303; *US - OCTG from Mexico (AB)*, paras. 148-153.

<sup>259</sup> *EC - Tube or Pipe Fittings (AB)*, para. 116.

<sup>260</sup> India First Written Submission, paras. 502-504.

<sup>261</sup> ITC Injury Determination, p. IV-2 (Exhibit IND-9); *see also* India First Written Submission, para. 503.

<sup>262</sup> ITC Injury Determination, p. IV-2 (Exhibit IND-9); *see also* India First Written Submission, para. 503.

<sup>263</sup> ITC Injury Determination, pp. 21 & IV-2 (Exhibit IND-9). All cumulated imports, subsidized and dumped, undersold the domestic like products in 64.7 percent of price comparisons. ITC Injury Determination, pp. 21.

150. India also asserts that the Commission's cumulated analysis for India and the other subject countries was inconsistent with the provisions of Article 15.5 of the SCM Agreement because it improperly attributed to subsidized imports the injurious effects of other dumped imports.<sup>264</sup> India's argument highlights one of the flaws underlying the cumulation theory it has presented in this appeal. In arguing that the Commission's decision to cumulate subsidized and dumped imports is not consistent with the provisions of Article 15.5, India fails to acknowledge that all of the imports found by Commerce to be subsidized in the original investigation, including those from India, were also found by Commerce to be dumped.<sup>265</sup> As a result, under Article 3.3. of the AD Agreement, the Commission was authorized to cumulate the dumped and subsidized imports from these five countries with the imports from the other six countries then subject to investigation for purposes of its injury analysis.<sup>266</sup>

151. Moreover, the Appellate Body has acknowledged that "it may well be the case that the injury the {countervailing and antidumping} duties seek to counteract is the same injury to the same industry."<sup>267</sup> Given this, it would be anomalous for the Panel to conclude that an authority is prohibited from cumulating subsidized and dumped imports with other imports that are only dumped. If the Panel were to conclude that such an analysis was necessary for dumped and subsidized imports under Article 15.5, it would require an investigating authority to separate out the injurious effects of imports that result from their status as "dumped imports" from the effects that are the result of their simultaneous status as "subsidized imports," even though the imports would, by definition, have the exact same price and volume effects. This type of illogical and absurd analysis is a direct result of India's reading of Article 15.5. The Panel should be reluctant to read this sort of "angels on the head of a pin" analysis into the injury provisions of the SCM and AD Agreement.

### **B. The Commission Properly Evaluated The Relevant Factors Bearing on the State of the Industry, as Required by Article 15.4 of the Agreement**

152. Finally, India argues that the Commission failed to make specific findings for three factors (growth, return on investment, and ability to raise capital) in its original injury determination. According to India, Article 15.4 of the SCM Agreement requires that an investigating authority make specific factual findings for these factors in its original injury determination.<sup>268</sup> Since the Commission's determination allegedly contains no "written record

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<sup>264</sup> India First Written Submission, paras. 510-517.

<sup>265</sup> See, e.g., ITC Injury Determination, pp. I-1 to I-4. (Exhibit IND-9).

<sup>266</sup> AD Agreement, Art. 3.3. We note that India has not challenged the Commission's conclusion that these imports meet the criteria for cumulation under Article 3.3.

<sup>267</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 570, fn. 549.

<sup>268</sup> India First Written Submission, paras. 507-509. Article 15.4 of the SCM Agreement provides:

The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

regarding {these} factors,” India contends, the Commission’s analysis was, *per se*, inconsistent with Article 15.4.<sup>269</sup> Once again, India’s arguments ignore the Appellate Body’s prior statements on this issue.

153. The Appellate Body has made clear that an authority is not required to make specific findings for each impact factor set forth in Article 15.4 of the SCM Agreement. In *EC - Malleable Pipe and Tube Fittings*, a case involving the nearly identical provisions of Article 3.4 of the AD Agreement, Brazil argued that the European Commission did not specifically make factual findings for the industry’s “growth” in its determination and therefore failed to “evaluate” this issue, as required by the provisions of Article 3.4 of the Agreement.<sup>270</sup> The Appellate Body rejected the argument, explaining that, under Article 3.4 of the AD Agreement, which lists the industry indicia of impact to be “evaluated” by an authority in an antidumping investigation,<sup>271</sup> an investigating authority need not make specific findings for every factor set forth in Article 3.4.<sup>272</sup>

154. The Appellate Body explained that, while it is mandatory to “evaluate” all fifteen factors set forth in Article 3.4, the text of the Article “does not address the *manner* in which the results of the investigating authority’s analysis of each injury factor are to be set out in the published documents...”<sup>273</sup> The Appellate Body noted that:

Because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel’s conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case.<sup>274</sup>

155. Having said this, the Appellate Body concluded that the European Commission had adequately evaluated the “growth” of the industry.<sup>275</sup> Noting that an evaluation of the growth factor is necessarily entailed by an analysis of the other factors listed in Article 3.4, the Appellate Body found that the European Commission adequately evaluated the “declines’ and ‘losses’” observed for these factors, thus addressing the “growth” of the industry, as provided by Article 3.4.<sup>276</sup>

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<sup>269</sup> India First Written Submission, para. 509.

<sup>270</sup> *EC - Tube or Pipe Fittings (AB)*, para. 152.

<sup>271</sup> The text of Article 15.3 is, in all pertinent respects, identical to the text of Article 3.4.

<sup>272</sup> *EC - Tube or Pipe Fittings (AB)*, paras. 151-166.

<sup>273</sup> *EC - Tube or Pipe Fittings (AB)*, para. 157.

<sup>274</sup> *EC - Tube or Pipe Fittings (AB)*, paras. 161. (emphasis added)

<sup>275</sup> *EC - Tube or Pipe Fittings (AB)*, paras. 162-166.

<sup>276</sup> *EC - Tube or Pipe Fittings (AB)*, paras. 151-166

156. Given the Appellate Body's findings in *EC - Malleable Pipe and Tube Fittings*, India has no basis for its claim that the Commission did not “evaluate” the industry’s “growth,” “return on investment,” and “ability to raise capital,” as required by Article 15.4. Despite India’s claims to the contrary, the Commission did “evaluate” these factors in the manner contemplated by Article 15.4. For example, in its injury determination, the Commission evaluated growth trends in the industry’s condition during the period of investigation, specifically addressing the changes in the industry’s production, production capacity, capacity utilization, shipments, employment levels, prices, operating profits and orders over the period.<sup>277</sup> By doing so, the Commission properly “traced developments” in the various indicia of the industry’s condition over the period, “touch[ing] upon the performance and relative diminution or expansion of the domestic industry” with respect to each factor.<sup>278</sup> Accordingly, the Commission appropriately addressed the growth of the industry, just as the European Commission did in *EC - Malleable Pipe and Tube Fittings*.

157. Moreover, there is no basis for India’s assertion that the Commission failed to “evaluate” the industry’s “return on investment” and “ability to raise capital.” In its determination, the Commission specifically stated that it considered “all relevant economic factors that bear on the state of the industry in the United States,” including “output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development.”<sup>279</sup> Moreover, during the course of its investigation, the Commission obtained detailed financial data from the industry relating to its financial operations, profitability levels and operating returns, capital and research and development expenditures, and the cost and value of their existing productive facilities, among other things.<sup>280</sup> Furthermore, the Commission requested the members of the industry to “describe any actual or potential negative effects of imports of hot-rolled steel products from the subject countries on their growth, investment, ability to raise capital, and/or their development efforts,” receiving a significant number of comments from the producers, which were confidential.<sup>281</sup> Finally, the Commission specifically addressed the industry’s profitability and returns on operations, the changes in its productive capacity levels, and their overall financial operations in its analysis.<sup>282</sup> In other words, the Commission both obtained and evaluated, as appropriate, information relating to these factors in its analysis.

158. In sum, the Commission reasonably “evaluated” the data pertaining to the industry’s condition, including the factors of “growth,” “return on investment,” and “ability to raise capital,” as provided for in Article 15.4. India’s claims to the contrary have no merit. Indeed, the United States would add that, if the Panel rejects India’s argument that the Commission failed expressly to “evaluate” these three factors, India is left with no prima facie challenge to the Commission’s analysis of these factors because it made no claim that these three factors undermined the Commission’s affirmative injury determination in any manner. Given this, the Panel should

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<sup>277</sup> ITC Injury Determination, at 23-26 (Exhibit IND-9); *see also* ITC Injury Determination at pp. 19-22. (Exhibit IND-9).

<sup>278</sup> *EC - Tube or Pipe Fittings (AB)*, para. 163.

<sup>279</sup> ITC Injury Determination, at p. 33. (emphasis added) (Exhibit IND-9).

<sup>280</sup> ITC Injury Determination, pp. VI-2 to VI-8. (Exhibit IND-9).

<sup>281</sup> ITC Injury Determination, p. VI-8 & Appendix E. (Exhibit IND-9).

<sup>282</sup> ITC Injury Determination, pp. 23-26. (Exhibit IND-9).

reject this aspect of India's as applied challenge to the Commission's original injury determination.

## **VII. THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT “AS SUCH” WITH ARTICLE 12.7 OF THE SCM AGREEMENT**

159. As a preliminary matter, the United States draws the Panel's attention to paragraph 156 of India's First written Submission, in which India states that the U.S. measure is “as such” inconsistent with Articles 12.1 and 12.7 of the SCM Agreement. Article 12.1 was not mentioned in India's panel request, nor did the United States and India consult regarding this WTO provision. Article 6.2 and 7.1 of the DSU require that a claim be contained in the complaining party's panel request in order to form part of the “matter referred to the DSB”, and thus within the panel's terms of reference. Because India failed to include a claim under Article 12.1 of the SCM Agreement in its consultations and panel requests, India is precluded from raising such a claim before the Panel. Therefore, the United States respectfully requests that the Panel find this claim to be outside its terms of reference.<sup>283</sup>

### **A. Neither the U.S. Statute Nor Commerce's Regulation Requires WTO Inconsistent Action With Respect to the Use of Facts Available**

160. As the United States will explain in full below, nothing in the U.S. statute or regulations regarding “adverse inferences” in the application of facts available is inconsistent with the WTO obligations. In fact, the AD Agreement's Facts Available Annex, which is directly relevant as context, explicitly provides that an administering authority may take account of an interested party's failure to cooperate.

161. As an initial matter, however, the United States would note that the U.S. statute and regulations at issue do not require the use of adverse inferences in selecting among the facts available. Because these provisions do not mandate the administering authority to take the actions challenged by India, India's “as such” claims must fail at the outset.

162. The text of the provisions makes plain that Commerce has the discretion either to employ or not employ the use of an adverse inference in selecting from among the facts available. The pertinent provision of the U.S. statute states:

Adverse Inferences.--If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under

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<sup>283</sup> Even if the Panel finds that India's claim under Article 12.1 falls within its terms of reference, India has failed to make a *prima facie* case of inconsistency. India's claim regarding Article 12.1 consists only of an assertion that the U.S. provisions “are ‘as such’ inconsistent with Articles 12.1 and 12.7 of the SCM Agreement,” and a recitation of the text of Article 12.1. No substantive claim related to Article 12.1 is articulated, and no further mention of that provision is made.

this title, *may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from-

- (1) the petition,
- (2) a final determination in the investigation under this subtitle
- (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
- (4) any other information placed on the record.<sup>284</sup>

a) The regulation challenged by India, section 351.308(a)-(d), states, in relevant part:

(a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Secretary *may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. This section lists some of the sources of information upon which the Secretary may base an adverse inference and explains the actions the Secretary will take with respect to corroboration of information.<sup>285</sup>

(b) *In general*. The Secretary may make a determination under the Act and this part, based on the facts otherwise available in accordance with section 776(a) of the Act.

(c) *Adverse inferences*. For purposes of section 776(b) of the Act, an adverse inference may include reliance on:

- (1) Secondary information, such as information derived from:
  - (i) The petition;
  - (ii) A final determination in a countervailing duty investigation or an antidumping investigation;
  - (iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or
- (2) Any other information placed on the record.

163. The use of the discretionary term "may" throughout both section (b) of 19 U.S.C. §1677e and Commerce's regulation at section 351.308(a) supports the conclusion that the provisions of

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<sup>284</sup> 19 U.S.C. § 1677(e)(b) (emphasis added). (Exhibit USA-12).

<sup>285</sup> 19 C.F.R. § 351.308(a) – (d) (emphasis added). (Exhibit USA-13).

law at issue are not mandatory in nature and cannot breach U.S. WTO obligations.<sup>286</sup> Accordingly, India cannot prevail on an “as such” claim against these provisions of U.S. law.

164. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member’s WTO obligations only if the legislation mandates action that is inconsistent with those obligations or precludes action that is consistent with those obligations.<sup>287</sup> If the legislation provides discretion to administering authorities to act in a WTO-consistent manner, the legislation cannot, “as such”, violate the Member’s WTO obligations.

165. The Appellate Body has explained that “the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a [Member’s] GATT 1947 obligations.”<sup>288</sup> This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member’s legislation is WTO-consistent.

166. In *US – Export Restraints*, the panel described the mandatory/discretionary distinction as a “classical test” with longstanding historical support<sup>289</sup>, and went on to apply the doctrine in concluding that certain provisions of the US countervailing duty law did not mandate action inconsistent with provisions of the SCM Agreement.<sup>290</sup> In *US – Section 211 Appropriations Act*, the Appellate Body continued to recognize that a distinction should be made between legislation that mandates WTO-inconsistent behavior, and legislation that gives rise to executive authority that can be exercised with discretion.<sup>291</sup> And in *US – OCTG from Argentina*, the Appellate Body restated the view that “an ‘as such’ claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct – not only in a particular instances that has occurred, but in future situations as well – *will necessarily be inconsistent with that Member’s WTO obligations.*”<sup>292</sup>

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<sup>286</sup> In *US - Steel Plate from India*, the panel addressed the issue whether sections 776(a) and 782 of U.S. law were mandatory. The panel specifically found a “straightforward reading of the US statutory provisions at issue leads us to conclude that US law is not mandatory in the sense that India posits.” *US - Steel Plate from India (Panel)*, para. 7.93. Like section 776(a), section 776(b) uses the same discretionary terms and should also be recognized as non-mandatory.

<sup>287</sup> See, e.g., *US - Steel Plate from India (Panel)*, paras. 7.88 to 7.89; *US - 1916 Act (AB)*, paras. 88-89; GATT Panel Report, *EEC – Parts and Components*, BISD 37S/132, paras. 5.25 and 5.26.

<sup>288</sup> *US – 1916 Act (AB)*, para. 88.

<sup>289</sup> *US - Export Restraints*, para. 8.9.

<sup>290</sup> *US - Export Restraints*, paras. 8.4-8.131.

<sup>291</sup> *US - Section 211 (AB)*, para. 259. *US - Zeroing (EC)*, para. 214; but see *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 98 (although the Appellate Body stated that that particular appeal did not call for a comprehensive examination of the mandatory/discretionary distinction, it observed that with any such analytical tool, the import of the distinction may vary from case to case, and thus cautioned against a mechanical application, see para. 93 and fn. 94).

<sup>292</sup> *US - OCTG from Argentina (AB)*, para. 172 (emphasis added).

167. India’s assertion that the provisions at issue are simply indifferent to the requirements of Article 12.7 and authorize Commerce to use certain information simply because it may be adverse to the non-cooperating party is misplaced.<sup>293</sup> Where Commerce finds a respondent has, in fact, failed to cooperate to the best of its ability, Commerce has discretion *not* to apply an inference that is adverse to the interests of that party in selecting from among the available facts. Indeed, in promulgating its regulation, commenting parties urged Commerce to adopt the position that the adverse inference must be mandatory, not discretionary, when a respondent fails to cooperate to the best of its ability.<sup>294</sup> These parties argued that application of neutral facts available when a respondent fails to cooperate with requests for information would undermine Commerce’s ability to obtain complete, timely, and accurate information when carrying out its statutory obligations. Commerce expressly rejected the proposal and instead retained in all cases its ability to decide whether to apply an inference that is adverse to the interests of the party on a case-by-case basis.<sup>295</sup>

168. Furthermore, in its application of these provisions, Commerce has exercised its discretion not to invoke the powers challenged by India in its submission. For example, in *Steel Plate from Indonesia* the respondent-company failed or refused to provide necessary information, as requested, and Commerce determined that the company failed to cooperate to the best of its ability. Commerce, however, did not employ an adverse inference, but instead relied on information supplied by the foreign government regarding the company’s non-use of the subsidy program.<sup>296</sup>

169. In light of the above arguments, India’s “as such” claim against these provisions of U.S. law fails.

#### **B. The U.S. Measures Regarding Facts Available are Not Inconsistent with Article 12.7 of the SCM Agreement**

170. Even aside from the fact that the U.S. measure does not require any WTO-inconsistent action, and therefore India’s “as such” claim fails on this basis, India’s claims under Article 12 of the SCM Agreement also fail because the U.S. measures governing determinations made based upon facts available are fully consistent with Article 12.7.

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<sup>293</sup> India First Written Submission, para. 178.

<sup>294</sup> *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-14).

<sup>295</sup> *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-14).

<sup>296</sup> *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-15); *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-16; Exhibit USA-17); *see also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027, Sep. 13, 2005, at 7-8 (Comment 1). (Exhibit USA-18; Exhibit USA-19).

## 1. Overview of US Laws

171. Before proceeding with its substantive argument, the United States finds it necessary to provide the Panel with a complete recitation of the U.S. measures at issue in this dispute, and a description of their operation. India has challenged in its first written submission only certain portions of the US measures. Three of the subparts excluded by India contain important restrictions relating to the use of facts available. In limiting its arguments and references only to certain portions of US law, India attempts to isolate one aspect of the measure, and to take it out of its proper context. When interpreted based on the text of the laws themselves, and when read together with the other subparts of the laws, the U.S. measure regarding determinations based on facts available complies with Article 12.7 of the SCM Agreement.<sup>297</sup>

172. Based on the plain language of the text, the U.S. facts available measures allow, first, that Commerce may make determinations based on the facts available whenever: i) necessary information is not available on the record; or ii) an interested party fails to provide information requested in a timely manner; or iii) Commerce is unable to verify information submitted.<sup>298</sup>

173. Next, where Commerce further finds that an interested party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” Commerce “may use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available.*”<sup>299</sup> Section (c) of the US regulation goes on to describe what may constitute the use of an adverse inference. Specifically, the regulation provides that when a decision is made that a party has failed to cooperate to the best of its ability, use of an adverse inference “may include *reliance on ... [s]econdary information...; or [a]ny other information placed on the record.*” “Secondary information”, according to Section (c), includes “information derived from”: i) the petition; ii) a final determination in a CVD or an anti-dumping investigation; or any previous administrative or other review. Based on the regulation, then, Commerce may use an adverse inference *in selecting from among the facts otherwise available*, and in any case, must *rely on* secondary or record information available.

174. Section (d) of the regulation (and section (c) of the statute), which were not discussed by India in its submission, includes the first of two important limitations on the use of facts available. Section (d) requires that, when relying on secondary information pursuant to Section (c), Commerce must, “to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal”. The regulation goes on to include an illustrative list of such independent sources, and also specifies that “[c]orroborate means that [Commerce] will examine whether the secondary information to be used has probative value”. Commerce may only use uncorroborated information in making its determinations where corroboration is in fact not practicable.

175. Finally, Section (e) of the regulation includes a second limitation on Commerce’s ability to make a determination based on the facts available. This section makes clear that Commerce

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<sup>297</sup> See Exhibits USA-12 and USA-13 for the complete versions of the US measures.

<sup>298</sup> See 19 U.S.C. §1677e (a) and 19 CFR 351.308(a) (Exhibit USA-12; Exhibit USA-13).

<sup>299</sup> See 19 U.S.C. §1677e (a) and 19 CFR 351.308(a) (Exhibit USA-12; Exhibit USA-13).

“will not decline to consider information that is submitted by an interested party and is necessary to the determination”, even if it does not meet all the requirements established by Commerce, if:

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
- (5) the information can be used without undue difficulties.

## **2. The U.S. Measures are Consistent with Article 12.7 of the SCM Agreement**

176. India has no basis for its argument that the U.S. measures breach Article 12.7 of the SCM Agreement “as such”.

177. Article 12.7 of the SCM Agreement states:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

178. Article 12.7 enables investigating authorities to make determinations when interested parties and Members have failed to provide necessary information. That is, Article 12.7 permits “recourse to facts available when an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation.”<sup>300</sup> Given the circumstances in which the need to resort to facts available arises, the Appellate Body has observed that Article 12.7 is “intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>301</sup>

179. Elaborating on the requirements of Article 12.7 in *Mexico-Beef and Rice*, the Appellate Body further found that Article 12.7 “permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to

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<sup>300</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 7.447.

<sup>301</sup> *Mexico – Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.

subsidization...and injury.”<sup>302</sup> The Appellate Body also noted that “the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.”<sup>303</sup> For these reasons, “to the extent possible, an investigating authority using “facts available” in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested by the party”.<sup>304</sup>

180. Nothing in Article 12.7, however, limits the application of facts available to those facts that are most favorable to the interests of a Member or interested party who fails to supply information, nor does the ordinary meaning of the term “facts available” speak to which facts should be selected. Rather, the permission to apply “the facts available” in making a determination pursuant to Article 12.7 merely means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available. These facts may include those that are less favorable to an interested Member or party.

181. The U.S. measures comply with Article 12.7. As described above, the measures allow Commerce to resort to facts otherwise available when necessary information is not provided by responding parties.<sup>305</sup> When Commerce further determines that a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information”, Commerce also has the discretion to “use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available”.<sup>306</sup> If it chooses to do so, Commerce may rely on secondary information contained in the petition, a final determination in a previous investigation, a previous review or other proceeding, or any other information placed on the record. If Commerce relies on secondary information, that information must be corroborated to the extent practicable.

182. India has argued that, because Commerce applies “adverse” facts available, it necessarily violated Article 12.7 of the SCM Agreement. India insists in its submission that without an express provision concerning “adverse” facts available, “the customary rules of treaty interpretation forbid the artificial insertion of such a concept into the SCM Agreement.”<sup>307</sup> India’s argument fails to read Article 12.7 in its proper context<sup>308</sup>, including in light of the parallel provisions of the Anti-Dumping Agreement, found in Article 6.8 and in Annex II.<sup>309</sup>

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<sup>302</sup> *Mexico – Rice (AB)*, para. 291.

<sup>303</sup> *Mexico – Rice (AB)*, para. 293.

<sup>304</sup> *Mexico – Rice (AB)*, para. 294.

<sup>305</sup> 19 U.S.C. §1677e (a); 19 CFR §351.308(a) and (b) (Exhibit USA-12; Exhibit USA-13).

<sup>306</sup> 19 U.S.C. §1677e (b); 19 CFR §351.308(a) and (c) (Exhibit USA-12; Exhibit USA-13).

<sup>307</sup> India’s First Written Submission, paras. 159-160.

<sup>308</sup> The facts available provision in the *Kennedy Round Anti-Dumping Code* provided the basis for what is now Article 12.7 of the SCM Agreement. The term “facts available” first appeared in the context of GATT in a March 3, 1967 draft of what later became the *Kennedy Round Anti-Dumping Code*. See *Sub-Committee on Non-Tariff Barriers, Group on Anti-Dumping Policies, Draft Anti-Dumping Code*, TN.64NTB/W/16 (3 March 1967) (Exhibit USA-20). The addition of the facts available provision is directly traceable to a proposal made by Canada during the Kennedy Round negotiations to address what it identified as long periods of time between the imposition of

183. Although the SCM Agreement does not include an annex to Article 12.7, the Appellate Body has observed that “it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of ‘facts available’ in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”<sup>310</sup>

184. Annex II of the AD Agreement, therefore, contains relevant guidance with respect to the application of facts available. In relevant part, Annex II provides that “the investigating authorities should specify in detail the information required from any interested party”, and

should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

185. Paragraph 3 of Annex II requires that an authority should take into account “[a]ll information which is verifiable, [and] which is appropriately submitted so that it can be used in the investigation without undue difficulties.” Paragraph 5 of Annex II further requires that, “provided the interested party has acted to the best of its ability,” the fact that certain information submitted “may not be ideal in all respects... should not justify the authorities from disregarding it”.

186. Finally, paragraph 7 of Annex II describes the circumstances in which an authority may be forced to rely on secondary sources. Paragraph 7 states that relying on such information should be done “with special circumspection”, and requires that “where practicable” secondary information should be checked using information from independent sources at the authority’s disposal. In the final statement of the Annex regarding the use of facts available, Paragraph 7 concludes with the following:

It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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provisional duties and final determinations of dumping for some members. Canada’s proposal, therefore, focused upon expeditious investigations, but recognized that to do so authorities must be free to rely on facts available. Based upon Canada’s proposal, Article 6(i) of the final text stated that “In cases in which any interested party withholds the necessary information, a final determination, affirmative or negative, may be made on the basis of the facts available.” See *Anti-Dumping Code*, L/2812 (12 July 1967) at 9, Article 6(i) (Exhibit USA-21; Exhibit USA-22). In the negotiations for the *Tokyo Round Subsidies Code*, Canada proposed a provision on facts available that reflected the same sentence, verbatim, from Article 6(i) of the *Kennedy Round Anti-Dumping Code*. Canada’s draft, therefore, provided no indication of an intent to modify the ability of GATT members to apply facts available where parties did not provide requested information in countervailing duty investigations. In the final text of the *Tokyo Round Subsidies Code*, the facts available provision was expanded to refer not only to “any interested party” but to “any interested party or signatory.” (Exhibit USA-23; Exhibit USA-24).

<sup>309</sup> See *Mexico – Rice (AB)*, paras. 290-91, 295.

<sup>310</sup> *Mexico – Rice (AB)*, para. 295.

187. India asserts that, because Annex II is entitled “Best Information Available in Terms of Paragraph 8 of Article 6”, the provision of the AD Agreement corresponding to Article 12.7 of the SCM Agreement, an authority making a determination based on the facts available is not permitted to use facts that are adverse to the interests of the responding industries. This interpretation is incorrect, however, and does not reflect the overall balance achieved in the facts available provisions of the AD and SCM Agreements.

188. Rather, the balance reflected in these provisions allows an authority to make its determinations based on the facts otherwise available on the record when a Member or interested party fails to provide information that is necessary to the conclusion of the investigation; but only if the authority has informed the responding parties what information is needed and warned them of the consequences of their failure to provide that information. “[P]rovided the interested party has acted to the best of its ability”, the investigating authority should only disregard information that is provided by an interested party if it is unverifiable, untimely, or inappropriate, such that it cannot be used without undue difficulty. The Appellate Body has confirmed this interpretation of Annex II in its findings in *Mexico – Beef and Rice*.<sup>311</sup>

189. Given the limited investigative powers of an investigating authority, and its lack of any subpoena or other information gathering power over foreign parties, Article 12.7 provides these authorities with an essential tool for dealing with uncooperative parties, and for successfully completing an investigation in light of such non-cooperation. This ability to rely on facts otherwise available ensures that an interested party may not evade the application of countervailing duties through non-cooperation, and may not obtain a duty margin *more* favorable to its interests for having not cooperated. That is, Article 12.7 allows an investigating authority to incentivize responding Members and interested parties to participate in an investigation by relying on facts available, including unfavorable facts, in making its determinations when such cooperation is not forthcoming.

190. India’s assertion that the SCM Agreement prohibits the use of “adverse inferences” appears to rely upon a fundamental misunderstanding of how facts available determinations are made in countervailing duty investigations where interested parties have failed to cooperate. In particular, India fails to acknowledge the fact that the use of an adverse inference is based on the application of facts. The “adverse” element is introduced when Commerce decides which available facts are appropriate for use when a responding party has provided no verifiable, substantiated information relevant to the determination at hand. In application, therefore, the use of “adverse inferences” refers to Commerce’s ability to “use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available”.

191. The U.S. measures at issue respond to circumstances specifically addressed by the authority provided in Article 12.7. As one panel has put it:

Article 12.7 of the SCM Agreement is an essential part of the limited investigative powers of an investigating authority in

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<sup>311</sup> *Mexico – Rice (AB)*, para. 288.

obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, 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.<sup>312</sup>

192. The practical result of any interpretation of the SCM Agreement that prohibits the use of an adverse inference in selecting from among the facts available, therefore, would be to incentivize non-cooperation on the part of responding parties. The Appellate Body has warned of this potential outcome, finding:

if 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.<sup>313</sup>

193. The failure to provide necessary information not only hinders the authority's investigation, it could make it impossible for authorities to reach conclusions and make determinations, either affirmative or negative, unless authorities are permitted to take account of the fact that such parties have refused to provide the necessary information. Determinative evidence is generally in the hands of the investigated industry and the Member country, particularly if the laws and practices of the Member country are not readily transparent. If it could hope to achieve a result that is at least as good or better than they might have gotten had they participated in the investigation, a responding party might choose to simply not cooperate rather than spend the time and resources that would otherwise be needed.

194. India wrongly equates the use of an adverse inference with an unfettered right to punish a party for failing to cooperate. In doing so, India's reliance on panel reports in *EC-DRAMS* and *China-GOES* is misplaced.<sup>314</sup> These panels did *not* find the use of adverse inferences to be impermissible "as such" under Article 12.7. Rather they rejected the specific application of adverse inferences based on the facts and circumstances in those cases. The findings of the *China-GOES* panel, for example, are only understood in the context of the facts in that dispute. Specifically, the panel found that China's investigating authority, MOFCOM, had ignored *substantiated facts* on the record in the application of a 100% subsidy utilization rate and that such a finding "was actually at odds with information on the record suggesting that a lesser rate of utilization should be applied."<sup>315</sup> For these reasons, the *China-GOES* panel concluded that MOFCOM failed "to establish any factual basis" for its facts available determination.<sup>316</sup> Thus, the primary issue in front of that panel was the investigating authority's unjustified rejection of

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<sup>312</sup> *EC-DRAMS*, para. 7.61 (emphasis added).

<sup>313</sup> *Mexico-Rice (AB)*, para. 293.

<sup>314</sup> India's First Written Submission, paras. 164-165.

<sup>315</sup> *China-GOES (Panel)*, para. 7.310.

<sup>316</sup> *China-GOES (Panel)*, para. 7.310.

substantiated facts on the record in favor of a conclusion that lacked any factual basis, and in fact contradicted what facts were available.<sup>317</sup>

195. It should also be noted that numerous WTO Members have incorporated some role for “adverse inferences” in their legislation governing the use of facts available. In particular, Armenia, Brazil, China, the European Union, Japan, Pakistan, Panama, Singapore, South Africa, Thailand, Turkey, Ukraine, the United States, and most recently Australia, have all enacted specific legislation that provides for the use of adverse inferences or results less favorable where a party does not cooperate in providing the information requested.<sup>318</sup> Other members whose legislative acts do not directly address the issue have followed the practice of using “adverse” facts available. For example, in its subsidy investigation of *Certain Aluminum Extrusions Originating In or Exported From the People’s Republic of China*, Canada’s administering authority, Canada Border Services Agency used an adverse inference in selecting facts attributed to non-cooperative exporters, applying “the highest amount of subsidy (Renminbi per kilogram) found for each of the 15 subsidy programs for the cooperative exporters located in China.”<sup>319</sup> Apart from these specific measures, we are aware of no WTO Member that has enacted legislation specifically limiting authorities from employing an adverse inference in selecting from among the facts available where a party refuses to cooperate.

**C. India has not presented a “rule or norm” of “general and prospective application” that is inconsistent with Article 12.7**

196. India states in its submission that the U.S. measures must be “read in light of the consistent practice of the US” in subsidy cases. India also appears to claim that these discretionary provisions, in application, are binding and mandatory, based upon Commerce’s practice.<sup>320</sup> Based on these statements, India may claim that it intended to challenge Commerce’s “approach” to making determinations based on facts available, and that this “approach” is “as such” inconsistent with Article 12.7 of the SCM Agreement. However, such a claim fails on both procedural and substantive grounds.

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<sup>317</sup> Similarly, and as noted above, in the case expressly relied upon by India, *EC-DRAMS*, the panel recognized that drawing certain inferences from the failure to cooperate plays a crucial role in the process. *EC - DRAMS*, at para. 7.61.

<sup>318</sup> See China: “MOFTEC may make its determination of subsidy and the amount of subsidy on the basis of facts available and draw adverse inferences with respect thereto.” (G/SCM/N/1/CHN/1/Suppl. 1, Art. 21 at pt. 16) (emphasis added); see also Armenia (G/SCM/N/1/ARM/1, Art. 41, para 6); Brazil (G/SCM/N/1/BRA/2, Ch. III, Art. 79, sections 1, 7); European Union (G/SCM/N/1/EEC/2, Arts. 28.1, 28.6); Japan (G/SCM/N/1/JPN/2/Suppl.6, Art 12, para. 7); Pakistan (G/SCM/N/1/PAK/2, Art. 28(6)); Panama (G/SCM/N/1/PAN/2/Suppl.1, Art. 157); Singapore (G/SCM/N/1/SGP/2/Suppl. 1, Art. 44, para 15); Thailand (G/SCM/N/1/THA/4, Arts. 4, 27, 70); Turkey (G/SMC/N/1/TUR/3, Art. 26); Ukraine (G/SCM/N/1/UKR/1, Art. 30, para. 6).

<sup>319</sup> *Statement of Reasons Concerning the making of final determinations with respect to the dumping and subsidizing of Certain Aluminum Extrusions Originating In or Exported From the People’s Republic of China*, March 3, 2009, 4218-26 CV/124, para. 259 (Exhibit USA-70).

<sup>320</sup> India First Written Submission, para. 181.

## 1. A Claim Based on Commerce’s “Approach” to Facts Available Is Not Within the Panel’s Terms of Reference

197. First, Article 6.2 of the DSU requires that the request for the establishment of a panel “shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” India’s request for this panel does not identify a practice, methodology, or procedure with respect to Commerce’s application of facts available in countervailing duty cases. Rather, India’s panel request, and its request for consultations before that, identified the U.S. statute, at 19 U.S.C. 1677e(b), and Commerce’s regulation at 19 C.F.R. 351.308.<sup>321</sup> Accordingly, on this basis alone, the Panel should reject India’s “as such” claim with respect to Commerce’s “consistent practice” because any such “measure” is outside the Panel’s terms of reference.

## 2. India Has Not Identified a “Measure” That May Be Challenged “As Such”

198. Second, Article 3.3 of the DSU provides that the dispute settlement system exists to deal with “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures* taken by another Member.”<sup>322</sup> Article 32.5 of the SCM Agreement refers to the obligation for each Member to ensure “its laws, regulations, and administrative procedures” are in conformity with the Agreement. Here, the issue is whether India has demonstrated that Commerce’s approach to facts available in countervailing duty cases falls within the ambit of these types of acts.

199. As the Appellate Body observed in *US-OCTG Argentina*, “an ‘as such’ claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member’s WTO obligations.”<sup>323</sup> “It flows from this that, in general, measures challenged ‘as such’ should have general and prospective application, and ‘necessarily’ result in a breach of WTO obligations.”<sup>324</sup>

200. In this respect, the Appellate Body in *US – Zeroing (EC)* has found that “a panel must not lightly assume the existence of a ‘rule or norm’ constituting a measure of general and prospective application.”<sup>325</sup> It further stated:

In our view, when bringing a challenge against such a “rule or norm” that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged “rule

<sup>321</sup> India Request for the Establishment of a Panel, (July 12, 2012), at para. 9.

<sup>322</sup> Emphasis added.

<sup>323</sup> *EC – ITA*, para. 7.154, referring to *US-OCTG from Argentina (AB)*, para. 172.

<sup>324</sup> *EC – ITA*, para. 7.154.

<sup>325</sup> *US – Zeroing (EC) (AB)*, paras. 196 and 204.

or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.\*

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\* This does not mean that a mere abstract principle would qualify as a "rule or norm" that can be challenged, as such.<sup>326</sup>

201. The Appellate Body went on to examine the evidence and find that the “methodology” at issue “consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract.”<sup>327</sup>

202. In *US-Export Restraints*, the panel addressed whether an individual action can give rise to an “as such” violation of WTO obligations. The panel found that:

“the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations.”<sup>328</sup>

203. The panel also addressed whether, as a practice, the treatment of export restraints as subsidies required the administering authority to treat such export restraints in a certain way. Noting that a practice must normally be followed such that those affected by the law have reason to expect that it will be followed, the panel stated: “the argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC ‘normally’ follows would not be sufficient to accord such a practice an independent operational existence.”<sup>329</sup> The panel observed that the administering authority could depart from the practice as long as it explained its reasons for doing so, and

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<sup>326</sup> *US – Zeroing (EC) (AB)*, para. 198.

<sup>327</sup> *US – Zeroing (EC) (AB)*, para. 198; *see also US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.131, and fn. 113.

<sup>328</sup> *US - Export Restraints*, para. 8.85.

<sup>329</sup> *US - Export Restraints*, para. 8.126.

concluded that this fact “prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action.”<sup>330</sup>

### **3. India Has Not Demonstrated That Commerce’s Approach to Facts Available is Inconsistent With Article 12.7 of the SCM Agreement**

204. To succeed in its “as such” claim against Commerce’s determinations, therefore, India has the burden of establishing that Commerce’s practice with respect to facts available determinations is a norm or rule of general and prospective application; and that this norm or rule, as such, violates Article 12.7 of the SCM Agreement. This means that India has the burden of establishing, as a matter of law, that the approach to facts available determinations taken by Commerce necessarily violates Article 12.7 of the SCM Agreement.<sup>331</sup> India has not met this burden.

205. In its “as such” arguments, India has not cited to even a *single instance of application* in order to demonstrate what Commerce’s practice, in its view, might entail; much less has India articulated a consistent practice rising to the level of “a norm of general and prospective application” which Commerce is bound to follow in all of its facts available determinations. In footnote 163, “India reserves its right to supplement this understanding with further evidence to prove such consistent practice.” It is not India’s *right*, however, to provide evidence sufficient to support its claim; it is its *obligation*, as the complaining party, to make a prima facie case.

206. Beyond India’s failure to establish any practice on the part of Commerce, the United States asserts that Commerce in fact follows no such “consistent practice”, and that India’s challenge is not within the scope of the measures that may be challenged under Article 32.5 of the SCM Agreement. That is, Commerce does not follow any one approach to its facts available determinations in countervailing duty cases such that it could be said to reflect an agency “administrative procedure” under any law or regulation – independently of the terms of the U.S. measures included in India’s panel request.

207. Rather, the way in which Commerce applies the facts available in making such determinations may vary from case to case, and from subsidy to subsidy program, depending on the facts provided, the facts available, and the circumstances of the case.<sup>332</sup> In fact, Commerce has declined to use an adverse inference in selecting from among the facts available in several instances where reliable information was otherwise available on the record, further undermining

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<sup>330</sup> *US - Export Restraints*, para. 8.126 (emphasis in original).

<sup>331</sup> *EC – Hormones (AB)*, para. 104.

<sup>332</sup> For example, in the 2007 Administrative Review, Commerce used Essar’s own information on its EPCGS licenses in its application of facts available rather than apply “the highest rate ever calculated for a program” as India has claimed, which demonstrates the use of facts available depends upon the facts provided, the facts available, and the circumstances of the case. *Issues and Decision Memorandum for 2007 Administrative Review*, April 29, 2009, Section IV.2, comments 6 and 8 (Exhibit IND-38).

any argument that Commerce has developed a “consistent practice” with respect to its application of facts available.<sup>333</sup>

208. It should also be noted that a panel has previously found that Commerce’s “practice” under another discretionary portion of the U.S. regulation regarding the use of facts available could not be challenged “as such” under Article 6.8 of the AD Agreement (which corresponds to Article 12.7 of the SCM Agreement). In *US-Measures On Steel Plate From India*, the panel addressed whether a US practice existed under 19 CFR §351.308(f) regarding the use of information submitted by interested parties such that it constituted a challengeable “measure”. There, the panel rejected India’s “as such” challenge to the facts available provision, reasoning that:

[There] is not a pre-established rule for the conduct of anti-dumping investigations. Rather, as India suggests, a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC. We note in this regard that the USDOC *decisions on application of facts available turn on the particular facts of each case, and the outcome may be the application of total facts available or partial facts available, depending on those facts.*<sup>334</sup>

209. Consistent with the findings in *US-Export Restraints*, the panel in *US-Measures On Steel Plate From India* placed repetitive action into perspective, stating:

we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its past practice, it might be possible to deem that practice a measure. The United States has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.<sup>335</sup>

210. Just as Commerce holds authority to change its practice in the anti-dumping context, it also holds the same authority in the countervailing duty context.

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<sup>333</sup> *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-15); *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-16; Exhibit USA-17); *see also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027, Sep. 13, 2005, at 7-8 (Comment 1). (Exhibit USA-18; Exhibit USA-19).

<sup>334</sup> *US – Steel Plate From India (Panel)*, at para. 7.22 (emphasis added).

<sup>335</sup> *US – Steel Plate From India (Panel)*, at para. 7.22.; *see also US – Zeroing (EC) (AB)*, paras. 196 and 204 (the Appellate Body expressly noted that “a panel must not lightly assume the existence of a ‘rule or norm’ constituting a measure of general and prospective application.” In that case, the Appellate Body examined the evidence, noting that it “consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract.”); *see also US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.131, and fn. 113.

211. Based on the foregoing, the United States therefore requests that the Panel find that India has failed to establish that the U.S. measures with respect to the application of facts available are inconsistent with Article 12.7 of the SCM Agreement.

### **VIII. COMMERCE’S APPLICATION OF FACTS AVAILABLE WAS CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT**

212. Article 12.7 of the SCM Agreement provides for determinations by administering authorities that are based upon the facts available. Article 12.7 states:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

#### **A. Commerce’s Use of “Adverse Inferences” In Selecting From Among the Available Facts To Determine the Amount of the Benefit Was Fully Consistent With the SCM Agreement**

213. India has challenged the program-specific subsidy rates that Commerce applied in the 2006, 2007, and 2008 administrative reviews.<sup>336</sup> Specifically, India claims that Commerce applied Article 12.7 in a punitive manner in determining the amount of the benefit in certain instances. As demonstrated below, Commerce properly applied the facts available consistent with Article 12.7 and based upon a factual foundation.

214. In section VII.B above, the United States refuted India’s argument that the WTO Agreement prohibits administering authorities from taking account of non-cooperation in the use of facts available. The United States now reiterates two main points that are particularly relevant in this section. First, the ordinary meaning of the term “facts available” in Article 12.7 does not limit the application only to those facts that are favorable to the interests of a Member or interested party. Rather, the term “facts available” allows administering authorities to select from *all available facts*, including those facts considered to be less favorable to an interested Member or interested party.<sup>337</sup>

215. Second, India’s assertion that the SCM Agreement prohibits the use of “adverse inferences” stems from a misunderstanding of how facts available determinations are made in countervailing duty cases where parties have not cooperated.<sup>338</sup> In particular, the use of an adverse inference is based upon the application of available facts. As explained in section VII.B above, the “adverse” element is introduced when Commerce decides *which* available facts are appropriate to use when a party has provided no verifiable, substantiated information relevant to the determination at hand. In application, the use of “adverse inferences” simply reflects that

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<sup>336</sup> India First Written Submission, paras. 526-528.

<sup>337</sup> *Supra*, section VII.B.

<sup>338</sup> India First Written Submission, paras. 159 and 166.

Commerce “may use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*” if an interested party has failed to cooperate.<sup>339</sup>

216. Relevant to India’s challenge of Commerce’s application of facts available in certain instances, in the 2006, 2007, and 2008 administrative reviews, JSW, Essar, and Tata, respectively, refused to provide requested information pertaining to the amount of the benefits they received from various subsidy programs during the particular time periods examined in those administrative reviews. Specifically:

- In the 2006 Administrative Review, JSW did not provide necessary information, as requested, pertaining to subsidy programs administered by the state government of Karnataka, and the GOI’s provision of high-grade ore and captive mining rights for iron ore.<sup>340</sup>
- In the 2007 Administrative Review, Essar did not provide necessary information, as requested, pertaining to the subsidy programs administered by the state government of Chhattisgarh, and incomplete information pertaining to the Export Promotion Capital Goods Scheme Licenses (EPCGS). In addition, the GOI did not provide necessary information, as requested, pertaining to the 2005 Special Economic Zone Act, and the Captive Port Facilities Program administered by the state government of Gujarat.<sup>341</sup>
- In the 2008 Administrative Review, Tata did not provide any information pertaining to any of the subsidy programs requested by Commerce.<sup>342</sup>

217. In each case, Commerce was left with no benefit information on the record with respect to the refusing companies. Commerce cannot calculate a rate for a non-cooperating company when the information required for such a calculation has not been provided. Benefit information is necessary to Commerce’s analysis and its absence would necessarily hinder that determination.

218. To make a determination in each instance where a subsidy program under review was missing benefit information, Commerce used a proxy by first seeking to identify a subsidy rate for the identical subsidy program using rates that were calculated from information provided by

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<sup>339</sup> 19 USC § 1677e (Exhibit USA-12). *See supra* section VII.B.

<sup>340</sup> *See Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 5-9, and section C. State Government of Karnataka Programs (Exhibit IND-33).

<sup>341</sup> *See Issues & Decision Memorandum for 2007 Administrative Review*, April 29, 2009, at comments 2, 4, 5, and 6 (Exhibit IND-38).

<sup>342</sup> *See Memorandum to the File “Phone Conversation with Counsel for Tata Steel Limited”* dated April 23, 2009. *See also Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 4 (Exhibit USA-25).

cooperating companies. Commerce looked to its prior determinations throughout the proceeding on hot-rolled steel products from India – *i.e.*, the investigation and all prior administrative reviews, but also any calculated rates from cooperating companies in the instant administrative review as well, if available.

219. For example, if Commerce found that one company in a prior determination cooperated by providing its benefit information for the identical subsidy program (in the investigation or any administrative review), Commerce used that company’s calculated benefit rate to fill in the missing information of the refusing company, provided the cooperating company’s rate for the program was above *de minimis*, as was done in the 2008 Administrative Review.<sup>343</sup> If Commerce found that two cooperating companies provided benefit information for the identical program, Commerce filled in the missing information by applying the higher subsidy rate of the two cooperating companies, as was also done in the 2008 Administrative Review.<sup>344</sup>

220. Where no information on the identical program was available within the proceeding on hot-rolled steel products from India, to fill in for the missing information, Commerce then looked for a similar or comparable subsidy program within the proceeding. Commerce applied the same principle as before – *i.e.*, that the subsidy rate to be used as facts available must be based upon a calculated rate from a cooperating company.<sup>345</sup>

221. Where no information on a similar program was available within the proceeding on hot-rolled steel products from India, to fill in for the missing information, Commerce expanded its search and examined subsidy rates from all countervailing duty proceedings involving India. Once again, Commerce required that any rate applied as facts available must be based upon a calculated rate from a cooperating company. Commerce also determined that it would not use any rates from programs that companies in the hot-rolled steel industry could not have used.<sup>346</sup>

222. In the 2006 Administrative Review, Commerce investigated new subsidies never examined before, and thus found there were no subsidy rates available for some identical or similar programs. In that case, Commerce expanded its search and examined the subsidy rates from all countervailing duty proceedings involving India.<sup>347</sup> In the 2007 and 2008

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<sup>343</sup> *Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 88-89 (Exhibit IND-33); *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 5, and 69-70 (Exhibit IND-41).

<sup>344</sup> For example, in the 2008 Administrative Review, as facts available, Commerce applied a subsidy rate for the identical program from a prior review for ten of the twenty-two programs administered by the GOI, such as the Pre-Shipment and Post-Shipment Export Financing. See *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 6-21 (Exhibit IND-41).

<sup>345</sup> *Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 88-89 (Exhibit IND-33); *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 5, and 69-70 (Exhibit IND-41).

<sup>346</sup> *Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 88-89 (Exhibit IND-33); *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 5, and 69-70 (Exhibit IND-41).

<sup>347</sup> In the 2006 Administrative Review, Commerce relied upon similar subsidy programs for the GOI’s Captive Mining of Iron Ore and certain sub-programs in either the instant review or the underlying investigation. For the remaining subsidy programs, Commerce relied upon the subsidy rate calculated for the Export Oriented Unit Program: Duty Free Import of Capital Goods and Raw Material in the *Final Affirmative Countervailing Duty Determination: Bottle-Grade polyethylene Terephthalate Resin from India*, 70 Fed. Reg. 13460, March 21, 2005.

Administrative Reviews, Commerce applied calculated rates from identical and similar subsidy programs based upon calculated rates from prior determinations within the hot-rolled steel proceeding.<sup>348</sup>

223. In each case in which Commerce identified the particular subsidy rate to be applied as facts available, as a final step, it examined the reliability and relevance of such rates to the extent practicable.<sup>349</sup> In its examination, if information on the record indicates that a particular subsidy rate to be applied as facts available was not appropriate, i.e., the information shows the rate does not have probative value and thus is not “corroborated,” Commerce will not use the rate<sup>350</sup> In these administrative reviews, no evidence on the record of the respective review contradicted or raised question about the subsidy rates that were to be applied as facts available. Because the subsidy rate for each program was on a par with identical or similar subsidy programs, the rate is not a punitive one, but instead provides a reasonable estimate of the level of subsidization provided by the government.

224. Commerce’s benefit determination in each case reflects a reasoned analysis and is based upon a factual foundation. The starting point for Commerce’s facts available analysis is the calculated subsidy rates of cooperating companies. These rates reflect the *actual subsidy practices* of the central and state governments in India as reflected in the actual experience of companies in India. Second, the logical inference applied in selecting from among the facts available in this situation is that where a company refuses to provide information, it is reasonable to conclude that the company has benefitted from the subsidy program at least as much as the cooperating company in the same industry who received the higher benefit amount. The refusing company may have benefitted to a greater extent than a company that provided the necessary information when requested. However, Commerce cannot know the true extent of the benefit without obtaining the actual data from the company or government. Thus, given the refusal of the company to provide the necessary information, Commerce applies the higher calculated rate for the particular subsidy program at issue, unless information on the record indicates that that rate is inaccurate or inappropriate.

225. In each of the challenged administrative reviews, it is undisputed that necessary information was not provided, as requested, and therefore Commerce properly resorted to the application of facts available under Article 12.7. In each case, Commerce examined the available evidence and, where there was no information to the contrary, Commerce reasonably

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*See Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 7, Section on “Selection of Adverse Facts Available Rate” (Exhibit IND-33).

<sup>348</sup> *See Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 5 (Exhibit IND-41). *See also, Issues & Decision Memorandum for 2007 Administrative Review*, April 29, 2009, at 22 (Exhibit IND-38).

<sup>349</sup> *See e.g., Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 8-9 (Exhibit IND-33). *See also*, “Results of Redetermination Pursuant to Court Remand” (Jan. 10, 2013), in *Essar Steel Limited v. United States*”, pertaining to the 2007 Administrative Review (in which Commerce stated, “Consistent with the statute, the Department corroborated these rates by examining the relevance and reliability of the rates. Although the Department did not explicitly state in the Final Results that it was corroborating the subsidy rates, the net subsidy rate for each subsidy program was corroborated.”) at 3 (Exhibit USA-26). The court affirmed Commerce’s redetermination of Essar’s subsidy rate in *Essar Steel Limited v. United States*, Slip Op. 13-48, Apr. 9, 2013, (unchanged from original determination) (Exhibit USA-27).

<sup>350</sup> 19 USC § 1677e (Exhibit USA-12).

inferred that the refusing party benefitted at the same rate as a cooperating party was found to benefit in this proceeding, or, if necessary, another proceeding pertaining to India.

226. In making its “as applied” argument, India reiterates its contention that adverse inferences are prohibited by Article 12.7, but makes no further argument concerning the subsidy rates applied as facts available in these challenged reviews.<sup>351</sup> India’s argument, however, is revealing for what it fails to contain. India does not argue that Commerce’s benefit determinations lacked a factual foundation. Nor does India argue that Commerce’s application is the “worst possible result” as it seems to imply in its “as such” argument.<sup>352</sup> A further flaw in India’s argument is that it does not identify any substantiated facts that contradict Commerce’s determinations, as was the case in the United States’ challenge to MOFCOM’s application of facts available in *China-GOES*.<sup>353</sup> Last, India does not identify what Commerce should have relied upon in making these determinations based upon facts available.

227. To be clear, Commerce’s approach in these administrative reviews does not obtain the “worst possible result”, nor was it intended to do so. Further, Commerce rested every benefit determination on the factual foundation of a cooperating party’s calculated subsidy rate for an identical or similar subsidy program in each of the challenged administrative reviews.

228. In light of the fact that “a significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation”<sup>354</sup> the refusal of these companies to provide *any* necessary information with respect to the benefits they received was properly taken into account in selecting from among the facts available in these respective reviews.

229. For these reasons, the Panel should reject India’s arguments that the United States acted inconsistently with its obligations under Article 12.7 of the SCM Agreement in determining the amount of the benefit received under the various subsidy programs based upon the facts available.

## **B. Commerce’s Facts Available Determinations in the 2008 Administrative Review Are Fully Consistent with Article 12.7 of the SCM Agreement**

### **1. 2008 Administrative Review – Factual Background**

230. On February 2, 2009, Commerce initiated an administrative review of Tata’s imports of hot-rolled steel products that entered the United States during calendar year 2008, as

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<sup>351</sup> India First Written Submission, Section V, paras. 157-166; and Section XI, paras. 522-524, and 528. India also raises the March 5, 2013 Sunset Review Determination in Hot-Rolled Steel Products from India. As discussed *infra*, this determination is not within the Panel’s terms of reference. The inclusion of claims related to this determination would inarguably expand the scope of this dispute as compared to the matter described in the request for the consultations. Under the DSU and Appellate Body findings, the terms of reference of this proceeding cannot extend to this determination. *See supra* section II.

<sup>352</sup> India First Written Submission, para.165.

<sup>353</sup> *See China – GOES*, para. 7.310.

<sup>354</sup> *EC - DRAMS*, para. 7.61.

requested.<sup>355</sup> Commerce issued questionnaires on February 6, 2009 to the GOI and Tata.<sup>356</sup> Tata initially questioned whether an administrative review was necessary stating that the company made no sales of commercial quantities during the period of review, but acknowledged that it made certain sales during the period.<sup>357</sup> After examining evidence pertaining to entry information, Commerce determined on March 27 that Tata, in fact, made sales of hot-rolled steel products during the period of review, and extended the time for Tata to respond to the questionnaire by 33 days, until April 17.<sup>358</sup>

231. The April 17 due date passed and Tata filed no response, nor did it request an extension of time to file its response. On April 23, Commerce officials contacted Tata concerning its questionnaire response. At that time, Tata company officials informed Commerce that the company was no longer participating in the review and would not be responding to Commerce's questionnaire.<sup>359</sup>

232. The GOI submitted its response on April 23. The submission, however, did not contain responses pertaining to programs administered by the state governments Gujarat, Maharashtra, Andhra Pradesh, Chhattisgarh, and Karnataka.<sup>360</sup> The GOI provided a response for the programs administered by the state government of Jharkhand. However, for many subsidy programs the GOI simply stated: "GOI understands that Tata has not availed any benefit under the program." In addition, with respect to Infrastructure Subsidies to Mega Projects, the GOI again stated that Tata did not receive benefits under the state government's programs, but noted "for the benefits if any availed by Tata, please see the response filed by Tata."<sup>361</sup>

233. On July 30, 2009, Commerce issued supplemental questionnaires and again asked the GOI to provide necessary information pertaining to the state programs.<sup>362</sup> In its August 10 response, the GOI again failed to respond to the questions pertaining to the programs administered by the five state governments.<sup>363</sup> On August 21, Commerce issued another supplemental questionnaire requesting additional information from these state governments, along with additional and clarifying information pertaining to the programs administered by the

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<sup>355</sup> *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 Fed. Reg. 5821 (Feb. 2, 2009) (Exhibit USA-28). Pursuant to a request for review by U.S. Steel Corporation (U.S. petitioner), Commerce initiated the administrative review for Essar, Ispat, JSW, and Tata.

<sup>356</sup> Commerce initially issued questionnaires to Essar, Ispat, and JSW, but rescinded the review for these companies on June 4, 2009, following U.S. Steel Corporation's withdrawal of its requests for review of such companies. See *Certain Hot-Rolled Carbon Steel Products from India: Partial Rescission of Countervailing Duty Administrative Review*, 74 Fed. Reg. 26847 (June 4, 2009) (Exhibit USA-29).

<sup>357</sup> *February 25, 2009 Letter from Tata Steel Limited to Commerce* (Feb. 25, 2009) (Exhibit USA-30).

<sup>358</sup> *Memorandum to the File "Sales by Tata during the POR"*, March 27, 2009 (Exhibit USA-31).

<sup>359</sup> *Memorandum to the File "Phone Conversation with Counsel for Tata Steel Limited"* dated April 23, 2009 (Exhibit USA-25). See also *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 4 (Exhibit IND-41).

<sup>360</sup> *GOI April 23, 2009 Response*, 84, and 95-96 (Exhibit USA-32). See also, *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 2-3 (Exhibit IND-41).

<sup>361</sup> *GOI April 23, 2009 Response*, at 95 (Exhibit USA-32).

<sup>362</sup> *Commerce July 30, 2009 Supplemental Questionnaire to the GOI*, at 1 (Exhibit USA-33). See also, *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 3 (Exhibit USA-41).

<sup>363</sup> *GOI's August 10, 2009 Supplemental Questionnaire Response* (2008 AR), at 1-3 (Exhibit USA-34).

state government of Jharkhand.<sup>364</sup> In its response, the GOI again provided no information with respect to the programs administered by these state governments.<sup>365</sup>

234. In a final supplemental questionnaire, issued September 10, 2009, Commerce requested the same information it requested in its August 21 supplemental questionnaire pertaining to the programs administered by the state government of Jharkhand.<sup>366</sup> In its September 24, 2009 response, the GOI submitted incomplete information on the programs administered by the state government of Jharkhand, and provided a letter from the state government’s Department of Industries that stated Tata had not received any benefits during the period of review.<sup>367</sup> The GOI did not provide any other information or documentation to demonstrate this claim, as Commerce specifically requested in its supplemental questionnaires.<sup>368</sup>

*a) State-Administered Subsidy Programs*

235. India contends that in some instances Commerce’s facts available determinations in the 2008 Administrative Review had no factual foundation,<sup>369</sup> while others were contradicted by available facts.<sup>370</sup> India’s arguments misrepresent Commerce’s use of an adverse inference, however, and therefore fail to demonstrate that any of these determinations was inconsistent with Article 12.7.

236. For example, for the subsidy programs administered by the state government of Jharkhand, Tata did not provide *any* information in the 2008 Administrative Review. India contends, however, that because Tata *did* provide information in the 2006 Administrative Review, and denied receiving any benefit from the programs at issue at that time, it is evident that “most of the factual basis to conclude Tata’s ineligibility continued to exist during the 2008 AR.”<sup>371</sup> India’s argument is flawed in two important respects. First, India fails to recognize that simply because a company did not receive benefits in a prior period does not mean that the company will never receive benefits under the program in the future. The question being examined in the 2008 Administrative Review – and thus the purpose of the review – is to determine whether, in fact, Tata received benefits under the programs during the specific period of time being examined in that review.

237. Moreover, India appears to be arguing that an administering authority should be prohibited from making a determination in a later administrative review, based upon facts

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<sup>364</sup> *Commerce August 21, 2009 Supplemental Questionnaire to the GOI*, at sections II and III (Exhibit USA-35).

<sup>365</sup> *GOI September 4, 2009 Response*, at III, stating “No information is available with the Government of India in this regard. US DOC may contact TATA Steel for a list of States in which they had operations during POR.” (Exhibit USA-36).

<sup>366</sup> *Commerce September 10, 2009 Supplemental Questionnaire to the GOI*, at section I.1 and I.2 (Exhibit USA-37).

<sup>367</sup> *GOI September 24, 2009 Response*, at 1, and Attachment. *See also, Issues & Decision Memorandum for 2008 Administrative Review*, April 19, 2010, at 3 (Exhibit USA-38).

<sup>368</sup> *See generally, GOI September 24, 2009 Response*, at 1, and Attachment (Exhibit USA-38) *See also, Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010 (Exhibit IND-41).

<sup>369</sup> India First Written Submission, Section XI.A.5, at paras. 545-561; and XI.A.6(a), at paras. 562-64.

<sup>370</sup> India First Written Submission, Section XI.A.6(b), at paras. 565-66.

<sup>371</sup> India First Written Submission, para. 559.

available, that diverges from a prior determination, even where companies refuse to provide or withhold current information, arguably because the facts on the record of the previous review must be applied as facts available in the current review. This limited interpretation of Article 12.7 is unsustainable, particularly where, as here, it would mean companies and governments can be free to withhold any unfavorable information they choose in an administrative review, and the administering authority would be *bound* to apply, as facts available, information that formed the basis of the prior determination. Such an interpretation would be contrary to the aims of Article 12.7 which, as the Appellate Body has observed, is “to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>372</sup>

238. India’s own arguments demonstrate this point. Information from the 2006 Administrative Review that India has placed before the Panel to show that Tata’s ineligibility continued to exist during the 2008 period for the programs at issue proves just the opposite.<sup>373</sup> For example, for purposes of “Infrastructure Subsidies to Mega Projects: (Tax Incentives, Grants, Loans)” in the 2006 Administrative Review, India states:

Tata further clarified that benefit under this sub-program, if any, can be availed by Tata only after completion of the project, within three months from the start of commercial production. Tata submitted that the likely date of commercial production for this project was the financial year 2008-2009 and accordingly, it could not have claimed benefit between January 1, 2006 and December 31, 2006.<sup>374</sup>

239. This statement indicates that, while Tata was not eligible for benefits under this program during the 2006 Administrative Review, the likely date of commercial production for Tata’s megaproject clearly falls within the period of time examined in the 2008 Administrative Review, making Tata appear to be eligible for benefits during the 2008 period. Most important, the statement demonstrates that a response that addresses subsidization during the current period of time plays a crucial role in any determination covering that time period. Undoubtedly, such information is “necessary information” as contemplated by Article 12.7. Thus, India has failed to demonstrate that Article 12.7 required Commerce to make its determination for the 2008 period based upon information from the 2006 Administrative Review.

240. It is important to note that in the 2008 Administrative Review, the GOI refused to provide the necessary information, as requested by Commerce. It could have provided the current eligibility requirements for this and other state-run programs. It did not. Tata also refused to respond to Commerce’s requests for information. It could have provided its current status in terms of eligibility for this and other state-run programs; and it could have informed Commerce about benefits it received under this and other state-run programs for this period. It did not. In

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<sup>372</sup> *Mexico – Rice (AB)*, para. 293.

<sup>373</sup> India First Written Submission, para. 556

<sup>374</sup> India First Written Submission, para. 556, citing Tata’s 2006 Questionnaire Response, November 27, at 6, 8, and 11. (Exhibit IND-66). Similarly, as India notes, in the 2006 Administrative Review “Tata denied adding any new iron ore facility and clarified that while it was planning to have a new iron ore facility in West Singhbhum, Jharkhand, the project had not yet started.”

India’s view, the eligibility information from a previous review was available to Commerce and should have been used as facts available.<sup>375</sup> India again misses the point with respect to the purpose of the review. To require Commerce to use information from a prior review as the only facts available would defeat the purpose of the review and hinder Commerce from making a determination for the current period.

241. As was demonstrated above, the facts surrounding a company’s eligibility for a particular program changes over time. Indeed, subsidies create incentives for companies. In turn, companies make business decisions that include these considerations. Companies expand by constructing, or in other cases by purchasing, new facilities; they create joint ventures; and relocate business operations. In the countervailing duty context, a mere change in an input supplier can also affect the level of subsidization.<sup>376</sup> Subsidies to input suppliers may be attributable to hot-rolled steel producers, depending on the facts and circumstances of the case. Similarly, governments also amend subsidy programs. But these important aspects of Commerce’s determination have been cut off by Tata and the GOI’s collective refusal to provide the necessary information Commerce requested. Instead, Commerce was left with no information on the record concerning Tata’s *current* state of eligibility or usage of the programs at issue, and therefore had to rely upon facts otherwise available. In the 2008 Administrative Review, the factual foundation relied upon by Commerce to make its determination was the factual information that provided the basis for initiating the investigation into these programs.<sup>377</sup> Thus, contrary to India’s claims, Commerce rested its decision upon facts available consistent with Article 12.7

242. India’s assertion that Commerce ignored the information from the record of the 2006 Administrative Review in making its facts available determinations with respect to the Jharkhand’s subsidy programs is also misplaced.<sup>378</sup> India makes similar arguments concerning the subsidy programs administered by the state governments of Karnataka, Andhra Pradesh, Chhattisgarh, Gujarat, and Maharashtra.<sup>379</sup> Again, using information from the 2006 Administrative Review – a period that preceded the period being examined by two years - India submits that Tata clarified that it was not located in Gujarat, and that its manufacturing facility was not located in Maharashtra.<sup>380</sup> The record of the 2006 Administrative Review is not part of the record of the 2008 Administrative Review. Commerce makes its determination for each review based upon the record before it. Each administrative review represents a discrete segment of the proceeding with a separate determination that pertains to the particular time period being examined.<sup>381</sup> The record of evidence accumulated during the course of the review

<sup>375</sup> India First Written Submission, para. 560.

<sup>376</sup> See, e.g., 19 C.F.R. § 351.525(b) (Exhibit USA-39).

<sup>377</sup> *Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Results of Countervailing Duty Administrative Review*, 75 Fed. Reg. 1496, 1518 (Jan. 11, 2010), citing Commerce’s “Memorandum regarding New Subsidy Allegations” (for Tata), September 27, 2007, placed on the record of the 2008 Administrative Review (see, *Memorandum to File from Gayle Longest*, December 31, 2009.) (Exhibit USA-40).

<sup>378</sup> India First Written Submission, para. 560.

<sup>379</sup> India First Written Submission, para. 563.

<sup>380</sup> India First Written Submission, para. 565.

<sup>381</sup> See 19 C.F.R. § 351.102(47) – that defines a “segment of proceeding” (Exhibit USA-41); see also *Beker Indus. v. United States*, 7 CIT 313, 315 (1984) (Exhibit USA-42); *Hynix Semiconductor, Inc. v. United States* 27 CIT 1469, 1471 (2003) (Exhibit USA-43); and *Neuweg Fertigung v. United States*, 797 F. Supp. 1020, 1022 (CIT 1992)

is then used in making the determination. Each final determination of a review is also separately reviewable by judicial authority.<sup>382</sup> Each determination must stand on its own and be supported by the underlying facts and evidence on the record of the particular review.

243. Commerce made its determination based on the only probative facts available to it, consistent with Article 12.7. As noted above, the purpose of the review is to make a determination for the period being examined. Using program-specific subsidy rates from cooperating companies who received actual subsidies from the government allows Commerce to base its determination on factual information. By contrast, to require Commerce to use the eligibility information from a prior period would make the review meaningless. Companies and the government could simply withhold any changes to subsidy programs that are viewed by those entities as unfavorable to their interests.

244. The information provided in the 2006 review does not address Tata's status for the 2008 period. Moreover, India cannot point to any information that addresses Tata's status, location, or benefit information for the period being examined in the 2008 Administrative Review. Because the 2008 Administrative Review covers a different time period, Commerce requested information on the above programs.<sup>383</sup> As demonstrated above, whether a company is eligible for benefits depends on the facts and circumstances during that period. Subsidies create incentives for companies to expand, merge with other companies, relocate, enter into joint ventures, or even purchase inputs from companies that are located in various states in India. Therefore, the information Commerce requested for the 2008 period is relevant and necessary for Commerce to make its determination.

245. In this review, Commerce therefore relied upon its previous determination that hot-rolled steel producers in India benefitted from countervailable subsidies provided by each of the state governments at issue here, including the state governments of Gujarat and Maharashtra.<sup>384</sup> While Commerce did not have available to it specific information pertaining to Tata for the current period, due to the collective refusal of the GOI and Tata to provide the requested information, determinations that are based upon facts available are, by their nature, limited to those facts that are available to the administering authority at the time of its determination. In making its determination, Commerce took all available facts into account, including its determinations from prior reviews, along with the GOI and Tata's non-cooperation. As the Appellate Body observed Article 12.7 of the SCM Agreement is "intended to ensure that the

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(Exhibit USA-44), which recognize that the record of an administrative review is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which 19 U.S.C. § 1615 authorizes judicial review.

<sup>382</sup> 19 U.S.C. § 1516a(a)(1)(D) (Exhibit USA-45); *see also* 19 C.F.R. 351.102(47) (Exhibit USA-41) referring to the same provision of the Tariff Act of 1930, as amended, stating that "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act."

<sup>383</sup> In the 2008 Administrative Review, Commerce specifically requested that the GOI "indicate the states in India in which Tata, the respondent company, had operations during the POR [period of review]." Commerce requested the GOI provide support documentation. *See Commerce's August 21, 2009 Supplemental Questionnaire*, at Section III (Exhibit USA-35).

<sup>384</sup> *Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Results of Countervailing Duty Administrative Review*, 75 Fed. Reg. 1496, 1507-1524 (Jan. 11, 2010) (Exhibit USA-40).

failure of a party to provide necessary information does not hinder an agency’s investigation.”<sup>385</sup> And that, “if 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.”

246. For these reasons, the Panel should reject India’s claim that Commerce breached Article 12.7 in making its determination based upon facts available.

***b) The Provision of High-Grade Iron-Ore, Market Development Assistance, Market Access Initiative, and Subsidies Under the SEZ Act***

247. With regard to the provision of high-grade iron ore, market development assistance, and subsidies under the SEZ Act, India contends that Commerce ignored evidence on the record of the 2008 Administrative Review by not taking into account the information submitted on the record by the GOI concerning these specific GOI programs.<sup>386</sup> This is incorrect. Commerce fully considered the record in the proceeding. The record included unsubstantiated facts, and wholly unanswered questions by the company being examined in the administrative review. As a result, Commerce had no option but to resort to the use of facts available.

248. Commerce issued a questionnaire to the GOI on February 6, 2009 requesting information on the GOI administered programs. The GOI, however, provided incomplete responses with respect to the particular subsidy programs identified by India.<sup>387</sup> For example, for the subsidy programs entitled Market Development Assistance, Market Access Initiative, and subsidies under the Special Economic Zone Act of 2005, the GOI simply stated “None of the respondent companies availed any benefits under this program”<sup>388</sup> and provided no further information.

249. While in April 2009 Tata communicated its decision not to cooperate in the administrative review,<sup>389</sup> Commerce continued to request information from the GOI in an effort to obtain information that could be used to demonstrate that, in fact, Tata did not use these subsidy programs during the 2008 period. Commerce issued a supplemental questionnaire on August 21, 2009 requesting documentation concerning these programs. For the Market Access Initiative, for example, Commerce requested:

Please identify the GOI administering authority that provides assistance to exporting companies under the MAI program and provide official documentation that demonstrates that this program was not used by Tata, the respondent company, during the POR

<sup>385</sup> *Mexico - Rice (AB)*, para. 293.

<sup>386</sup> India First Written Submission, 567.

<sup>387</sup> India First Written Submission, paras. 567-568.

<sup>388</sup> *GOI’s April 23, 2009 Response*, at 59 for the Market Development Assistance; at 67 for the Market Access Initiative; and at 68 for subsidies under the SEZ Act of 2005 (Exhibit USA-32).

<sup>389</sup> *Memorandum to the File “Phone Conversation with Counsel for Tata Steel Limited”* dated April 23, 2009 (Exhibit USA-25). See also *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 4 (Exhibit IND-41).

[period of review]. For example, copies of the GOI’s records concerning grants provided to exporters during the POR [period of review].<sup>390</sup>

250. In other words, Commerce requested that the GOI provide copies of records that would document which exporters received grants under the program for the time period being examined. The GOI identified the administering authority and provided a statement from the administering authority but did not provide the documentation requested.<sup>391</sup> The same is true with respect to the Market Development Assistance program.<sup>392</sup>

251. In light of Tata’s refusal to provide the necessary information, the documentation requested of the GOI became the only basis upon which Commerce could have obtained *substantiated* facts that Tata had, in fact, not received benefits under the program at issue. In addition, absent Tata’s own information it is unknown whether any company affiliated with Tata received benefits under these programs.<sup>393</sup> As a result, Commerce determined that the information provided by the GOI was “not complete and verifiable evidence” to allow Commerce to make its determination.<sup>394</sup> Instead, Commerce applied the facts available, relying on prior determinations, placed on the record of the instant review, in which these particular subsidy programs were examined. Commerce found the Market Development Assistance and Market Access Initiative to be export subsidies that provided countervailable subsidies to various producers in India.<sup>395</sup> On that basis, Commerce’s determination is consistent with Article 12.7.

### **c) Steel Development Fund Loans**

252. India contends that Commerce breached Article 12.7 because it previously determined that SDF loans were a direct transfer of funds, but in the 2008 Administrative Review as facts available, Commerce found the transfer to be a “potential” direct transfer of funds.<sup>396</sup> India’s concern that this language was intended to address “an obligation on the GOI to provide funds in the future” is misplaced.<sup>397</sup>

253. The reference to the term “potential” in this context was simply meant to convey the potential benefit for the 2008 period as there was no specific information on SDF provided by the company during the 2008 Administrative Review. Indeed, Commerce’s facts available determination is limited to the amount of the benefit determined to be applicable during the 2008 period.<sup>398</sup> No additional benefit amount was determined based on any future obligation on the

<sup>390</sup> Commerce’s August 21, 2009 Supplemental Questionnaire, at I.B.4 (Exhibit USA-35).

<sup>391</sup> September 4, 2009 GOI Questionnaire Response, at I.B.4 and Attachment 4 (Exhibit USA-36).

<sup>392</sup> September 4, 2009 GOI Questionnaire Response, at I.B.3 and Attachment 3 (Exhibit USA-36).

<sup>393</sup> Commerce’s February 6, 2009 Questionnaire, Section III pertaining to affiliated companies requires all respondents to “identify all companies with which your company is affiliated.” (Exhibit USA-46).

<sup>394</sup> *Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Results of Countervailing Duty Administrative Review*, 75 Fed. Reg. 1496, 1503-1506 (Jan. 11, 2010) (Exhibit USA-40).

<sup>395</sup> *Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 14-15 (Exhibit IND-41).

<sup>396</sup> India First Written Submission, para. 575.

<sup>397</sup> India First Written Submission, para. 575.

<sup>398</sup> *Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Results of Countervailing Duty Administrative Review*, 75 Fed. Reg. 1496, 1501 (Jan 11, 2010) (Exhibit USA-40).

part of the GOI.<sup>399</sup> Accordingly, the Panel should reject India’s assertion that Commerce violated Article 12.7 with respect to the SDF loans.

### **C. Commerce’s Facts Available Determinations in the 2006 Administrative Review Are Fully Consistent With Article 12.7**

#### **1. 2006 Administrative Review – Factual Background**

254. In December 2006, JSW, a producer and exporter of hot-rolled steel products from India, requested that Commerce conduct an administrative review of its imports into the United States during calendar year 2006.<sup>400</sup> Commerce initiated the review, as requested, and issued questionnaires to the GOI and to JSW on February 2, 2007.<sup>401</sup> JSW provided its initial response on April 4; and the GOI provided its initial response on April 23, 2007.

255. On May 23, 2007, U.S. Steel Corporation (U.S. Steel), the petitioning U.S. producer, requested that Commerce examine whether JSW, among others, received subsidies under new subsidy programs. After examining the evidence provided by U.S. Steel, Commerce determined a reasonable basis existed to include many of these programs in its review. On September 27, 2007, Commerce initiated an examination into the programs allegedly used by JSW, and issued questionnaires to JSW and the GOI. One questionnaire issued to the GOI included subsidy programs pertaining to JSW that were administered by the state government of Karnataka. The other questionnaire issued to the GOI included subsidy programs pertaining to Tata that were administered by the state government of Jharkhand.<sup>402</sup>

256. JSW provided initial responses to Commerce’s new subsidy questionnaires and Commerce issued a supplemental questionnaire to JSW on November 1, 2007. Commerce officials spoke with JSW’s representative on November 14, 2007 concerning the company’s supplemental response pertaining to the new subsidies. The JSW company official indicated that the company was compiling the information and might request an extension to submit its response.<sup>403</sup> Commerce officials again spoke with JSW’s representative on November 21 to point out that if the company needed additional time, it would have to file a letter requesting an

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<sup>399</sup> For the 2008 period, Commerce used the subsidy rate of 0.99 percent *ad valorem* which was the rate calculated for the same program, “Loan from the Steel Development Fund,” in the countervailing duty investigation phase of the hot-rolled steel from India proceeding.

<sup>400</sup> All respondent companies timely filed their requests for review: JSW and Tata on December 29, Essar and Ispat on December 28. See *Initiation of Antidumping and Countervailing duty Administrative Reviews and Requests for Revocation in Part*, 72 Fed. Reg. 5005 (Feb. 2, 2007) (Exhibit USA-47). See also, *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578 (Jan. 9, 2008) (Exhibit IND-32).

<sup>401</sup> Commerce’s Questionnaire to JSW, Feb. 2, 2007; and Commerce Questionnaire to the GOI, Feb. 2, 2007 (Exhibit IND-48). See also, *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1579, Jan. 9, 2008 (Exhibit IND-32).

<sup>402</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, Jan. 9, 2008 (Exhibit IND-32).

<sup>403</sup> *Memorandum to the File from Kristen Johnson*, November 14, 2007 (Exhibit USA-51).

extension of time.<sup>404</sup> JSW, however, did not request an extension and did not respond to Commerce’s supplemental questionnaire.<sup>405</sup>

257. At the request of the GOI, Commerce extended the GOI’s due date to respond to new subsidy questionnaire. On October 12, Commerce granted the GOI an additional two week extension to respond to the questionnaires pertaining to JSW. On November 1, Commerce granted the GOI an additional seven-day extension to respond to all four subsidy questionnaires.<sup>406</sup>

258. On November 8, the GOI submitted a response pertaining to the new subsidies allegedly received by Tata. For JSW, however, the GOI did not submit responses to the questionnaires. Instead, the GOI filed a letter stating that for JSW “since information sought from the Government of India is on the same lines as that sought from JSW, the Government of India has nothing further to add.”<sup>407</sup> On November 14, Commerce provided the questionnaires again to the GOI, explaining that “[t]he questions addressed to the GOI in the new subsidy questionnaires are distinct from those contained in the new subsidy questionnaires issued to other respondent companies.”<sup>408</sup> In its letter, Commerce also provided the GOI with an additional 12 days to submit the requested questionnaire responses.

259. Prior to the due date for its responses, the GOI requested an additional two-day extension to provide responses to questions pertaining to JSW.<sup>409</sup> In an amended submission, the GOI then requested an additional five-day extension.<sup>410</sup> Commerce could not grant the GOI a further extension on the grounds that the GOI’s newly proposed due date would not provide the administering authority with sufficient time to analyze and incorporate the responses into its analysis.<sup>411</sup> The due date passed, and the GOI filed no response pertaining to programs that allegedly provided benefits to JSW.<sup>412</sup>

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<sup>404</sup> *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578 (Jan. 9, 2008) (Exhibit IND-32).

<sup>405</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1581, Jan. 9, 2008 (Exhibit IND-32).

<sup>406</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1581, Jan. 9, 2008 (Exhibit IND-32).

<sup>407</sup> *November 8, 2007 GOI Response for JSW*, at 1 (Exhibit USA-53).

<sup>408</sup> *November 14, 2007 Letter from Commerce to the GOI*, at 1 (Exhibit USA-54).

<sup>409</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1580, Jan. 9, 2008 (Exhibit IND-32).

<sup>410</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1580, Jan. 9, 2008 (Exhibit IND-32).

<sup>411</sup> *November 28, 2007 Letter from Commerce to the GOI* (Exhibit USA-55). See also *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1580, Jan. 9, 2008 (Exhibit IND-32).

<sup>412</sup> *Certain Hot-rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1579, Jan. 9, 2008 (Exhibit IND-32)

**a) Commerce’s Determination Concerning NMDC’s Provision of High-Grade Iron-Ore to JSW**

260. India contends that Commerce ignored information on the record in reaching its determination that JSW paid nothing for the iron-ore it obtained from NMDC during the 2006 Administrative Review.<sup>413</sup> To the contrary, Commerce correctly chose not to rely upon unsubstantiated facts in reaching its determination on this issue.

261. In the 2006 Administrative Review, Commerce requested that the GOI provide prices for iron-ore fines and lumps for calendar year 2006.<sup>414</sup> In its April 23, 2007 response, the GOI provided a rate chart for sales during the period 2005-06 and 2006-07. The GOI indicated that these rates “are valid with supplies with effect from 1/4/06 up to 31/3/07 normally and/or subject to market variation in prices.”<sup>415</sup>

262. Based upon the GOI’s statement, it is clear the reported price from each iron-ore mine was from a rate chart. The rate specified in the chart was variable and subject to changes in the market, and thus the reported price point in the rate chart did not represent the actual prices JSW paid for the high-grade iron-ore. This rate was drawn from the *Tex Report*, a publication that reports on annual world-wide negotiations.<sup>416</sup> Commerce requested that JSW provide information pertaining to its purchases of high-grade iron-ore in its initial questionnaire of February 2, 2007 and in two supplemental questionnaires of September 18 and November 1, 2007.<sup>417</sup> In particular, Commerce requested that JSW:

Provide a listing of all of your purchases of high-grade iron ore fines and lumps during the POR. This list should include all purchases in which payment for the purchase was made or due during the POR. Specify the quantity of the purchase, the total amount of the purchase, the date of payment, the characteristics of the product purchased, the delivery terms, and the price per unit (specify unit, *i.e.*, ton, etc.).<sup>418</sup>

263. In each response, JSW withheld the requested pricing information. In its November 17 supplemental response, JSW provided some information pertaining to this subsidy program, reporting the quantity of high grade iron-ore fines and lumps that it received from NMDC and

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<sup>413</sup> India First Written Submission, paras. 529-534.

<sup>414</sup> *Commerce’s February 2, 2007 Questionnaire*, at 14, Section F (Exhibit USA-48).

<sup>415</sup> GOI’s April 23, 2007 Submission, at 41 (Exhibit USA-56) (emphasis added).

<sup>416</sup> The price point reported is in answer to Commerce’s question concerning “any price lists the GOI or the NMDC uses to base its negotiations on prices.” See *Commerce’s February 2, 2007 Questionnaire*, at 15, Section F.5.f (Exhibit USA-48).

<sup>417</sup> *Commerce’s February 2, 2007 Questionnaire*, at 14 (Exhibit USA-48); *Commerce’s September 18, 2007 Supplemental Questionnaire*, at 10 (section F) (Exhibit USA-57); and *Commerce’s November 1, 2007 Supplemental Questionnaire to JSW*, at 6 (Section on Sale of High-Grade Ore) (Exhibit USA-58).

<sup>418</sup> *Commerce’s November 1, 2007 Supplemental Questionnaire to JSW*, at 6 (Section on Sale of High-Grade Ore, at Question 4) (Exhibit USA-58).

other suppliers during the period of review. Once again however, JSW refused to provide any pricing information, as requested.<sup>419</sup>

264. The single price point reported by the GOI is not a substantiated fact for JSW’s actual pricing during the review period. In light of the GOI’s use of the term “normally” which indicates actual prices vary from the price point in the rate chart, and the indication of market variation in prices, along with the fact that the company provided all other information, but refused on three separate occasions to provide any actual pricing information, Commerce determined that necessary information was not provided and therefore resorted to facts available to make its determination. On that basis, Commerce determined that JSW made no payment for the iron-ore received from NMDC during the period of time at issue.<sup>420</sup> India’s assertion that Commerce ignored information available on the record is misplaced. To the contrary, in weighing the information, Commerce chose not to rely upon a rate chart to establish JSW’s actual pricing, and instead required actual prices for purposes of making its determination.

265. For these reasons, the Panel should reject India’s argument that the United States acted inconsistently with its obligations under Article 12.7 of the SCM Agreement.

***b) Commerce’s Determination That VMPL Received Subsidies Under the Programs Administered by the State of Karnataka***

266. India contends Commerce’s finding that VMPL<sup>421</sup> received benefits under the subsidy programs administered by the state government of Karnataka lacked a factual foundation.<sup>422</sup> In particular, noting that a questionnaire was not provided directly to VMPL, India asserts that Commerce’s determination was based upon “pure speculation” inasmuch as the U.S. domestic industry had not alleged that VMPL received benefits under the KIP subsidy programs from 1993 through 2006.<sup>423</sup> India’s argument fails to take account of the facts and circumstances in this case that provided Commerce with the appropriate basis to examine whether, in fact, VMPL received subsidies under Karnataka’s 1993-2006 subsidy programs.

267. Here, the undisputed facts show that VMPL is a joint venture between JSW and Mysore Materials Ltd. (MML); that JSW owns 70 percent of VMPL.<sup>424</sup> Based upon facts on the record, “VMPL supplies JSW with an input that is primarily dedicated to the production of steel.”<sup>425</sup> Further, based upon such facts as alleged by U.S. Steel, India does not dispute that JSW and VMPL are cross-owned companies and thus the interests of the companies have merged to such a degree that one company can use or direct the individual assets (or subsidy benefits) of the other in essentially the same ways it can use its own assets (or subsidy benefits), the subsidies to

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<sup>419</sup> *Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 9, and 93-94 (Exhibit IND-33).

<sup>420</sup> *Issue & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 93-94 (Exhibit IND-33).

<sup>421</sup> The acronym “VMPL” stands for Vijayanagar Minerals Private Limited.

<sup>422</sup> India First Written Submission, paras. 535-540.

<sup>423</sup> India First Written Submission, paras 539-540.

<sup>424</sup> *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 1578, 1595 (Jan. 9, 2008) (Exhibit IND-32).

<sup>425</sup> *Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations,”* September 27, 2007, at 10 (Exhibit USA-59).

one are attributable to the other.<sup>426</sup> Given that U.S. Steel’s allegation provided a basis for Commerce to examine the 1993-2006 KIP subsidies to JSW, and that JSW received subsidies by virtue of its ownership in VMPL, Commerce had reasonable grounds to request information on the alleged subsidies received by VMPL for KIP 1993-2006 that are attributable to JSW.

268. India complains that the questionnaire was not directly delivered to VMPL, but was instead provided to JSW. India does not explain how this action violated Article 12.7. India does not even argue that VMPL did not receive the questionnaire through its parent company. Most important, India does not challenge or question that subsidies to VMPL are relevant to Commerce’s countervailing duty determination with respect to JSW. India also does not claim that factual information on the record of the administrative review at issue was ignored or that facts on the record demonstrate VMPL did not receive subsidies under the programs at issue. Accordingly, Commerce relied on the undisputed facts available on the record in order to make its determination, and India has not demonstrated that this determination was inconsistent with Article 12.7 of the SCM Agreement.

***c) Commerce’s Determination That SGOK Provided Subsidies, Through Mysore Materials Ltd., Attributable To JSW***

269. India contends the United States assumed the subsidies received by VMPL from Mysore Materials Ltd. (MML) are subsidies within the meaning of Article 1.1 of the SCM Agreement.<sup>427</sup> India claims that “the determination made by the United States does not contain any explanation or analysis as to the manner in which MML is a government or a public body.” India’s newly added challenge concerning the treatment of MML as a public body, however, is not within the Panel’s terms of reference. Article 6.2 and 7.1 of the DSU require that a claim be contained in the complaining party’s panel request in order to form part of the “matter referred to the DSB”, and thus within the panel’s terms of reference. Because India failed to include this claim in its panel request, as well as in its request for consultations, India is precluded from now raising it in its submissions.<sup>428</sup> The United States therefore respectfully requests that the panel decline to make a finding on this claim because it is not within the panel’s terms of reference.

270. India also contends that the United States breached Article 12.7 because “nothing on record provided sufficient information or evidence for the United States to have assumed that the purchase of iron ore by MML [from VMPL] was for more than adequate remuneration.”<sup>429</sup> India, however, ignores the information on the record that supported Commerce’s determination.

271. In the 2006 Administrative Review, U.S. Steel alleged that “MML failed to enforce certain pricing agreements in contracts it had with VMPL that resulted in MML paying higher

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<sup>426</sup> *Countervailing Duties*, 63 Fed. Reg. 65348, 65401 (November 25, 1998) (Exhibit USA-60).

<sup>427</sup> India First Written Submission, para. 542.

<sup>428</sup> See generally, *India’s Request for the Establishment of a Panel*, WT/DS436/3 and *India’s Request for Consultations*, WT/DS436/1/Rev. 1.

<sup>429</sup> India First Written Submission, para. 543.

prices for iron ore than what was established by the two companies.”<sup>430</sup> U.S. Steel based its allegation on information contained in the Report by the Comptroller and Auditor General of India (known as the Auditor’s Report) and, in particular, on information contained in Chapter II of that report addressing “Reviews Related To Government Companies.”<sup>431</sup> The Auditor’s Report identified MML’s failure to obtain the agreed upon price for purchases of iron ore from VMPL, and also MML’s failure to fix the price for iron ore purchases from VMPL on the basis of the market price.<sup>432</sup> The Auditor’s Report concluded that both situations caused MML to incur losses.<sup>433</sup>

272. Based upon the documented allegation, Commerce requested that JSW provide information concerning the pricing agreements and the recovery of premium payments owed by VMPL to MML.<sup>434</sup> In response, JSW stated that MML received payment against the balance of premiums owed by VMPL.<sup>435</sup> JSW, however, provided no documentation to support its statement. Accordingly, in a November 8, 2007 supplemental questionnaire, Commerce again requested that JSW provide documentation to support its statement.<sup>436</sup> As noted above, JSW did not provide any further information or response to Commerce.<sup>437</sup> Thus, the information contained in U.S. Steel’s allegation provided Commerce with the basis for making its determination using the facts available.<sup>438</sup>

273. For these reasons, the Panel should reject India’s argument that the United States acted inconsistently with its obligations under Article 12.7 of the SCM Agreement.

#### **D. Commerce’s 2013 Sunset Review Determination On Hot-Rolled Steel Products Is Not Within the Panel’s Terms of Reference**

274. India has no legal basis for its challenge to Commerce’s 2012 Sunset Review Determination, as India did not request consultations on this determination, and, as is plain from

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<sup>430</sup> *Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations,”* September 27, 2007, at 10, citing U.S. Steel Corporation’s May 23, 2007, New Subsidy Allegation on JSW, at 15-21, and Exh. 24 (Report Of The Comptroller And Auditor General of India) (Exhibit USA-59).

<sup>431</sup> *Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations,”* September 27, 2007, at 10, citing U.S. Steel Corporation’s May 23, 2007, New Subsidy Allegation on JSW, at Exh. 24, at 1 and 17. (Exhibit USA-59).

<sup>432</sup> *Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations,”* September 27, 2007, at 10, citing U.S. Steel Corporation’s May 23, 2007, New Subsidy Allegation on JSW, at Exh. 24, at 2.1.31, and 2.1.33. (Exhibit USA-59).

<sup>433</sup> *Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations,”* September 27, 2007, at 10, citing U.S. Steel Corporation’s May 23, 2007, New Subsidy Allegation on JSW, at Exh. 24, at 2.1.31, and 2.1.33. (Exhibit USA-59).

<sup>434</sup> *Commerce’s September 27, 2007 New Subsidy Questionnaire to JSW,* at 9, section F.5 and F.6 (Exhibit USA-61).

<sup>435</sup> *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review,* 73 Fed. Reg. 1578, 1595 (Jan. 9, 2008) (Exhibit IND-32).

<sup>436</sup> *See Commerce’s November 8, 2007 Supplemental Questionnaire,* at 14 (Exhibit USA-62).

<sup>437</sup> *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review,* 73 Fed. Reg. 1578, 1595 (Jan. 9, 2008) (Exhibit IND-32).

<sup>438</sup> *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review,* 73 Fed. Reg. 1578, 1595 (Jan. 9, 2008) (Exhibit IND-32).. *See also,* Commerce’s Memorandum “JSW Steel Limited New Subsidy Allegations”, September 27, 2007, at 10 (Exhibit USA-59).

Appellate Body findings explained below, matters that have not been subject to consultations are outside the terms of reference of a panel proceeding.

275. India’s panel request also does not list the 2012 Sunset Review Determination as a measure at issue.<sup>439</sup> The measure is also not listed in India’s request for consultations.<sup>440</sup> As such, the measure was never subject to consultations, and thus, the measure is not within the terms of reference of this proceeding. In the Consultations Request, India listed only the countervailing duty investigation, 2001-2002 Administrative Review, the 2004 Administrative Review, 2006-2008 Administrative Reviews, and the 2007 Sunset Review Determination.<sup>441</sup>

276. In its request for consultations, a Member must describe the matter at issue. In particular, the request must include an “identification of the measures at issue and an indication of the legal basis for the complaint.”<sup>442</sup> Where – as was the case here – the defending Member engages in consultations, the complaining Member *may request the establishment of a panel on the disputed matter only* “[i]f the consultations fail to settle the dispute.”<sup>443</sup> This request for panel establishment under Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), in turn, establishes the terms of reference for the panel proceeding.<sup>444</sup>

277. It follows from these DSU provisions that – as the Appellate Body has affirmed – Articles 4 and 6 of the DSU “set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.”<sup>445</sup> As a “prerequisite to panel proceedings,” consultations play a critical role in the dispute settlement process because they “serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to ‘define and delimit’ the scope of the dispute between them.”<sup>446</sup>

278. On the other hand, this purpose of consultations is frustrated where the complaining party introduces measures in its first written submission that were not identified in the consultation request and which, by definition, could not have formed part of the basis for the parties’ attempts to further define the scope of the dispute between them. The Appellate Body has made clear

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<sup>439</sup> *Request For the Establishment of a Panel by India*, 12 July 2012, at Annex – 1.

<sup>440</sup> *India’s Consultations Request*, dated 12 April, 2012, at Annex-1. The determination India now raises was issued on March 12, 2013. See *Certain Hot-Rolled Carbon Steel Flat Products From India, Indonesia, the People’s Republic of China, Taiwan, Thailand, and Ukraine; Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders*, 78 Fed. Reg. 15703 (Mar. 12, 2013) (Exhibit USA-63).

<sup>441</sup> *India’s Consultations Request*, at Annex - 1.

<sup>442</sup> DSU, Article 4.4.

<sup>443</sup> DSU, Article 4.7.

<sup>444</sup> The Panel’s terms of reference for this dispute, set out in WT/DS436/1/Rev. 1, are the standard terms of reference provided in Article 7.1 of the DSU.

<sup>445</sup> *Brazil – Aircraft (AB)*, para. 131.

<sup>446</sup> *US – Customs Bond Directive (India) (AB)*, para. 293.

that, in such circumstances, those additional measures do not fall within the panel's terms of reference.<sup>447</sup>

279. With these principles in mind, the Appellate Body has repeatedly considered the issue of adding measures to a dispute from the consultations request to the panel request. Generally, it has found that the relevant question is whether “the scope of the dispute” was expanded as a result of their addition.<sup>448</sup>

280. For example, in *US – Certain EC Products*, the Appellate Body upheld the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it.

281. In particular, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of March 3, 1999, on EC listed products in connection with the EC Bananas dispute, but not to U.S. action taken on April 19, 1999, which imposed 100 percent duties on certain designated EC products.<sup>449</sup> When the EC sought findings with respect to both the March 3rd measure and the April 19th action, the panel found that the March 3rd measure and the April 19th measure were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.<sup>450</sup>

282. The Appellate Body upheld the panel's findings. The Appellate Body found that because the consultations request did not refer to the April 19th action, and as the EC admitted at the oral hearing that the April 19th action “was not formally the subject of consultations,” it was not a measure in that dispute and fell outside the panel's terms of reference.<sup>451</sup>

283. In the present case, neither India's consultations request nor its request for the establishment of a panel mentions the 2013 sunset review determination in certain hot-rolled carbon steel flat products from India. The inclusion of claims related to this determination would inarguably expand the scope of this dispute as compared to the matter described in the request for the consultations. Under the DSU and Appellate Body findings, the terms of reference of this proceeding cannot extend to this determination.

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<sup>447</sup> See, e.g., *US – Customs Bond Directive (India) (AB)*, para. 296; *US – Certain EC Products (AB)*, para. 82.

<sup>448</sup> *US – Zeroing II (AB)*, quoting *US – Upland Cotton*, para. 293.

<sup>449</sup> *US – Certain EC Products (AB)*, para. 70.

<sup>450</sup> *US – Certain EC Products (AB)*, para. 82.

<sup>451</sup> *US – Certain EC Products (AB)*, para. 70.

## **IX. COMMERCE ACTED CONSISTENTLY WITH ARTICLES 1.1, 1.2, 2 AND 14 WITH RESPECT TO THE PROVISION OF HIGH GRADE IRON ORE BY NMDC**

### **A. India Has Not Demonstrated That Commerce Acted Inconsistently With Article 1.1(a)(1) of the SCM Agreement**

#### **1. India’s Public Body Claims are Founded on an Erroneous Interpretation of the SCM Agreement and Therefore Must be Rejected**

284. In its first written submission, India claims that Commerce’s public body determinations in the challenged investigation are inconsistent with Article 1.1(a)(1) of the SCM Agreement because Commerce based its determinations on “[m]ere majority shareholding by government”<sup>452</sup> or “solely” on “alleged control by a government”.<sup>453</sup>

285. India fails to provide the Panel with arguments necessary to support its claims, because India relies on an erroneous interpretation of Article 1.1(a)(1). The United States also notes that Article 1.1(a)(1) is a definition. It does not contain any obligation on a Member. As a result, it is not accurate to refer to a Member “breaching” or “acting inconsistently with” Article 1.1(a)(1), and a measure cannot be found to be inconsistent with Article 1.1(a)(1). Any claim of breach would need to be based on a different provision of the SCM Agreement, one that contains an obligation related to a “subsidy”, and the breach presumably would be because the measure at issue does not accord with the term “subsidy” used in that provision (based on the definition in Article 1).

286. As explained in detail below, when interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU, the term “public body” means an entity that is controlled by the government such that the government can use that entity’s resources as its own.<sup>454</sup> India has not presented any legal argument demonstrating that Commerce’s determinations are based on an understanding of the term “public body” contrary to Article 1.1(a)(1) of the SCM Agreement, when properly interpreted. Accordingly, India’s claims should be rejected on this basis as well.

#### ***a) Interpreted in Accordance with the Customary Rules of Interpretation of Public International Law, the Term “Public Body” in Article 1.1(a)(1) of the SCM Agreement Means an Entity Controlled by the Government Such that the Government Can Use that Entity’s Resources as Its Own***

287. In its first written submission, India attempts to truncate the Panel’s interpretative analysis by relying on the interpretation of the Appellate Body in *US – Anti-Dumping and*

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<sup>452</sup> India First Written Submission, heading VII.B.1.b

<sup>453</sup> India First Written Submission, para. 417.

<sup>454</sup> The United States notes that government ownership is relevant to an evaluation of government control, although ownership may not always be sufficient by itself to indicate a level of control such that the government can use the entity’s resources as its own. At the same time, the level of control must be evaluated on a case-by-case basis and in the contextual framework of the country subject to investigation.

*Countervailing Duties (China)*, combined with another interpretation by the panel in *Canada – Dairy*<sup>455</sup>. From *US – Anti-Dumping and Countervailing Duties (China)*, India gleans that:

[I]t [is] highly relevant that not only must the alleged public body be performing a *governmental function*, but that body must have the *powers and authority* to perform those functions.<sup>456</sup>

288. Reading this interpretation together with an interpretation *not* of the term “public body” by the panel in *Canada – Dairy*, India submits that Article 1.1(a)(1)(iv) requires that:

over and above the presence of a governmental framework, there has to be the express delegation of the power to regulate, control, or supervise individuals, or otherwise restrain conduct and that this power must flow from the 'governmental' source, as is understood in the traditional narrow sense, such that it differs from the ordinary relations between private entities.<sup>457</sup>

289. The United States disagrees with India’s approach, as well as the legal conclusions it urges the Panel to make. Accordingly, we present here an interpretative analysis of the term “public body” in accordance with customary rules of interpretation of public international law.

290. In the analysis that follows, we first start with the relevant text of the SCM Agreement and its ordinary meaning. While dictionary definitions of the terms “public” and “body” can capture a wide range of meanings, we note that the primary definitions in the context of groups of persons would point towards ownership by the community of legal persons or organizations. Contrary to India’s claim, dictionary definitions do not point to government authority as a primary meaning of these terms.

291. Next, we turn to understanding the ordinary meaning of the terms in their context. We examine the language of Article 1.1(a)(1) itself, including “government *or any* public body” (italics added), and other context in Article 1.1(a), such as “private body,” “financial contribution,” and “funding mechanism.” These contextual elements support an interpretation of “public body” as an entity that is controlled by the government. Control of such an entity means that the government can use that entity’s resources as its own. In this way, the financial contributions (in the ordinary sense) flowing to recipients through the economic activities of such entities are a conveyance of value from a Member to a recipient in the same way as if the government had provided the financial contribution directly.

292. Then, we turn to an understanding of the text in its context in light of the object and purpose of the SCM Agreement. We note that the SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the marketplace without the effects of subsidies distorting the outcome of that competition. An understanding of

<sup>455</sup> See generally, sections VII.B.1 and IX.C.1 of India’s FWS.

<sup>456</sup> India First Written Submission, para. 222 (original emphasis).

<sup>457</sup> India First Written Submission, para. 225.

“public body” as reaching financial contributions flowing from an entity that is controlled by the government such that the government can use that entity’s resources as its own supports the object and purpose of the SCM Agreement. To find otherwise would permit a government to provide the same financial contribution with the same economic effects and escape the definition of a “financial contribution” merely by changing the legal form of the grantor from a government agency to, for example, a wholly-owned corporation.

293. Throughout the following discussion, we address relevant panel and Appellate Body reports, including the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. We also consider certain additional rationales laid out by the Appellate Body in support of its interpretation of the term “public body.” After examining those closely, however, we respectfully conclude that they do not support an interpretation of the term “public body” that differs from the proper interpretation that we present to the Panel.

1) The Ordinary Meaning of the Term “Public Body” or “Organisme Public” or “Organismo Público” as Reflected in Dictionary Definitions Supports the Conclusion that a Public Body Is Any Entity Controlled by the Government

294. Article 1.1 of the SCM Agreement provides, in relevant part, that “a subsidy shall be deemed to exist if:”

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or service other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . . .

295. While the SCM Agreement does not define the term “public body,” and “public body” is not defined in dictionaries as a compound word, the definitions of the words “public” and “body” shed light on the ordinary meaning of the term “public body” in Article 1.1(a)(1) of the SCM Agreement.

296. We start with the noun “body.” While dictionary definitions cover a number of senses, as used in the construction “public body,” the term refers to the sense of a group of persons or an entity (as opposed to, for example, the “material frame” of persons). This definition in the sense of “an aggregate of individuals” is: “an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society.”<sup>458</sup>

297. Turning to the adjective “public,” the relevant definition that pertains to a “body” as a group of individuals is the first: “of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation.” A second definition is “carried out or made by or on behalf of the community as a whole; authorized by or representing the community.”<sup>459</sup> However, in conjunction with the term “body” (in the sense of a legal person or corporation or organization), this second definition appears less apt.

298. Thus, the ordinary meaning of the composite term “public body” according to dictionary definitions would be “an artificial person created by legal authority; a corporation; an officially constituted organization”<sup>460</sup> that is “of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation.” These definitions therefore convey two primary elements: first, that there is an entity; and second, that this body belongs to, pertains to, or is “of” the community or people as a whole. These elements point towards ownership by the community as one meaning of the term “public body.” If an entity “belongs to” or is “of” the community, it also suggests that the community can make decisions for, or control, that entity.

299. Dictionary definitions of the corresponding words in the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement are similar. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained:

The French term for public body is “organisme public”, and the Spanish is “organismo público”. In French, the word “organisme” (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons, offices, etc.) working to a common purpose (e.g., “institution formée d’un ensemble d’éléments coordonnés entre eux et remplissant des fonctions déterminées; [ . . . ], chacun des services ainsi coordonnés, ou des associations de personnes les constituant”, and “[e]nsemble des services, des bureaux affectés à une tâche”). The French word “public” also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., “d’État, qui est sous contrôle de

<sup>458</sup> *The New Shorter Oxford English Dictionary* at 253 (1993) (Exhibit USA-64). See also *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 285 (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 261).

<sup>459</sup> *The New Shorter Oxford English Dictionary* at 2404 (1993) (Exhibit USA-64). See also *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 285 (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2394), mindful that the dictionary definition used should be one contemporaneous with the negotiation of the term being interpreted.

<sup>460</sup> We note that the additional senses of “an assembly, an institution, a society” appear less relevant as they become increasingly general.

l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État"). The Spanish term "organismo" is defined similarly to the French "organisme" as referring to a grouping of elements forming a body or institution (e.g., "conjunto de oficinas, dependencias o empleos que forman un cuerpo o institución"). The Spanish term "público", like the French "public", is defined as belonging to or related to the government (e.g., "pertenciente o relativo al Estado o a otra administración").<sup>461</sup>

300. In light of the dictionary definitions it examined in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

The composite term "public body" could thus refer to a number of different concepts, depending on the combination of the different definitional elements. As such, dictionary definitions suggest a rather broad range of potential meanings of the term "public body", which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation.<sup>462</sup>

301. The Appellate Body further considered that "dictionary definitions of these words in Spanish and French would accommodate a similarly broad range of potential meanings of the term 'public body'."<sup>463</sup>

302. The United States agrees with these observations of the Appellate Body to some extent. That is, dictionary definitions suggest that the ordinary meaning of the term "public body" could have a broad meaning. However, the Appellate Body's analysis does not identify the *concept* that is at the heart of the "range of meanings" it discerned. That is, while "public body" in different contexts could "encompass[] a variety of entities," all of those entities would share the common element of an entity of, belonging to, or pertaining to the community as a whole. Such an entity would be owned or controlled by the community. Responding to China's argument that the term "public body" is limited only to entities "authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority," the panel in *US – Anti-Dumping and Countervailing Duties (China)* considered that dictionary definitions "would appear to encompass, *but could not be said to be limited to*, such entities."<sup>464</sup> The United States agrees with the panel's observation.<sup>465</sup>

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<sup>461</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.61 (citations omitted).

<sup>462</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.

<sup>463</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.

<sup>464</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.59 (emphasis added).

<sup>465</sup> It may be the case that an entity vested with or exercising governmental authority could be considered an organ of the government or potentially a public body. In *US – DRAMS CVD*, the panel raised the possibility that an entity that the investigating authority had found to be a "private body" might also have been classified as a "public body." *US – DRAMS CVD (Panel)*, note 29 to para. 7.8 & note 80 to para. 7.62; *see also US – DRAMS CVD (AB)*, note 225 to para. 131.

303. In the view of the United States, the correct conclusion to draw at this point in the interpretative analysis is that dictionary definitions of “public” and “body” suggest the ordinary meaning of those terms refers to an entity of, belonging to, or pertaining to the community as a whole. Nothing in those dictionary definitions would restrict the meaning of the term “public body” to an entity vested with, or exercising, government authority. Interpreting the term “public body” as an entity of, belonging to, or pertaining to the community as a whole (*e.g.*, through government) would provide a coherent interpretation that fully respects the broadness of the ordinary meaning of the term.

304. As a final point on the ordinary meaning conveyed by dictionary definitions, the United States notes that, just as the definitions examined do not convey the meaning of “vested with or exercising governmental authority,” which the Appellate Body found there, there were a number of other terms that were available to the negotiators had they wished to convey that meaning. For example, to convey the sense of governmental authority in relation to an entity, the negotiators might have used “governmental body,” “public agency,” “governmental agency,” or “governmental authority.” These terms would have, through their ordinary meaning, more clearly conveyed the sense of exercising governmental authority.<sup>466</sup> That they were not used does not itself determine the ordinary meaning of “public body,” but the juxtaposition of those terms (governmental versus public; agency or authority versus body) does shed light on the different concept captured by the term “public body.”

305. The role of a treaty interpreter is to understand the ordinary meaning of the term “public body” in its context. Thus, with these observations on the dictionary definitions of “public” and “body,” the United States now turns to an examination of those terms in their context. This context reveals that it is indeed government ownership or control that is central to the proper interpretation of “public body,” for these elements mean that the government can use the entity’s resources as its own.

2) Reading the Term “Public Body” in Context Supports the Conclusion that a “Public Body” is Any Entity Controlled by the Government Such that the Government Can Use that Entity’s Resources as Its Own

306. The ordinary meaning of the terms of a treaty must be understood “in their context.”<sup>467</sup> As explained below, reading the term “public body” in context supports the conclusion that a “public body” is an entity controlled by the government such that the government can use that entity’s resources as its own.

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<sup>466</sup> Indeed, the Appellate Body noted in *Canada – Dairy* that “‘government agency’ is, in our view, an entity which exercises powers vested in it by a ‘government’ for the purpose of performing functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.” *Canada – Dairy (AB)*, para. 97.

<sup>467</sup> Vienna Convention, Article 31.

i. *The Use of the Distinct Terms “Government” and  
“Public Body” Suggests that these Terms Have  
Different Meanings*

307. In Article 1.1(a)(1) of the SCM Agreement, the term “public body” is part of the disjunctive phrase “by a government or any public body within the territory of a Member. . . .” The SCM Agreement thus uses two different terms – “a government” on the one hand and “any public body” on the other hand – to identify the two types of entities that can directly provide a financial contribution.<sup>468</sup> As a contextual matter, the use of the distinct terms “a government” and “any public body” together this way suggests that the terms have distinct and different meanings. Treaty interpretation should seek to give meaning and effect to all terms of a treaty. As the Appellate Body has explained, “the internationally recognized interpretive principle of effectiveness should guide the interpretation of the *WTO Agreement*, and, under this principle, provisions of the *WTO Agreement* should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility.”<sup>469</sup> Accordingly, the term “public body” should not be interpreted in a manner that would render it redundant with the word “government.”

308. The term “government,” as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: “The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry.”<sup>470</sup> In *Canada – Dairy*, the Appellate Body explained that “[t]he essence of ‘government’ is . . . that it enjoys the effective power to ‘regulate’, ‘control’ or ‘supervise’ individuals, or otherwise ‘restrain’ their conduct, through the exercise of lawful authority.”<sup>471</sup> The Appellate Body further explained that a “‘government agency’ is, in our view, an entity which exercises powers vested in it by a ‘government’ for the purpose of performing functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.”<sup>472</sup>

309. The term “public body,” therefore, should be interpreted as meaning something other than an entity that performs “functions of a ‘governmental’ character, that is, to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.”<sup>473</sup> Otherwise, a “public body” is “a government,” or a part of “a government,” and there is no reason for the term “public body” to have been included in Article 1.1(a)(1) of the SCM Agreement. That is, the term would be reduced to redundancy or inutility, contrary to the customary rules of interpretation.<sup>474</sup>

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<sup>468</sup> A financial contribution can also be provided through the use of a “funding mechanism” or via a “private body” entrusted or directed to provide the financial contribution. See SCM Agreement, Article 1.1(a)(1)(iv).

<sup>469</sup> *US – CDSOA (AB)*, para. 271. See also *US – Gasoline (AB)* at 23.

<sup>470</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1123).

<sup>471</sup> *Canada – Dairy (AB)*, para. 97.

<sup>472</sup> *Canada – Dairy (AB)*, para. 97.

<sup>473</sup> *Canada – Dairy (AB)*, para. 97.

<sup>474</sup> Although the terms “government” and “public body” must have distinct meanings, this does not mean that the terms are completely unrelated or unconnected. As described further below, the terms are related, in that a “public

ii. *The Use of the Words “A,” “Any,” and “Or” in Article 1.1(a)(1) Suggests that the Term “Public Body” Should Be Interpreted as Meaning Something Different from and Broader than the Term “Government”*

310. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel “consider[ed] significant that in Article 1.1(a)(1) the terms ‘a government’ and ‘any public body’ are separated by the disjunctive ‘or’, suggesting that they are two separate concepts rather than a single concept or nearly synonymous.”<sup>475</sup> The United States agrees.

311. That panel also reasoned that “the word ‘any’ before ‘public body’ suggests a rather broader than narrower meaning of that term, i.e., as referring to ‘public bodies’ of ‘any’ kind.”<sup>476</sup> The panel concluded that:

Taking these contextual elements together suggests a meaning of the term “public body” as something separate from and broader than “government” or “government agency”, and we consider that given the use of the words “a”, “or” and “any”, this reading of the phrase “a government or any public body” gives meaning to that phrase as a whole.<sup>477</sup>

312. The United States also agrees with this conclusion, which captures the idea that there might be different *types* of public bodies, consistent with the broad range of entities that may be a “public body” according to the dictionary definition of that term – that is, an entity of, pertaining to, or belonging to a community. Some entities that would correctly be deemed “public bodies” might be more akin to government agencies, while others might be corporations engaging in business activities. The unifying characteristic of all public bodies is that they are controlled by the government, such that the government can use their resources as its own.

313. Additionally, we note that the use of the term “any” draws a further contextual distinction between the terms “government” and “public body” and indicates that the term “public body” should not be interpreted as relating back to the term “government.” The language in the SCM Agreement could have been written as “government or public body,” or “government or its public bodies,” or “government or another public body” or “government or similar public bodies.” The SCM Agreement was not written in this way, and the language actually used must be given effect.

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body” is an entity controlled by the government, such that the government can use the entity’s resources as its own. In the end, the public body’s actions are attributable to the Member by virtue of government control. The terms are distinct, however, in that the public body need not have the authority to “regulate,” “restrain,” “supervise,” or “control” the conduct of private citizens.

<sup>475</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.

<sup>476</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.

<sup>477</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.

iii. *The Use of the Term “Government” as a Shorthand Reference for the Phrase “a Government or any Public Body within the Territory of a Member” in Article 1.1(a)(1) of the SCM Agreement Does Not Require a Narrow Interpretation of the Term “Public Body”*

314. While the use and juxtaposition of the terms “government” and “public body” in Article 1.1(a)(1) of the SCM Agreement suggests that they are distinct terms with independent definitions, the provision in Article 1.1(a)(1) that the phrase “a government or any public body within the territory of a Member” is referred to in the SCM Agreement as “government” also suggests that the terms “government” and “public body” may be related.

315. The question is: what is the nature of the relationship of these two terms? Understanding the relationship to be one in which the government has authorized the public body to perform governmental acts – *i.e.*, “to ‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens”<sup>478</sup> – would mean that the terms “government” and “public body” are not merely related, but that they are identical. Furthermore, such an understanding is also not consonant with the dictionary definitions of “public” and “body” examined earlier, which nowhere suggest that these terms refer to government or entities with governmental authority.

316. On the other hand, understanding the relationship as one of control of a “public body” by “a government” (on behalf of the community it represents) gives meaning to both terms and avoids reducing the term “public body” to redundancy. It is also consistent with the dictionary definitions relevant to the term “public body,” as discussed above.

317. The United States agrees with the panel in *US – Anti-Dumping and Countervailing Duties (China)*, which found that the use of the term “government” to refer to the phrase “a government or any public body within the territory of a Member” is a drafting technique, used so that the lengthy phrase need not be repeated throughout the SCM Agreement.<sup>479</sup> We note that this drafting technique is similar to that used in Article 2.1 of the SCM Agreement, which refers to “an enterprise or industry or group of enterprises or industries” as “certain enterprises.” Clearly, the terms “enterprise” and “industry” (and groups thereof) have different meanings, despite being referred to collectively as “certain enterprises.” The use of the term “certain enterprises” in Article 2.1 of the SCM Agreement is a drafting technique used to obviate the need to repeat the lengthy phrase “an enterprise or industry or group of enterprises or industries” throughout the text.<sup>480</sup>

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<sup>478</sup> *Canada – Dairy (AB)*, para. 97.

<sup>479</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.66.

<sup>480</sup> This type of drafting technique is used elsewhere in the WTO agreements as well. “Injury” is defined in the SCM Agreement and AD Agreement to mean not only “material injury” and “threat of material injury,” but also “material retardation” of the establishment of a domestic injury. *See* SCM Agreement, Article 15, note 45; AD Agreement, Article 3, note 9. The term “financial services” is defined in the GATS Annex on Financial Services as including not only financial and banking services, but also “insurance and insurance-related services.” *See* GATS Annex on Financial Services, para. 5(a).

318. Of course, we recognize that the Appellate Body disagreed with the panel in *US – Anti-Dumping and Countervailing Duties (China)* that “the use of the collective term ‘government’ has no meaning besides facilitating the drafting of the Agreement.”<sup>481</sup> The Appellate Body considered that the “defining elements of the word ‘government’ inform the meaning of the term ‘public body’” and “[t]his suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.”<sup>482</sup> This, however, is an assertion. The Appellate Body does not explain why its conclusion necessarily follows from the use of the collective term “government.”

319. A more logical conclusion to draw from the SCM Agreement’s reference to “a government” and “any public body” together as “government” is that, as the *Korea – Commercial Vessels* panel found, “[i]f an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement.”<sup>483</sup> That panel considered that such an “approach is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies shall be referred to as ‘government’.”<sup>484</sup> Similarly, the panel in *US – Anti-Dumping and Countervailing Duties (China)* viewed “the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of ‘government’ for purposes of the Agreement, as well as when ‘private’ actors may be said to be acting on behalf of ‘government’.”<sup>485</sup>

320. The Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* does not address the *Korea – Commercial Vessels* panel’s analysis of the context of Article 1.1(a)(1). The conclusion of the panels in *Korea – Commercial Vessels* and *US – Anti-Dumping and Countervailing Duties (China)* is more logical because it preserves the dichotomy established in Article 1.1(a)(1) by the use of the two different terms “government” and “public body.” The interpretation adopted by the panels is consistent, once again, with the interpretive principle of effectiveness as it avoids reducing the term “public body” to a redundancy. This interpretation also preserves the relationship between the “government” and a “public body” in the sense that the government can use the resources of the public body as its own resources.

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<sup>481</sup> *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 289.

<sup>482</sup> *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 290.

<sup>483</sup> *Korea – Commercial Vessels*, para. 7.50 (footnote omitted).

<sup>484</sup> *Korea – Commercial Vessels*, para. 7.50, note 43.

<sup>485</sup> *US – Anti-Dumping and Countervailing Duties (China)* (Panel), para. 8.90.

iv. *The Context Provided by the Term “Private Body”  
in Article 1.1(a)(1)(iv) of the SCM Agreement  
Supports an Understanding of the Term “Public  
Body” as an Entity Controlled by the Government  
Such that the Government Can Use the Entity’s  
Resources as Its Own*

321. The understanding of “public body” as an entity controlled by the government such that the government can use the entity’s resources as its own is further supported by the context provided in Article 1.1(a)(1)(iv) of the SCM Agreement by the use of the term “private body.”

322. The terms “public body” and “private body” are, more or less, opposites. Indeed, the dictionary definition for the term “public” includes: “In general, and in most of the senses, the opposite of *private* adj.”<sup>486</sup> “Private,” on the other hand, in the sense “Of a service, business, etc.,” is defined as “provided or owned by an individual rather than the State or a public body.”<sup>487</sup>

323. Logically, since the ordinary meaning of the term “public” is the opposite of “private,” the term “public” means “*provided or owned by the State or a public body rather than an individual.*” This is further support for interpreting the term “public body” as meaning an entity controlled by the government whose resources the government can use as its own.

v. *The Context Provided by “Financial Contribution”  
in Article 1.1(a)(1) of the SCM Agreement Supports  
an Understanding of “Public Body” as an Entity  
Controlled by the Government Such that the  
Government Can Use the Entity’s Resources as Its  
Own*

324. In seeking to understand the term “public body” in its context, it is important to recall that the Agreement is identifying those entities which may make “financial contributions.” Those financial contributions are one part of a definition of “subsidy,” and those subsidies are granted or maintained by Members. A Member can make the financial contribution underlying the subsidy directly through its “government” (narrowly understood). However, it also can make that financial contribution through entities that it controls.

325. Article 1.1(a)(1) of the SCM Agreement identifies a variety of actions that constitute financial contributions, including “a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees),” foregoing or not collecting “government revenue,” “provid[ing] goods or services other than general infrastructure, or purchas[ing] goods,” and “mak[ing] payments to a funding mechanism.” The ordinary meaning of a “financial contribution” suggested by this list of actions is to convey value. In this ordinary sense, entities controlled by the government can convey value just as the

<sup>486</sup> *Oxford English Dictionary Online*, definition of “public, *adj.* and *n.*,” at 2 (2009) (Exhibit USA-65).

<sup>487</sup> *The New Shorter Oxford English Dictionary* at 2359 (1993) (Exhibit USA-64).

government can, and the value conveyed can be precisely the same as that conveyed by the government.

326. Consider, for example, a “direct transfer of funds” by a government to a recipient in the form of a grant. Conveying value in this way is plainly a “financial contribution” within the meaning of the SCM Agreement.

327. If the government formed a legal entity (for example, a corporation), controlled the entity (for example, by holding 100 percent of the shares of the corporation), and the entity provided the same grant to a recipient, the same financial contribution (in the ordinary sense) has occurred: the government has conveyed value. Whether the funds are provided directly by the government or by an entity controlled by the community through its government, it is the Member that is making the financial contribution (in the ordinary sense).

328. There is no evident reason for one transaction to fall within the scope of Article 1.1(a)(1) of the SCM Agreement and the other not to. Nor would the term “financial contribution” suggest that a distinction should be drawn between those transactions based on whether the entity or corporation is “vested with or exercising governmental authority.”

329. Rather, the context supplied by “financial contribution” suggests a different common concept between “government” and “public body” than that discerned by the Appellate Body. If a “financial contribution” (in the ordinary sense) means to convey something of value, this suggests that the concept sought to be captured by the SCM Agreement term is the use by a government of its resources, or resources it controls, to convey value to economic actors.

330. If a government undertakes the activities described in Article 1.1(a)(1)(i)-(iii), there is a conveyance of value from a Member to a recipient. Equally, when a Member establishes an entity (for example, a wholly-government-owned corporation), whose resources the Member can control and use, and the entity engages in the same activities, there is a conveyance of value from a Member to a recipient.<sup>488</sup>

331. The same logic applies to lower levels of ownership as well, so long as the government controls the entity. Irrespective of the government’s ownership stake, if the government, through whatever means, controls the corporation such that it can use the corporation’s resources as its own, then a grant provided by the corporation to a recipient is a conveyance of value by the Member. The corporation’s transfer of its financial resources is a transfer of the government’s resources (that is, financial resources the government could otherwise use as its own for other purposes). And because the government can control the corporation, any transaction that conveys value to a recipient is either authorized by or not restrained by the government.

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<sup>488</sup> To simplify matters, we have used as a hypothetical example a “direct transfer of funds” in the form of a grant. The same logic applies with equal force in the case of other forms of financial contribution, such as when a government provides goods for less than adequate remuneration.

332. The context provided by “financial contribution” (as well as “a government or any,” as explained above) suggests that a “public body” is an entity controlled by the government such that the government is entitled to use the entity’s resources as its own.<sup>489</sup> The financial contribution (in the ordinary sense) flowing to a recipient through the economic activity of an entity controlled by the government conveys value from a Member to a recipient in the same way as if the government had provided the financial contribution directly.

vi. *Further Context in Article 1.1(a)(1) of the SCM Agreement, Such as “Payments to a Funding Mechanism,” Supports This Understanding of the Scope of Transactions That Are “Financial Contributions”*

333. The understanding of “financial contribution” set out above suggests that this concept is intended to delineate economic activities of entities through which a Member may convey value to a recipient. It further underscores that the SCM Agreement reaches activities through which value may be conveyed in the same way as if the government had provided the financial contribution directly. For example, Article 1.1(a)(1)(iv) describes another means to convey value: “a government makes payments to a funding mechanism.”

334. While not further elaborated in the SCM Agreement, the clause suggests that the government or any public body transfers money to a pool or instrument that then provides financial resources (funds) to recipients. The dictionary defines the noun “fund” as “a stock or sum of money, esp. as set apart for a particular purpose,” “the money at a person’s disposal; financial resources,” and “a portion of revenue set apart as security for specified payments.” As a verb, “fund” is defined as “supply with funds, finance (a person, position, or project)” and “funding” as “the action of the [verb].”<sup>490</sup> The word “mechanism” is defined as “a means by which a particular effect is produced.”<sup>491</sup> The ordinary meaning of the term “funding mechanism” suggested by these dictionary definitions is a means by which money is supplied for a particular purpose.

335. However, significantly, nothing in the phrase “a government makes payments to a funding mechanism” suggests that the government makes any further decisions on what payments are made and to which recipients. The term “mechanism” rather suggests that it is that pool or instrument that undertakes to distribute the financial resources.

336. Thus, this “funding mechanism” provision indicates that the transfer of value by a government to a recipient through such a mechanism can be at issue under the SCM Agreement. The government could have made a payment directly to a recipient, but instead used a funding mechanism. The Agreement reaches the funding mechanism transaction because, if the government makes payments to a funding mechanism and then those funds are provided to

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<sup>489</sup> It should be noted that the context provided by the term “financial contribution” does not suggest that the entity through which the flow occurs must be vested with or exercising governmental authority.

<sup>490</sup> *The New Shorter Oxford English Dictionary* at 1042 (1993) (Exhibit USA-64).

<sup>491</sup> *The New Shorter Oxford English Dictionary* at 1728 (1993) (Exhibit USA-64).

recipients, there is the same conveyance of value from the Member. And nothing in the ordinary meaning of the term “funding mechanism” indicates that the funding mechanism is vested with or exercising governmental authority when it carries out this transfer. Rather, the funding mechanism just dispenses funds.

337. This context, then, supports the understanding of “financial contribution” within which “public body” should be interpreted, as indicated above. When a financial contribution (in the ordinary sense) flows to a recipient through the economic activity of an entity controlled by the government, value is conveyed from a Member to that recipient in the same way it would if the government had provided the financial contribution directly. Article 1.1(a)(1) of the SCM Agreement is designed to capture such flows within its definition of “financial contribution.”

vii. *The Context Provided by the “Entrusts or Directs”  
Language in Article 1.1(a)(1)(iv) of the SCM  
Agreement Does Not Weigh Against an  
Understanding of “Public Body” as an Entity  
Controlled by the Government Such that the  
Government Can Use the Entity’s Resources as Its  
Own*

338. In its first written submission, India echoes the Appellate Body’s finding in *US – Anti-Dumping and Countervailing Duties (China)* to argue that a public body must have “the authority, including the power of compulsion, over a private body... as well as be able to grant responsibility to a private body” in order to be able to “entrust” or “direct” it within the meaning of Article 1.1(a)(1)(iv).<sup>492</sup> India’s reliance on this contextual argument, however, is unavailing.

339. Article 1.1(a)(1)(iv) of the SCM Agreement provides that “there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ‘government’)” where:

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

340. Analyzing this provision as part of its contextual analysis of the term “public body” in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

[B]ecause the word “government” in Article 1.1(a)(1)(iv) is used in the sense of the collective term “government”, that provision covers financial contributions provided by a government or any public body where “a government or any public body” entrusts or

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<sup>492</sup> India First Written Submission, para. 226.

directs a private body to carry out one or more of the type of functions or conduct illustrated in subparagraphs (i)-(iii). Accordingly, subparagraph (iv) envisages that a public body may “entrust” or “direct” a private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii).<sup>493</sup>

341. The Appellate Body further reasoned that “for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command” and, “[s]imilarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility.”<sup>494</sup> The United States agrees with these Appellate Body propositions as far as they go.

342. However, it does not follow from these propositions that a public body must be vested with governmental authority to perform governmental functions, *i.e.*, regulating, restraining, supervising or controlling the conduct of private citizens.<sup>495</sup> In other words, the fact that an entity has the “authority” or “responsibility” to do a task, such as selling steel or chemicals, which can be entrusted to another entity if the first entity so chooses, does not mean that the entity has “authority” or “responsibility” to perform governmental functions. There was no basis for the Appellate Body to conclude that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions.

343. Further, even assuming *arguendo* that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions, it does not follow that all public bodies must have this authority. In other words, it does not follow that all public bodies must be homogeneous in their possession of authority to entrust or direct private bodies. Indeed, many organs of Member governments – including ministries, departments and agencies – do not possess the legal authority to entrust or direct private bodies to carry out the functions identified in Articles 1.1(a)(1)(i)-(iii), even though, in other respects, they may possess and exercise authority to “‘regulate’, ‘restrain’, ‘supervise’ or ‘control’ the conduct of private citizens.”<sup>496</sup> The absence of authority to entrust or direct private bodies does not move these organs outside the category of “government.” Likewise, logically, the absence of authority to entrust or direct private bodies does not, as a definitional matter, move any particular entity outside the category of “public body.” The “entrusts or directs” provision of Article 1.1(a)(1)(iv) of the SCM Agreement simply provides no contextual guidance for the interpretation of the term “public body” in Article 1.1(a)(1).

344. The same is true of the reference in Article 1.1(a)(1)(iv) to “the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.” As the Appellate Body explained in *US – Countervailing Duty Investigation on DRAMS*:

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<sup>493</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.

<sup>494</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.

<sup>495</sup> *See Canada – Dairy (AB)*, para. 97.

<sup>496</sup> *Canada – Dairy (AB)*, para. 97.

Paragraph (iv) of Article 1.1(a)(1) further states that the private body must have been entrusted or directed to carry out *one of the type of functions* in paragraphs (i) through (iii). As the panel in *US – Export Restraints* explained, this means that “the scope of the actions . . . covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)-(iii)”. A situation where the government entrusts or directs a private body to carry out a function that is outside the scope of paragraphs (i) through (iii) would consequently fall outside the scope of paragraph (iv). Thus, we agree with the *US – Export Restraints* panel that “the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*.”<sup>497</sup>

345. The panel in *US – Export Restraints*, with which the Appellate Body agreed in *US – Countervailing Duty Investigation on DRAMS*, was more explicit: “the phrase ‘type of functions’ refers to the physical functions identified in subparagraphs (i)-(iii).”<sup>498</sup>

346. We also recall that the term “government” in subparagraph (iv) of Article 1.1(a)(1) is used in the collective sense.<sup>499</sup> Thus, subparagraph (iv) provides that there is a financial contribution when a government or any public body entrusts or directs a private body:

. . . to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the [government or any public body within the territory of a Member] and the practice, in no real sense, differs from practices normally followed by [governments or any public bodies within the territory of a Member].

347. India’s suggestion that “‘government function’ is not about what a government itself may engage in” but whether it is “regulating, controlling, or supervising individuals, or otherwise restraining their conduct, through the exercise of lawful authority”<sup>500</sup> is thus unsupported by the text. The language in subparagraph (iv) of Article 1.1(a)(1) simply refers back to the functions described in subparagraphs (i) through (iii).

348. Consequently, it is circular to read Article 1.1(a)(1)(iv) as requiring that the term “public body” be interpreted as meaning an entity vested with or exercising authority to perform governmental functions. Necessarily, an entity alleged to have taken one or more of the actions identified in Article 1.1(a)(1)(i)-(iii) possesses – at least allegedly – authority to perform such actions. So, an entity’s possession of such authority tells us nothing about whether the entity is a “public body” or a “private body” – or part of “a government” for that matter. On the other

<sup>497</sup> *US – DRAMS CVD (AB)*, para. 112 (citations omitted, emphasis in original).

<sup>498</sup> *US – Export Restraints*, para. 8.53.

<sup>499</sup> See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.

<sup>500</sup> India First Written Submission, para. 223.

hand, the presence or absence of government control permits distinctions to be drawn between entities that are “public bodies” and those that are “private bodies.”

3) Reading the Term “Public Body” in Light of the Object and Purpose of the SCM Agreement Supports the Conclusion that a “Public Body” Is Any Entity Controlled by the Government Such That the Government Can Use the Entity’s Resources As Its Own

349. Under the customary rules of interpretation, the terms of an international agreement also must be interpreted in light of the object and purpose of the agreement. Here, the object and purpose of the SCM Agreement support an interpretation of the term “public body” as meaning an entity controlled by the government such that the government can use the entity’s resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions.

350. While the SCM Agreement has no preamble or explicit indication of its object and purpose, the Appellate Body has said that the object and purpose of the SCM Agreement is to “strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.”<sup>501</sup> In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body stated that the SCM Agreement “reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures.”<sup>502</sup>

351. The Appellate Body and panels have sought to ensure that the SCM Agreement is not interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that “would make circumvention of obligations by Members too easy.”<sup>503</sup> In *Australia – Automotive Leather II*, the panel declined to restrict its analysis of export contingency exclusively to the legal instruments or administrative arrangements surrounding the subsidy, stating that “[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a). . . .”<sup>504</sup> In *US – Softwood Lumber IV*, the Appellate Body explained that “the object and purpose of the *SCM Agreement* . . . includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies.”<sup>505</sup> The Appellate Body emphasized in *US – Softwood Lumber IV* the right of WTO Members to “fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.”<sup>506</sup>

<sup>501</sup> *US – Softwood Lumber IV (AB)*, para. 64.

<sup>502</sup> *US – DRAMS CVD (AB)*, para. 115.

<sup>503</sup> *Canada – Autos (AB)*, para. 142.

<sup>504</sup> *Australia – Automotive Leather*, para. 9.56.

<sup>505</sup> *US – Softwood Lumber IV (AB)*, para. 95 (citing *US – Carbon Steel (AB)*, paras. 73-74).

<sup>506</sup> *US – Softwood Lumber IV (AB)*, para. 95 (citing *US – Carbon Steel (AB)*, paras. 73-74).

352. Interpreting the term “public body” as referring to entities controlled by the government preserves the strength and effectiveness of the subsidy disciplines and inhibits circumvention. Such an interpretation ensures that governments cannot escape those disciplines by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them. India’s interpretation, that “there has to be the express delegation of the *power* to regulate, control, or supervise individuals, or otherwise restrain conduct”,<sup>507</sup> on the other hand, is at odds with the object and purpose of the SCM Agreement. As the Appellate Body has found, inherent “governmental functions” are to regulate, control, supervise, or restrain private persons.<sup>508</sup> Government-controlled entities, however, that do not engage in these typical “governmental functions”, and do not require any express *delegation* of power, could nevertheless provide financial contributions that confer benefits to certain enterprises. Such subsidization might not be reachable under India’s mistaken interpretation.

353. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body noted the panel’s concern about “what it saw as the implications of too narrow an interpretation” but cautioned that “too broad an interpretation of the term ‘public body’ could equally risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies.”<sup>509</sup>

354. An interpretation of the term “public body” that includes entities controlled by a government such that the government can use the entity’s resources as its own is not so broad that it undermines the object and purpose of the SCM Agreement. The panel in *US – Anti-Dumping and Countervailing Duties (China)* discussed this issue at length, explaining that a “public body” analysis is only the first step in a subsidy analysis.<sup>510</sup> As that panel explained, a finding that an entity is a “public body” does not “condemn that entity, or otherwise . . . cast it in a negative light.”<sup>511</sup> Nor does such a finding end the subsidy analysis. It only means that there is the potential for a financial contribution that confers a benefit.<sup>512</sup> These elements of a subsidy, as well as specificity, can then be examined. In other words, determining that a particular entity is a public body does not mandate finding that an actionable subsidy exists. Therefore, finding entities controlled by the government to be “public bodies” does not extend the reach of the SCM Agreement in a manner that is inconsistent with its object and purpose. To the contrary, it simply ensures that certain entities are subject to the *potential* disciplines of the Agreement.

355. Ultimately, the Appellate Body concluded in *US – Anti-Dumping and Countervailing Duties (China)* that “considerations of the object and purpose of the SCM Agreement do not favour either a broad or a narrow interpretation of the term ‘public body’.”<sup>513</sup> As explained above, the United States disagrees. We believe that our proposed interpretation of the term

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<sup>507</sup> India First Written Submission, para. 225.

<sup>508</sup> *Canada – Dairy (AB)*, para. 97.

<sup>509</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.

<sup>510</sup> See *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.78-8.81.

<sup>511</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.78.

<sup>512</sup> See *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.80-8.81.

<sup>513</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.

“public body” is consistent with and supports the object and purpose of the SCM Agreement. However, if the Panel agrees with the Appellate Body’s observations with respect to the object and purpose of the SCM Agreement, it should nevertheless interpret the term “public body” as meaning an entity controlled by the government, because such an interpretation is consistent with the broad range of meanings suggested by the ordinary meaning of the words “public” and “body,” and because reading the term “public body” in context likewise supports that interpretation.

4) When Interpreting Article 1.1(a)(1) of the SCM Agreement, It Is Not Necessary to Take into Account the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts

356. Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“*Vienna Convention*”) provides that:

3. There shall be taken into account, together with the context:

...

(c) any relevant rules of international law applicable in the relations between the parties.

357. In *US – Anti-Dumping and Countervailing Duties (China)*, there was a great deal of argument by the parties and discussion by the panel and the Appellate Body of whether, when interpreting the terms of Article 1.1(a)(1) of the SCM Agreement, certain provisions of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), in particular Article 5, may be taken into account as one among several interpretative elements.<sup>514</sup>

358. The Appellate Body, while it discussed the ILC Articles in response to arguments of the parties and the findings of the panel, did not appear to take the ILC Articles into account in its interpretation of Article 1.1(a)(1). Rather, the Appellate Body found that it was “not necessary . . . to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law.”<sup>515</sup> Without first resolving the question of whether and to what extent Article 5 of the ILC Articles reflects customary international law, it is not permissible under the customary rules of interpretation reflected in the *Vienna Convention* to take Article 5 into account with the context of Article 1.1(a)(1) of the SCM Agreement when interpreting that provision. Thus, the United States understands the Appellate Body not to have taken Article 5 of the ILC Articles into account in its interpretative analysis of Article 1.1(a)(1) of the SCM Agreement. This was appropriate because the ILC Articles are not relevant rules of international law applicable in the relations between the parties.

<sup>514</sup> See *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 304-316; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.84-91.

<sup>515</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311.

359. With respect to the status of the ILC Articles, that is, whether the ILC Articles constitute “rules of international law applicable in the relations between the parties,” we note that they have not been adopted and cannot be considered an agreement between the parties.<sup>516</sup> In *US – Line Pipe*, the Appellate Body explained that “the International Law Commission’s Draft Articles . . . do not constitute a binding legal instrument as such . . . .”<sup>517</sup> While the Appellate Body has recognized that certain parts of the ILC Articles may be understood as setting out recognized principles of customary international law,<sup>518</sup> the United States notes that, given the level of detail and fine-line distinctions constructed in Articles 5-8 of the ILC Articles, it remains an open, and contested, question whether all of these details and distinctions have risen to the status of customary international law. Only if these articles were customary international law could they be said to be “applicable in the relations between the parties” and, as a result, possibly relevant to an interpretative analysis under Article 31(3)(c) of the *Vienna Convention*. That some parts of the ILC Articles might reflect customary international law does not mean that all of the details of the ILC Articles, including the ILC Commentaries, have attained this status.<sup>519</sup>

360. Assuming *arguendo* that the ILC Articles can be considered “rules of international law applicable in the relations between the parties,” it is nevertheless impermissible to take them into

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<sup>516</sup> In 2001, the United Nations General Assembly adopted a resolution on the ILC Articles, which indicated that the General Assembly:

Takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action . . . .

Resolution Adopted by the General Assembly, A/RES/56/83 (12 December 2001) (underlining added). The United Nations General Assembly adopted similar resolutions in 2004, 2007, and 2010. *See* Resolution Adopted by the General Assembly, A/RES/59/35 (2 December 2004) (The resolution “*Commends once again the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . .*” (underlining added)); Resolution Adopted by the General Assembly, A/RES/62/61 (6 December 2007) (The resolution “*Commends once again the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . .*” (underlining added)); “General Assembly, on Recommendation of Legal Committee, Adopts Texts on Measures to Eliminate Global Terrorism, Programme of International Legal Assistance; Also Adopts Texts on Rule of Law; Work of United Nations Commission on International Trade Law, International Law Commission,”

<http://www.un.org/News/Press/docs//2010/ga11030.doc.htm> (6 December 2010) (“Before the Assembly is a report on the responsibility of States for internationally wrongful acts (document A/65/463). It contains one resolution approved on 5 November, by which the Assembly would request Governments to consider the question of future adoption of the draft articles or other appropriate action and submit written comments on such future action to the Secretary-General.” (emphasis added)). That these resolutions are all “without prejudice to the question of [the ILC Articles’] future adoption” indicates that the ILC Articles have not been adopted and cannot be considered an “agreement between the parties.”

<sup>517</sup> *US – Line Pipe (AB)*, para. 259.

<sup>518</sup> *See US – Line Pipe (AB)*, para. 259 (noting that Article 51 of the Draft Articles sets out a recognized principle of customary international law).

<sup>519</sup> In this regard, we would note that the first sentence of the General Commentary to the ILC Articles states that “[t]hese articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.” The reference, in particular, to “progressive development” suggests that the authors of the ILC Articles recognized themselves that the ILC Articles go beyond current public international law.

account because the ILC Articles are not “relevant” to the interpretation of the term “public body” in Article 1.1(a)(1) of the SCM Agreement.

361. The ILC Articles are clear that their purpose is *not* to define the primary rules establishing obligations under international law, but rather to define when a state (as opposed to some other entity) is responsible for a breach of those primary rules.<sup>520</sup> In the context of countervailing duties under the SCM Agreement, the primary rule is contained in Article 10 of the SCM Agreement – namely, that Members shall ensure that imposition of a countervailing duty “is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement,” including Article 1.1(a)(1) of the SCM Agreement. The question in this dispute is whether the United States breached this primary obligation, and the ILC Articles have nothing to say about *whether* such a breach occurred.

362. In this respect, the commentaries to the ILC Articles are helpful. The commentaries state:

It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc.<sup>521</sup>

363. The task of the Panel here is to determine whether the United States breached its obligation to impose countervailing duties only in accordance with the provisions of the SCM Agreement.<sup>522</sup> With respect to the “public body” issue, the Panel needs to assess whether Commerce’s findings are inconsistent with the SCM Agreement in light of Article 1.1(a)(1) of that Agreement. This is a question solely for the SCM Agreement and the GATT 1994. The ILC Articles are not helpful in determining *whether* the United States breached its obligations; they would only be helpful in determining whether the United States was responsible for any

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<sup>520</sup> See *ILC Articles, General Commentary*, para. 1 (“These articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility.”). The commentaries also quote one of the architects of the ILC Articles as saying that the Articles specify “the principles which govern the responsibility of States for internationally wrongful acts, *maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility.* . . .” *Id.*, para. 2 (emphasis added).

<sup>521</sup> *ILC Articles, Commentary to Chapter III*, para. 2 (footnote omitted).

<sup>522</sup> See SCM Agreement, Art. 10.

alleged breach, for example, if there was some question about whether the action of Commerce is attributable to the United States.<sup>523</sup>

364. Even if the issue in this dispute were whether India (as opposed to the United States) breached its obligations, the question of whether a “public body” provided goods in India is not one of attribution of “wrongful” acts to India. The question simply relates to the substantive conditions for something potentially to be deemed a subsidy under the SCM Agreement. Even if a subsidy is deemed to exist, it may not be wrongful as such, but rather may give the right to another WTO Member, in this case, the United States, to impose countervailing duties if certain additional conditions under the “primary rules” of the SCM Agreement are met. As the Appellate Body stated in *US – FSC (Article 21.5 I)*:

Article 1.1 of the *SCM Agreement* sets out a *definition* of a “subsidy” for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the *SCM Agreement* which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1. . . .

In other words, Article 1.1 of the *SCM Agreement* does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the *SCM Agreement*. . . .<sup>524</sup>

365. Similarly, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body confirmed that:

. . . the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a “subsidy”, without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*.<sup>525</sup>

366. In sum, secondary rules of general international law (limited to responsibility for wrongful conduct) cannot be grafted onto primary rules of international law that do not even define wrongful conduct.

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<sup>523</sup> See, e.g., *US – Gambling (Panel)*, para. 6.127 (finding that “as an agency of the United States government with specific responsibilities and powers, actions taken by the USITC pursuant to those responsibilities and powers are attributable to the United States.”).

<sup>524</sup> *US – FSC (Article 21.5) (AB)*, paras. 85-86.

<sup>525</sup> *Canada – Aircraft (Article 21.5) (AB)*, para. 47.

367. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* recognized, a determination that a government-controlled entity is a “public body” under the SCM Agreement, or that such public body has provided a financial contribution, is not a determination that the Member has engaged in “wrongful conduct.” That panel correctly observed that “to say that certain behaviour of an entity is covered by the SCM Agreement (*i.e.*, is a specific subsidy) in itself carries no negative connotation. Only in the particular, narrow instance of a prohibited subsidy does the existence of the subsidy give rise to such a connotation, and otherwise the existence of specific subsidies is a neutral event under the Agreement, actionable only where it causes, in particular instances, defined forms of adverse effects on another Member’s interests.”<sup>526</sup> Similarly, in *Korea – Commercial Vessels*, Korea urged the panel to adopt a test drawn from Article 5 of the ILC Articles, but the panel there declined to do so.<sup>527</sup> Here likewise there is no basis for taking into account the ILC Articles in the interpretative analysis of Article 1.1(a)(1) of the SCM Agreement.

***b) Other Dispute Settlement Panels, WTO Members, and Commentators Have Disagreed with the Appellate Body’s Interpretation of the Term “Public Body” in US – Anti-Dumping and Countervailing Duties (China)***

368. We note that three WTO dispute settlement panels have interpreted the term “public body” in Article 1.1(a)(1) of the SCM Agreement and concluded that a “public body” is an entity controlled by the government.

369. In *Korea – Commercial Vessels*, the panel concluded that “an entity will constitute a ‘public body’ if it is controlled by the government (or other public bodies).”<sup>528</sup> In reaching this conclusion, that panel rejected some of the very same arguments China advanced before the panel and the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

370. In *EC and certain member States – Large Civil Aircraft*, the panel, addressing the status of a government-owned financial institution, explained that, “at the time of its 1992 investment in Aerospatiale, Credit Lyonnais was controlled by the French government and was a ‘public body’ for purposes of Article 1.1(a)(1) of the SCM Agreement.”<sup>529</sup> Accordingly, the capital contribution made by Credit Lyonnais to Aerospatiale constituted a financial contribution by a public body.<sup>530</sup>

371. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel concluded that “a ‘public body’, as that term is used in Article 1.1 of the SCM Agreement, is any entity controlled by a government.” That panel viewed that as “the correct interpretation, which emerges from an

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<sup>526</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.78.

<sup>527</sup> See *Korea – Commercial Vessels*, paras. 7.37, 7.39, 7.44-45, 7.48-49.

<sup>528</sup> *Korea – Commercial Vessels*, para. 7.50. See also *id.*, paras. 7.172, 7.353, and 7.356.

<sup>529</sup> *EC – LCA (Panel)*, para. 7.1359.

<sup>530</sup> *EC – LCA (Panel)*, para. 7.1359.

analysis of the ordinary meaning of the term in its context and in the light of the object and purpose of the provision and of the SCM Agreement.”<sup>531</sup>

372. Additionally, we note that during the meeting of the WTO Dispute Settlement Body at which the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* were adopted, seven WTO Members joined the United States in raising concerns about the Appellate Body’s findings with respect to the interpretation of the term “public body.”<sup>532</sup>

373. Finally, we draw the Panel’s attention to an article in the *Journal of World Trade* penned by Michael Cartland, Gérard Depayre, and Jan Woznowski, each of whom participated in the Negotiating Group on subsidies and countervailing measures in the Uruguay Round.<sup>533</sup> The article presents a detailed discussion of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and raises a host of concerns with the Appellate Body’s interpretation of the term “public body.”

***c) The Parties Agree that the Appellate Body Report in US – Anti-Dumping and Countervailing Duties (China) Does Not Bar the Panel’s Own Consideration of the Interpretation of “Public Body” in This Dispute***

374. Although India has relied heavily on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* with respect to the interpretation of the term “public body”, India does not suggest that the Panel is bound to apply the same interpretation. Rather, India presents its own interpretation, based upon its reading of both panel and Appellate Body reports, which it urges the Panel to adopt.<sup>534</sup> Thus, while the parties are in agreement that the findings of the Appellate Body on “public body” are important and need to be taken into account in this dispute, India does not and cannot assert that the Panel may merely rely on or apply those findings without engaging in its own examination of the rights and obligations set out in the text of the covered agreements.

375. There is no doctrine of *stare decisis* in the WTO dispute settlement system. Article 11 of the DSU provides that a panel make its own “objective assessment” of the applicability of the covered agreements in order to fulfill its role under the DSU. Article 3.2 sets out that the Panel’s assessment is to be made “in accordance with customary rules of interpretation of public international law,” which has been understood to be reflected in Articles 31 and 32 of the Vienna Convention. Based on India’s submissions in this dispute, India agrees that the panel is to make an objective assessment of the covered agreements; the United States agrees. Therefore, the Panel should make its own evaluation of the meaning of “public body” in accordance with the customary rules of interpretation of public international law.

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<sup>531</sup> *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.94.

<sup>532</sup> See WT/DSB/M/294, paras. 103-127.

<sup>533</sup> Cartland, Michael, Depayre, Gérard & Woznowski, Jan. ‘Is Something Going Wrong in the WTO Dispute Settlement?’ *Journal of World Trade* 46, no. 5 (2012): 979–1016 (Exhibit USA-65).

<sup>534</sup> See India First Written Submission, para. 225.

376. For these reasons, for purposes of this dispute, the term “public body” should be interpreted by applying the customary rules of interpretation of public international law, taking due account of previous interpretations of that term. As explained above, the term “public body” in Article 1.1(a)(1) of the SCM Agreement means an entity controlled by the government such that the government can use the entity’s resources as its own.

## **2. India has Failed to Demonstrate that Commerce’s Finding with Respect to NMDC was Inconsistent with Article 1.1(a)(1) of the SCM Agreement**

377. In its first written submission, India argues that Commerce “only considered shareholding of GOI to determine NMDC to be a public body”<sup>535</sup>, but that “mere majority shareholding by a government is insufficient to conclude that a body corporate is a ‘public body’ within the meaning of Article 1.1(a)(1).”<sup>536</sup> As explained above, however, India’s claim is premised on a flawed interpretation of Article 1.1(a)(1) of the SCM Agreement. India has advanced no arguments supporting the conclusion that the United States has breached the SCM Agreement in light of Article 1.1(a)(1), as that provision is correctly interpreted, and its claim should therefore be rejected.

378. Commerce determined that the GOI owns over 98% of the NMDC, and that the GOI specifically established the NMDC to arrange for the exploitation of iron ore. Indian and NMDC officials explained that the GOI was heavily involved in the selection of the directors of the NMDC, some of which were directly appointed by the Ministry of Steel.<sup>537</sup> India further explained that it appoints 2 directors and had approval power over an additional 5 directors out of a total of 13 directors.<sup>538</sup> Based on these facts, it was reasonable for Commerce to determine that NMDC was a public body, as properly interpreted, as the Government of India had control of NMDC such that it could use NMDC’s financial resources as its own.<sup>539</sup> The Panel should therefore reject India’s claim that the United States acted inconsistently with its obligations under Article 1.1(a)(1) when Commerce found that NMDC was a public body.

## **3. In the Alternative, the Record Evidence was Sufficient to Demonstrate that NMDC was Exercising or Vested with Governmental Authority**

379. If the Panel finds that India’s interpretation of Article 1.1(a)(1)(iv) is appropriate, and that Commerce should have applied the test set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the United States respectfully requests the Panel to further find that the record evidence available during the investigation would support a finding that NMDC is a “public body”.

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<sup>535</sup> India First Written Submission, heading VII.B.1.b.

<sup>536</sup> India First Written Submission, heading VII.B.1.c.

<sup>537</sup> *2004 Verification Report of Government of India Responses*, at 5-6 (January 3, 2006)(“*2004 Verification India*”)(Exhibit U.S.-45).

<sup>538</sup> *India’s May 5, 2008, Questionnaire Response(2007 AR)*, at 5 (Exhibit U.S.-46).

<sup>539</sup> *2004 Preliminary Results*, 71 *Fed. Reg. at 1516 (IND-17)*; *2006 Preliminary Results*, 71 *Fed. Reg. 1586-1587*, (Exhibit U.S.-22); *2007 Review Final Results*, 74 *Fed. Reg. at 79796 (IND-39)*; *2008 Preliminary Results*, 75 *Fed Reg. at 1503(IND-40)*.

380. India claims that Commerce’s determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement because it was based solely on a determination that India owned over 98% of the NMDC.<sup>540</sup> However, this argument does not accurately reflect the full extent of Commerce’s analysis and does not account for the evidence that NMDC performs what is in India a government function. As demonstrated below, the evidence indicates that the NMDC is a public body pursuant to Article 1.1(a)(1) of the SCM Agreement because it is owned by India and has the authority to perform Indian government functions.

381. As an initial matter, and as described above, there is no dispute that GOI owns over 98% of the NMDC. The GOI, in response to Commerce questionnaires, reported that 98.38% of the NMDC was owned by the government and that the remaining shares are owned by financial institutions, private shareholders, and employees of the company.<sup>541</sup> Throughout the proceeding, the GOI never indicated that any of the facts had changed.

382. Commerce, as part of its final results in the 2004, 2006, 2007, and 2008 administrative reviews, found that the NMDC was part of the GOI, *i.e.*, a public body, and pointed to the GOI’s 98% ownership of the NMDC.<sup>542</sup> However, Commerce’s analysis did not stop with just an analysis of ownership. Commerce also found that the NMDC, as a state-owned mining company, was governed by the GOI’s India’s Ministry of Steel.<sup>543</sup> Indeed, record evidence showed that the NMDC’s own website declared that the “NMDC was established as a fully owned Government of India Corporation in 1958 with the objective of developing all minerals other than coal, petroleum oil and atomic minerals. NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel, Government of India.”<sup>544</sup>

383. During the 2004 review verification, Indian and NMDC officials explained that the GOI was heavily involved in the selection of the directors of the NMDC, a few of which were directly appointed by the Ministry of Steel.<sup>545</sup> During the 2007 review, India further explained that it appoints 2 directors and had approval power over an additional 5 directors out of a total of 13 directors. Commerce explicitly found that this evidence supported its determinations that the NMDC was “part of the GOI”.<sup>546</sup> Therefore, contrary to India’s arguments, Commerce’s determinations that the NMDC is a public body are not based solely on ownership but also an analysis of the control that India has over the NMDC.

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<sup>540</sup> India First Written Submission, para. 232.

<sup>541</sup> *India’s September 2, 2005, Supplemental Questionnaire Response (2004 AR)* (Exhibit US-68).

<sup>542</sup> *2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exhibit U.S.-12); *2006 Preliminary Results*, 71 Fed. Reg. 1586-1587, (Exhibit U.S.-22); *2007 Review Final Results*, 74 Fed. Reg. at 79796 (Exhibit U.S.-37); *2008 Preliminary Results*, 75 Fed Reg. at 1503(Exhibit U.S.-40).

<sup>543</sup> *2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exhibit U.S.-12); *2006 Preliminary Results*, 71 Fed. Reg. 1586-1587, (Exhibit U.S.-22); *2007 Final Issues and Decision Memorandum*, Comment 10 (Exhibit U.S.-38); *2008 Preliminary Results*, 75 Fed Reg. at 1503(Exhibit U.S.-40).

<sup>544</sup> *2004 New Subsidies Allegation*, Exhibit 6, p.2 (May 2, 2005)(Exhibit U.S.-13).

<sup>545</sup> *2004 Verification Report of Government of India Responses*, at 5-6 (January 3, 2006) (“*2004 Verification India*”) (Exhibit USA-67).

<sup>546</sup> *2007 Final Issues and Decision Memorandum*, Comment 10 (Exhibit IND-38).

384. In *US – Antidumping and Countervailing Duties (China)*, the Appellate Body, as discussed above, has offered an (erroneous) interpretation of “public body” under Article 1.1(a)(1) of the SCM Agreement indicating that a public body must have the authority to perform government functions.<sup>547</sup> In so concluding, the Appellate Body has also stated that “the legal order of the relevant Member may be a relevant consideration whether or not a specific entity is a public body.”<sup>548</sup> In the legal order of India, the NMDC performs a government function

385. In India, as set out in evidence on the record of the relevant reviews, the Indian government, *i.e.*, the state and federal governments, owns all the mineral resources on behalf of the Indian public.<sup>549</sup> The Indian federal government has the final approval of the granting of mining leases for iron ore.<sup>550</sup> 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.”<sup>551</sup> During Commerce’s on-site verification in the 2004 administrative review, an official from the Indian Ministry of Steel identified the NMDC as a strategic company which was monitored and reviewed by the government because it provided a specific service to the Indian public.<sup>552</sup> While the NMDC mines other minerals, the NMDC operates several iron ore mines and sells the iron ore it obtains from those mines.<sup>553</sup> Because the NMDC is exploiting public resources on the behalf of the Indian government, the owner of the resources, the NMDC is performing a government function in India.

386. India argues that Commerce ignored evidence that most of the day-to-day operations are not dictated directly by the Indian government. However, Commerce did not ignore that evidence. Even though some of the day-to-day operations may not be directly managed by the GOI, it has a say in the appointment of a majority of the board of directors which act on the GOI’s behalf in the day-to-day operations of the NMDC.

387. In sum, even under the standard articulated by the Appellate Body in DS379, the NMDC qualifies as a “public body” pursuant to Article 1.1(a)(1) of the SCM Agreement because the GOI owns over 98% of the NMDC, the GOI controls the NMDC through its appointment of directors, and the NMDC performs a government function, by directing the exploitation of government-owned resources.

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<sup>547</sup> *U.S.-China Products(AB)*, at para. 290.

<sup>548</sup> *U.S.-China Products(AB)*, at para. 297.

<sup>549</sup> *The Report of the “Expert Group” on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore*, p. 79, (“DANG Report”) (attached to *2006 New Subsidies Allegation (JSW)*, (Exhibit USA-50) (Under Indian law, the state governments owns the minerals in the land, however, for iron ore, which is listed a Schedule 1 mineral, the federal Indian government must approve all mining leases.)

<sup>550</sup> *DANG Report*, at 79 (attached to *2006 New Subsidies Allegation(JSW)* (Exhibit USA-50).

<sup>551</sup> *2004 New Subsidies Allegation*, Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).

<sup>552</sup> *2004 Verification Report*, at 9 (Exhibit USA-67).

<sup>553</sup> *India’s September 2, 2005, Supplemental Questionnaire Response(2004 AR)*, *New Subsidy Allegations A.2.(b)* and (c) (Exhibit USA-68).

**B. Commerce’s Specificity Determination Concerning the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Is Not Inconsistent with Articles 1 and 2 of the SCM Agreement, and Is Substantiated on the Basis Of Positive Evidence**

388. As explained above, the NMDC, a public body, provided iron ore to certain enterprises or industries that use iron ore. In so doing, India provided a production input to a discrete segment of the Indian economy: certain enterprises that use iron ore. Notwithstanding these facts, India claims that Commerce’s determination that India’s provision of iron ore for less than adequate remuneration was specific to certain enterprises was inconsistent with Article 2 of the SCM Agreement.<sup>554</sup>

389. As an initial matter, similar to the discussion above concerning Article 1.1(a)(1), it is useful to note that Articles 2.1(a) and 2.1(c) of the SCM Agreement are definitional provisions that do not contain obligations. Articles 2.1(a) and 2.1(c) serve to help define which subsidies are subject to Parts III or V of the SCM Agreement. And as with Article 1.1(a)(1), Article 2 applies not just in the context of countervailing duties, but to other aspects, including Part III of the SCM Agreement. Under Part III, there is no determination by an investigating authority or a Member. Accordingly, India errs in requesting the Panel to find a U.S. measure inconsistent with Article 2.1.<sup>555</sup>

390. Even aside from this, however, India’s approach is in error. First, India argues that Article 2.1(c) of the SCM Agreement does not permit a “*de facto*” specificity finding where the inherent characteristics of the product, rather than the program itself, make the product useful only to certain enterprises.<sup>556</sup> Second, India claims that Commerce failed to establish that the provision of iron ore for less than adequate remuneration was used by a “limited number of certain enterprises.”<sup>557</sup> Third, India claims that in determining that the GOI’s provision of iron ore was “*de facto*” specific to certain enterprises, Commerce failed to take into account the “extent of economic diversification of economic activities” within India, as well as the length of time the program has been in place as required by Article 2.1(c) of the SCM Agreement.<sup>558</sup> Finally, India asserts that Commerce’s specificity determinations were not clearly substantiated by positive evidence in accordance with Article 2.4 of the SCM Agreement.<sup>559</sup> Each of these claims by India is without merit. We set forth the proper interpretation of Article 2.1 and 2.4, and then address each of India’s claims in turn.

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<sup>554</sup> India First Written Submission, paras. 239-278.

<sup>555</sup> India First Written Submission, para. 641(f)(ii), (g)(iii), and (h)(ii).

<sup>556</sup> India First Written Submission, paras. 239-270.

<sup>557</sup> India First Written Submission, paras. 271-273.

<sup>558</sup> India First Written Submission, paras. 274-276.

<sup>559</sup> India First Written Submission, para. 277.

## **1. The Proper Interpretation of Article 2.1 and 2.4 of the SCM Agreement**

391. Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is “specific in accordance with the provisions of Article 2.” Article 2.1 provides as follows:

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, of the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such a subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions [fn omitted] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy by certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant the subsidy. In applying this subparagraph account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority as well as the length of time during which the subsidy programme has been in operation.

392. Thus, Article 2.1 of the SCM Agreement sets out “principles” for determining whether a subsidy, identified according to Article 1 of the Agreement, is “specific” to “an enterprise, industry, or group of enterprises or industries,” referred to as “certain enterprises.”<sup>560</sup> This dispute involves specificity related to Article 2.1(c) of the SCM Agreement. Article 2.1(c)

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<sup>560</sup> SCM Agreement, Article 2.1.

addresses the principles for finding that a subsidy is *de facto* specific, that is, when a subsidy is limited in fact to certain enterprises.<sup>561</sup>

393. The Appellate Body has explained that the term “industry” in Article 2 “signifies ‘[a] particular form or branch of productive labour,’ such as a “trade” or “manufacture.”<sup>562</sup> As the panel explained in *US – Upland Cotton*, in a decision cited favorably by the Appellate Body, what represents a limited “industry” is largely dependent on the facts of a given case:

The breadth of this concept of ‘industry’ may depend on several factors in a given case. At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis.<sup>563</sup>

394. The ultimate question is whether the industry, or group of industries, at issue “is a sufficiently discrete segment” of the “economy in order to qualify as ‘specific’ within the meaning of Article 2 of the SCM Agreement.”<sup>564</sup>

395. Article 2.4 requires that “[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.” The Appellate Body has explained that “the term ‘positive evidence’ relates” to “the quality of the evidence that authorities may rely upon in making a determination.”<sup>565</sup> Further, the Appellate Body has stated that “[t]he word ‘positive’ means” “that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”<sup>566</sup> Thus, where 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).

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<sup>561</sup> Article 2.1(a) addresses the principles applicable for finding that a subsidy is *de jure* specific, that is, when access to the subsidy is “explicitly limited to certain enterprises.”

<sup>562</sup> *US – Antidumping and Countervailing Duties (AB)*, para. 373.

<sup>563</sup> *US – Upland Cotton (Panel)*, para. 7.1142; *see also*, *US – Antidumping and Countervailing Duties (AB)*, para. 373 (agreeing with the *US – Upland Cotton* panel’s finding that such a decision “can only be made on a case-by-case basis.”).

<sup>564</sup> *US – Upland Cotton (Panel)*, para. 7.1151; *see also*, *US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.

<sup>565</sup> *US – Hot-Rolled Steel (AB)*, para. 192; *see also*, *Thailand – H-Beams (AB)*, para. 107 (“the dictionary meaning of the term ‘positive’ suggests that ‘positive evidence’ is ‘formally or explicitly stated; definite, unquestionable (positive proof)’”).

<sup>566</sup> *US – Hot-Rolled Steel (AB)*, para. 192.

396. The object and purpose of the SCM Agreement, in relevant part, is to “discipline trade-distorting subsidies.”<sup>567</sup> As the panel stated in *US – AD/CVD*, the specificity determination under Article 2, is to “establish that the subsidies deemed under the Agreement to be potentially trade distortive are those targeted in some way to particular beneficiaries, rather than being broadly available through the economy of the Member.”<sup>568</sup> As we demonstrate below, Commerce’s specificity determinations concerning the GOI’s provision of iron ore for less than adequate remuneration, as described below, is consistent with the requirements of Article 2 of the SCM Agreement.

## **2. Article 2.1(c) of the SCM Agreement Does Not Require an Investigating Authority or Panel to Follow India’s Proposed Order of Analyzing De Facto Specificity**

397. India claims 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” of “similarly-situated” entities.<sup>569</sup> Then, India continues, the administering authority must consider whether the actual use of the subsidy is limited to certain enterprises, *i.e.*, a subset of that group.<sup>570</sup> Article 2.1(c) of the SCM Agreement contains no such requirement.

398. India’s argument is based on a questionable path of reasoning. Focusing on Articles 2.1(a) (*de jure* specificity) and 2.1(b) (non-specificity based on objective criteria), India submits that a conclusion that a program is specific to “certain enterprises” can only be reached with reference to a “comparative set” consisting of:

similarly-situated entities, *i.e.* entities that share a mutual or common relation / degree of similarity as the ‘certain enterprises’ in question such that entities covered thereby would have otherwise been capable of receiving the subsidy in question.<sup>571</sup>

399. In India’s view, “[t]his conclusion obviously follows if the provisions of the SCM Agreement are intended to be given a meaning that is logically consistent and is sound from an economic standpoint.”<sup>572</sup> From there, India seeks (and purports to find) support for its notion of a “comparative set” by analyzing Appellate Body findings interpreting Article 1.1(a)(1)(ii) (financial contribution based on revenue foregone) and contextual references to other covered agreements.<sup>573</sup> Based exclusively on this analysis, India concludes that Article 2.1(c) requires that a determination of *de facto* specificity can only be made with reference to a “comparative set” of “similarly-situated” entities. India is incorrect.

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<sup>567</sup> *US – Antidumping and Countervailing Duties (Panel)*, para. 9.21; *see also, US – Softwood Lumber IV (AB)*, para. 95.

<sup>568</sup> *US – Antidumping and Countervailing Duties (Panel)*, para. 9.21.

<sup>569</sup> India First Written Submission, para. 245-261.

<sup>570</sup> India First Written Submission, para. 261.

<sup>571</sup> India First Written Submission, para. 250.

<sup>572</sup> India First Written Submission, para. 251.

<sup>573</sup> India First Written Submission, para. 251-261.

400. First, as explained above, Article 2.1(c) specifically provides that *de facto* specificity may be found in light of the “use of a subsidy programme by a limited number of certain enterprises.”<sup>574</sup> As a result, if a limited number of enterprises use the program, this fact supports a finding of specificity. Although India argues that the term “certain enterprises” means a subset of *eligible* enterprises, that conclusion is not supported by the text of Article 2.1(c).

401. As noted, “certain enterprises” is defined by the *chapeau* of Article 2.1 to include an “industry” or “group of industries,” and that an “industry” may be “generally referred to by the type of products they produce.”<sup>575</sup> India’s position that the recipient of a financial contribution must be compared to a “comparative set” of “similarly situated entities”<sup>576</sup> is therefore incorrect: in the case where the recipients constitute an industry, such a test would be circular.

402. Rather, the text of Article 2.1(c) establishes that, when considering the existence of *de facto* specificity based on the use of a subsidy program by a limited number of “certain enterprises,” the question a panel or investigating authority must answer is whether the “certain enterprises” constitute a discrete segment of the economy. As stated by a previous panel, “Article 2 [of the] SCM Agreement is concerned with the distortion that is created by a subsidy which either in law or in fact is *not broadly available*.”<sup>577</sup> For this reason, subsidies that “are broadly available and *widely used throughout an economy*” are not specific within the meaning of Article 2.<sup>578</sup> Thus, when considering whether a subsidy program is used by “a limited number of certain enterprises,” consideration of whether the number of enterprises or industries which receive the subsidy is “limited” is made with respect to the economy of the Member concerned.<sup>579</sup>

403. In contrast to the text-based interpretation followed by multiple panels, neither the Appellate Body findings nor the *travaux préparatoires* of the SCM Agreement relied upon by India clarify the meaning of Article 2.1(c) of the SCM Agreement. In particular, India’s reliance on the Appellate Body findings in *US – FSC (21.5)* and *US – LCA* is misplaced.<sup>580</sup> The passages cited by India do not address *de facto* specificity. Indeed, the paragraphs India cites in both cases concern the existence of financial contribution, specifically “revenue foregone” under Article 1.1(a)(1)(ii).<sup>581</sup>

404. Not only do the passages relied upon by India concern a different provision than Article 2, but there is no basis for assuming (as India appears to do) that the analysis of whether revenue

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<sup>574</sup> SCM Agreement, Art. 2.1(c).

<sup>575</sup> *US – Antidumping and Countervailing Duties (AB)*, para. 373 (quoting *US – Upland Cotton (Panel)*, para. 7.1142.

<sup>576</sup> India First Written Submission, para. 250.

<sup>577</sup> *US – Softwood Lumber IV (Panel)*, para. 7.116.

<sup>578</sup> *US – Upland Cotton (Panel)*, para. 7.1143.

<sup>579</sup> It is not necessary in this dispute, where the subsidy at issue is provided only to the limited industry that uses iron ore to quantify the point at which a subsidy becomes “widely used.” Rather, the United States agrees that “a subsidy that is limited to a small proportion of industries, such as those producing one or two individual ... products would be limited and thus ‘specific’ within the meaning of Article 2.” (*US – Upland Cotton (Panel)*, para. 7.1147).

<sup>580</sup> India First Written Submission, paras. 251-255.

<sup>581</sup> *US – LCA (AB)*, paras. 806-815; *see also, US – FSC (Article 21.5) (AB)*, paras. 85-106.

foregone constitutes a financial contribution is relevant to a determination of whether a subsidy is specific. For example, in the context of determining whether the establishment or change to a tax regime results in a non-collection of revenue otherwise due within the meaning of Article 1.1(a)(1)(ii), it is necessary for a panel to consider a counterfactual: would the recipient of the alleged financial contribution have provided government revenue but for the measure at issue. Necessarily, this requires reference to a “benchmark” based on “the rules of taxation” of the Member concerned.<sup>582</sup> Under Article 2.1(c), however, the analysis for determining whether a “limited number of certain enterprises” receive a subsidy does not require resort to a counterfactual; as found by previous panels, the comparator to those receiving the subsidy is the economy as it actually exists. As such, the passages from Appellate Body reports relied upon by India are inapposite.<sup>583</sup>

405. With regard to the negotiating history cited by India, as an initial matter, Article 32 of the Vienna Convention on the Law of Treaties provides that supplementary material may be used to assist in interpretation of the terms of a treaty “to confirm the meaning resulting from the application of article 31” or to determine the meaning if the interpretation according to article 31 “(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” India has not suggested that after analyzing the terms of Article 2.1 in accordance with their ordinary meaning in their context and in light of the object and purpose of the SCM Agreement, that Article 2.1 is ambiguous or absurd. In fact, the language of Article 2.1 is clear.

406. Even if, negotiating history is referenced to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, nothing in the negotiating history relied upon by India indicates that Article 2.1(c) in the SCM Agreement should be interpreted to require the identification of a “comparative set” or “eligible group” among which only a specific subset receives benefits. In fact, the negotiating history supports the opposite conclusion. India argues that the 1985 “draft guidelines issued by the Committee on Subsidies and Countervailing Measures” and a 1987 “checklist of issues for negotiations” circulated by the Negotiating Group on Subsidies and Countervailing Measures indicate that the government must “deliberately” act to limit the effect of a subsidy in order for the subsidy to be specific. From its first written submission, it is clear that India believes that if the government provides everyone in the “eligible” group with the same access to the good and does not direct it to a subset of the “eligible” group there can be no specificity. India is incorrect.

407. While the documents cited by India may demonstrate that the concept of “deliberate” government action was discussed, the fact is that a requirement of deliberate government action was not included anywhere in the SCM Agreement, much less in Article 2. As explained above, if a subsidy is provided “in fact” to a specific “enterprise or industry or group of enterprises or

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<sup>582</sup> *US – FSC (Article 21.5) (AB)*, para. 90.

<sup>583</sup> Similarly, India’s reliance on “contextual references from other covered agreements” is irrelevant (*see*, India First Written Submission, paras. 260-261). In particular, India relies on a report making findings under Article I:1 of the GATT 1994. Article I:1, like other so-called “non-discrimination” provisions apply to “like product[s]” (*see also*, GATT 1994, Art. III:4). In the event of a claim under one of those articles, an analysis must be undertaken to determine whether the products are, in fact, like. In contrast, Article 2 of the SCM Agreement applies to “certain enterprises” and there is no requirement that a “like enterprise” analysis be conducted.

industries,” Article 2.1(c) of the SCM Agreement does not require the further analysis of whether the government deliberately intended the specificity. A finding that a subsidy is *de facto* provided to a limited number of “certain enterprises” is sufficient to find specificity regardless of the intent of the government.<sup>584</sup> Article 2.1(c) of the SCM Agreement simply does not contain the requirement that specificity can only be found if a subset of similarly situated entities receives the subsidy.

### **3. Article 2.1(c) of the SCM Agreement Does Not Bar a De Facto Specificity Finding Simply Because the “Inherent Characteristics” of a Product Provided for LTAR Result in the Product Being Used by Only Certain Enterprises**

408. Having demonstrated that the text of Article 2.1(c) does not provide that *de facto* specificity can only be found if a subset of “similarly situated entities receives the subsidy in question, the U.S. turns now to India’s second Article 2.1(c) argument: that if the inherent characteristics of a good, rather than the government program, limits the uses of that good to certain enterprises, the program cannot be found to be specific.<sup>585</sup> India is incorrect. There is no basis in Article 2.1(c) of the SCM Agreement for India’s position.

409. India’s theory regarding the alleged “inherent characteristics” of a good provided for less than adequate remuneration has already been made to – and rejected by – a prior WTO panel. In *US – Softwood Lumber IV*, Canada argued that the provision of standing timber was not specific because it was the inherent characteristics of the standing timber, rather than the Government of Canada, that limited the number of enterprises that uses standing timber. The panel rejected Canada’s argument and, in a finding that Canada did not appeal, stated:

Article 2 speaks to the use by a limited number of certain enterprises . . . , not to the use by a limited number of certain eligible industries. In the case of a *good* that is provided by the government – and not just money, which is fungible – and that has utility for only certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only. We do not consider that this would imply that any provision of a good in the form of a natural resource automatically would be specific, precisely because in some cases, the goods provided (such as for example oil, gas, water, etc.) may be used by an indefinite number of industries. This is not the situation before us. As Canada acknowledges, the inherent

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<sup>584</sup> *US – Softwood Lumber IV (Panel)*, para. 7.116 (“While deliberate action by a government to restrict access to a subsidy that is in principle broadly available, through the use of discretion, could well be the basis for a finding of *de facto* specificity, we see no basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada’s argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, *i.e.* to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products.”).

<sup>585</sup> India First Written Submission, paras. 239-279.

characteristics of the good provided, standing timber, limit possible use to “certain enterprises” only.<sup>586</sup>

410. The panel recognized the different nature of goods and money and that while money is fungible, goods may have limited utility. Moreover, when the good provided by the government is of “limited utility, the panel found it *more likely* that a subsidy was conferred only on certain enterprises. Therefore, the panel found that Article 2 permits a specificity finding based on the fact that the use of the good is limited to certain enterprises based on its limited commercial use.

411. Here again India’s reliance on the negotiating history for Article 2 is misplaced. Again, India has not argued that the meaning of the text of Article 2 is ambiguous or absurd. But even if one considers the negotiating history relied upon by India to confirm the meaning resulting from an application of Article 31 of the Vienna Convention, that history does not support India’s position regarding the meaning of “inherent characteristics.” As India argues, the First Cartland Draft does contain a draft provision that would have required a finding that “the granting authority knew or should have known it was conferring or would confer a benefit on certain enterprises.”<sup>587</sup> The footnote India cites from the 1990 draft agreement indicates that signatories still needed to address specificity based upon the “inherent characteristics of goods, services or extraction or harvesting rights provided by a government.”<sup>588</sup> However, given the final text of Article 2.1(c) of the SCM Agreement, which omits any reference to the intent of the government as a criteria for specificity, and the explicit inclusion of a factor supporting *de facto* specificity based on a limited number of certain enterprises using the program, the only reasonable interpretation of Article 2.1(c) is that the signatories intended that specificity may be found when a government provides a good to a limited number of certain enterprises, regardless of its inherent characteristics or uses. Indeed, the fact that Members rejected the proposed text on which India relies indicates that adopting such an interpretation of the current text would be contrary to the intent of the negotiators.

412. Finally, to interpret Article 2.1(c) in the manner India suggests would result in a loophole in the SCM Agreement that would permit Members to subsidize the provision of inputs that can be used by only a limited group of enterprises, by providing such goods at less than adequate remuneration. In fact, the limited utility of the good makes it *more likely* that a subsidy was specific. India has not provided any substantive argument that the Members intended to create such a loophole in the SCM Agreement. As a result, India’s arguments should be rejected, just as the panel in *US – Softwood Lumber IV* rejected Canada’s similar claims.<sup>589</sup>

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<sup>586</sup> *US – Softwood Lumber IV (Panel)*, para. 7.116 (emphasis original).

<sup>587</sup> India First Written Submission, para. 267.

<sup>588</sup> India First Written Submission, para. 268.

<sup>589</sup> *US – Softwood Lumber IV (Panel)*, para. 7.116.

#### **4. Commerce Determined that the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Was De Facto Specific to a Limited Number of Certain Enterprises That Used Iron Ore**

413. India argues that Commerce’s determination that the provision of iron ore for less than adequate remuneration is specific because the subsidy program was used by a limited number of certain enterprises is inconsistent with Article 2.1(c) of the SCM Agreement.<sup>590</sup> India argues that Commerce’s determination is inconsistent with Article 2.1(c) because Commerce failed to, first, determine what the overall “set of ‘certain enterprises’” was, and then that the provision of iron ore was made to only a limited number of entities within that set.<sup>591</sup>

414. As was explained above, pursuant to Article 2.1(c), a program is specific if the subsidy is used “by a limited number of certain enterprises.” The question a panel or investigating authority is to answer 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.”<sup>592</sup>

415. Commerce’s determinations demonstrate that the users of iron ore constitute a discrete segment of the Indian economy such that its provision is specific within the meaning of Article 2.1(c) of the SCM Agreement. In the 2004, 2006, 2007 and 2008 administrative reviews, Commerce found that the GOI’s provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore.<sup>593</sup> The positive evidence supporting Commerce’s determination that the iron ore program was used by a limited number of certain enterprises consists of a list of 43 NMDC customers identified on the NMDC website, most of which were iron and steel companies.<sup>594</sup> In addition, the Report of the “Expert Group” On Preferential Grant of Mining Leases For Iron Ore, Manganese Ore and Chrome Ore, (hereinafter the “*Dang Report*”), demonstrates that iron ore is used for making steel, pig iron and sponge iron.<sup>595</sup> The report identifies the end use of all of India’s domestic consumption of iron ore for 2003. The total Indian domestic consumption of iron ore was accounted for by steel

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<sup>590</sup> India First Written Submission, para. 277-278.

<sup>591</sup> India First Written Submission, para. 272.

<sup>592</sup> *US – Upland Cotton (Panel)*, para. 7.1151 (emphasis added); *see also, US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.

<sup>593</sup> *2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exhibit IND-17); *2006 Preliminary Results*, 73 Fed. Reg. at 1587 (Exhibit IND-32); *2006 Issues and Decisions Memorandum*, Analysis of Programs, 1. Programs Determined to Be Countervailable, A. GOI Programs, 4. Sale of High Grade Iron Ore for Less Than Adequate Remuneration (Exhibit U.S.-30); *2007 Preliminary Results*, 73 Fed. Reg. at 79797 (Exhibit IND-37); *2007 Final Issues and Decision Memorandum*, IV. Analysis of Programs, A. Programs Administered By the Government of India, 3. Sales of High Grade Iron Ore for LTAR (Exhibit IND-39); *2008 Preliminary Results*, 75 Fed. Reg. at 1503 (Exhibit IND-40); *2008 Final Issues and Decision Memorandum*, II. Analysis of Programs, A. Programs Administered by the Government of India, 12. Sale of High Grade Iron Ore for Less Than Adequate Remuneration (Exhibit IND-41).

<sup>594</sup> *2004 New Subsidies Allegation*, p. 4, Exhibit 7 (May 2, 2005) (Exhibit USA-69).

<sup>595</sup> *Dang Report*, p. 48 (attached to *2006 New Subsidies Allegation (JSW)*), at Exhibit 31 (Exhibit US-50).

producers and pig and sponge iron producers.<sup>596</sup> The overwhelming majority, approximately 76%, was used by steel producers.<sup>597</sup>

416. As determined by Commerce, therefore, the steel industry and the pig and sponge iron industries constitute a limited number of certain enterprises within the meaning of Article 2.1(c) of the SCM Agreement.

**5. Commerce’s Determination that the GOI’s Provision of Iron Ore for Less Than Adequate Remuneration Was De Facto Specific to Certain Enterprises That Used Iron Ore Is Supported by Positive Evidence and Is Not Inconsistent with Article 2.4 of the SCM Agreement**

417. India argues that Commerce’s determination that iron ore is used by a limited number of enterprises is not supported by positive evidence as required by Article 2.4 of the SCM Agreement.<sup>598</sup> India’s claim is without merit.

418. Article 2.4 requires that “[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.” The Appellate Body has stated that “[t]he word ‘positive’ means ... that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”<sup>599</sup> Thus, where a panel or 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 *de facto* specificity is consistent with the requirements of Article 2.1(c) of the SCM Agreement.

419. As explained in the preceding section, Commerce’s specificity determination concerning the GOI’s provision of iron ore at less than adequate remuneration is substantiated by positive evidence and is consistent with Article 2.4 of the SCM Agreement. Therefore, India’s claim under Article 2.4 should be rejected.

**6. The United States Was Not Required to Address Explicitly the Diversification of India’s Economy or the Length of Time That High-Grade Iron Ore Was Sold for LTAR.**

420. India claims that Commerce’s specificity determination regarding the provision of high-grade iron ore by India is inconsistent with the third sentence of Article 2.1(c) of the SCM Agreement because Commerce did not consider all of the factors required to make a finding of *de facto* specificity. Specifically, India argues that Commerce failed to consider the extent of economic diversification in India, as well as the length of time high-grade iron ore has been sold in India.<sup>600</sup> India is incorrect: Commerce did account for India’s economic diversification and the length of time during which the subsidy program operated in light of Article 2.1(c) and the

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<sup>596</sup> *Dang Report*, p. 48 (attached to *2006 New Subsidies Allegation (JSW)*), at Exhibit 31 (Exhibit USA-50).

<sup>597</sup> *Dang Report*, p. 48 (attached to *2006 New Subsidies Allegation (JSW)*), at Exhibit 31 (Exhibit USA-50).

<sup>598</sup> India First Written Submission, paras. 277-278.

<sup>599</sup> *US – Hot-Rolled Steel (AB)*, para. 192; *see also, Thailand – H-Beams (AB)*, para. 107.

<sup>600</sup> India First Written Submission, paras. 274-276.

facts and circumstances underlying Commerce’s determination. India appears to argue that, going beyond what is required by the text of Article 2.1(c), Commerce was required to make specific determinations as to these factors. As we demonstrate below, Commerce was not required to make specific determinations regarding these factors because India failed to raise the issues during the examination of this program.

421. The third sentence of Article 2.1(c) states that “account shall be taken” of economic diversification and the length of time during which the subsidy program has operated. As discussed, a specificity determination involves a fact-based analysis, made on a case-by-case basis.<sup>601</sup> As part of that specificity determination, the relevance of either (1) the economic diversification in the Member or (2) the length of time a subsidy has been in place would also be determined on a case-by-case basis.

422. With respect to economic diversification, the inherent logic of the provision is simple. When the economy of a subsidy-granting jurisdiction is not diverse and is dependent on a small number of industries—or even a single industry—a subsidy that is provided to all industries may appear to be *de facto* specific, within the meaning of Article 2.1(c). In other words, such a subsidy may be widely distributed within the economy, and yet appear specific, simply due to the limitations of the domestic economy where the subsidy was granted.<sup>602</sup> To prevent Article 2.1(c) of the SCM Agreement from functioning as a *per se* rule under which any subsidy within a small or undiversified economy automatically would be specific, the “diversification” language requires a consideration of the broader economic context within which the particular subsidy program functions.

423. Similarly, respect to economic diversification, the inherent logic of the provision is simple. When the economy of a subsidy-granting jurisdiction is not diverse and is dependent on a small number of industries—or even a single industry—a subsidy that is provided to all industries may appear to be *de facto* specific, within the meaning of Article 2.1(c). In other words, such a subsidy may be widely distributed within the economy, and yet appear specific, simply due to the limitations of the domestic economy where the subsidy was granted.<sup>603</sup> To prevent Article 2.1(c) of the SCM Agreement from functioning as a *per se* rule under which any subsidy within a small or undiversified economy automatically would be specific, the “diversification” language requires a consideration of the broader economic context within which the particular subsidy program functions.

424. Contrary to India’s assertion, Commerce did account for these factors in its specificity analysis of the provision of iron ore for less than adequate remuneration. In doing so, Commerce

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<sup>601</sup> See, *US – Antidumping and Countervailing Duties (AB)*, para. 373 (noting that the “determination of whether a number of enterprises or industries constitute ‘certain enterprises’ can only be made on a case-by-case basis”).

<sup>602</sup> See, *EC – LCA (Panel)*, para. 7.975 (“[F]or example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate ‘predominant use’.”).

<sup>603</sup> See, *EC – LCA (Panel)*, para. 7.975 (“[F]or example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate ‘predominant use’.”).

considered that the facts and circumstances of the challenged specificity determination demonstrated that neither of these factors would affect the conclusion that the provision of iron ore was specific.<sup>604</sup>

425. Commerce accounted for the fact that India’s economy is highly diverse.<sup>605</sup> The United States specifically recognized a variety of Indian industries such as polyethylene terephthalate film and resin in the challenged investigation.<sup>606</sup> Commerce also determined that only a limited number of enterprises use iron ore. This stands in contrast to the large number of industries in the Indian economy, a fact that India has not disputed.

426. Similarly, the evidence underlying Commerce’s specificity findings with respect to high-grade iron ore led to the conclusion that the issue of the duration of that program’s operation was not relevant to the subsidy program at issue. The United States found that the provision of high-grade iron ore was specific “because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number.”<sup>607</sup> This finding rendered unnecessary any additional analysis of the duration of the subsidy, because the only industries that could receive the subsidy over time would still be defined as part of the original, limited group of beneficiaries – those that use iron ore. Accordingly, further analysis of the program’s duration was unnecessary. Thus, while the factors listed in the third sentence of Article 2.1(c) proved not to affect Commerce’s specificity analysis, it is not the case that Commerce did not consider or “account” for those factors.

427. At points in its argument, India appears to suggest that Commerce had an obligation to make a specific determination as to the factors listed in the third sentence of Article 2.1(c).<sup>608</sup> If this is, in fact, the basis for India’s claim, India is incorrect. When record evidence and the circumstances of an investigation demonstrate that the issues of diversification and duration of the subsidy would not affect the specificity analysis, and no party argues to the contrary, Commerce is not required to make explicit determinations as to those aspects of the *de facto* analysis. In *EC-DRAMS*, the panel rejected the contention that a party must make explicit findings regarding these considerations when other parties fail to raise the issue: “[t]he record

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<sup>604</sup> See, *EC – LCA (Panel)*, para. 7.975 (“[T]he relevance of the [] two factors to understanding whether there has been ‘predominant use {of a subsidy programme} by certain enterprises’ will depend on the particular facts” at issue.).

<sup>605</sup> The United States notes that the panel in *US – Softwood Lumber IV* found that an implicit statement about the granting authority’s economic activities is sufficient and, in that dispute, a detailed analysis of the Canadian economy’s portfolio of companies and industries was not necessary. Instead, the panel found that the United States had properly taken account of economic diversification by stating, “[t]he vast majority of companies and industries in Canada do not receive benefits under these programmes [*i.e.*, stumpage subsidies]” because it was a “publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies. (*US – Softwood Lumber IV (Panel)*, para. 7.124).

<sup>606</sup> See, e.g., *2004 Preliminary Results*, 71 FR at 1513-14 (Exhibit IND-17) (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34950 (May 16, 2002) and *Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13460 (March 21, 2005)).

<sup>607</sup> *2004 Preliminary Results*, 71 FR at 1516 (Exhibit IND-17), *unchanged in 2004 Review Final Results*, 71 FR at 28667 (Exhibit IND-19).

<sup>608</sup> See India First Written Submission, para. 276.

does not indicate that the parties ever raised the issue that the disproportionate use of the Programme’s funds . . . was somehow to be explained by the lack of diversification of the Korean economy or the length of time the program had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters.”<sup>609</sup>

428. In this case, no party challenged Commerce’s specificity findings with respect to the sale of high-grade iron ore, and no party suggested that either limited economic diversification or the duration of the subsidy program was relevant to the limited number of industries benefiting from that program.<sup>610</sup> No party ever raised the issue of whether India’s economic diversification or the length of time the subsidy program had been in operation had any bearing on Commerce’s *de facto* specificity analysis. Accordingly, Commerce’s *de facto* specificity findings were consistent with U.S. obligations under Article 2.1(c).

### **C. Commerce’s Determinations that the NMDC’s Sales of High Grade Iron Ore Conferred a Benefit Are Not Inconsistent With Article 14(d) of the SCM Agreement**

429. India claims that Commerce’s benchmarks for determining whether the NMDC’s sales of high grade iron ore in the 2006 and 2007 final review results are inconsistent with U.S. obligations under Article 14 of the SCM Agreement.<sup>611</sup> First, India argues that Commerce should have determined whether a benefit was conferred by using a cost-to-government standard. Second, India argues that Commerce ignored domestic price information on the record. Third, in India’s view, Commerce refused to use an available in-country price. Fourth, India argues that Commerce failed to adjust the benchmark prices to reflect prevailing market conditions. Fifth, India argues that Commerce improperly excluded the NMDC prices from the world market price benchmark. Finally, India argues that the United States has not performed its obligation under Article 14(d) of the SCM Agreement in good faith. As we demonstrate below, each of India’s claims is without merit.

430. As was explained above, the *chapeau* of Article 14 of the SCM Agreement specifically identifies the correct standard for calculating the subsidy benefit as focusing on “the benefit to the recipient.”<sup>612</sup> As discussed above, the Appellate Body has stated that whether a “benefit” has been “conferred” 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.<sup>613</sup> Thus, when considering a financial contribution in the form of government provision of goods under Article 14(d), the focus of the benefit inquiry is whether the recipient received a good from the government at a price less than that available to the recipient on the market.

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<sup>609</sup> *EC – DRAMS*, para. 7.229.

<sup>610</sup> *2004 Review Final Results*, 71 FR at 28667 (Exhibit IND-19); *2004 Issues and Decisions Memorandum*, II. Analysis of Programs, 4. Sale of High-Grade Iron Ore for Less than Adequate Remuneration and IV. Analysis of Comments (Exhibit IND-18).

<sup>611</sup> India First Written Submission, paras. 279-319.

<sup>612</sup> SCM Agreement, Art. 14.

<sup>613</sup> *Canada – Aircraft (AB)*, para. 157 (emphasis added).

## 1. The Iron Ore Benchmarks Used By Commerce By Review

431. As explained in the relevant determinations, Commerce used the following benchmarks for high grade iron ore fines and lumps. Lumps come in two forms relevant to this proceeding: regular high grade iron ore lumps and DR-CLO lumps.<sup>614</sup>

432. For the DR-CLO lumps, Commerce used in-country private prices: a price from an actual import of DR-CLO lumps from Brazil into India and a private price at which ISPAT purchased DR-CLO in the Indian market. For regular lumps and fines, there were no usable domestic private benchmark prices in India so Commerce used world market prices from Hamersley, Australia (with the exception of the 2004 review, as explained below).<sup>615</sup> Commerce used the world market price for Hamersley, Australia high grade iron ore lumps and fines because it was the only world market price identified with a specific iron content based on the available data sources in the record. The record also contained shipping data for coal from Hamersley, Australia to Tata’s steel plant so that Commerce could compute the delivered price to India for the iron ore.

### a) 2004 Administrative Review

433. In the 2004 administrative review, Commerce used the average of Hamersley, Australia iron ore lump price contained in the *Tex Report*, and the NMDC iron ore lump price to Japan.<sup>616</sup> As explained below, the NMDC iron ore lump price to Japan should not have been included. There were no fines or DR-CLO purchases in the 2004 administrative review.

Benchmark	Essar		
	Fines	Lumps	DR-CLO
2004 Review		Average of H and N	

H = Hamersley, Australia High Grade Iron Ore Price from *Tex Report*

N= NMDC Prices from *Tex Report*

Blank Cells mean there were no transactions for that type of iron.

<sup>614</sup> High Grade iron ore lumps have an iron content of at least 64% iron. DR-CLO lumps have an iron content of 67% iron.

<sup>615</sup> While there were some private prices for iron ore lumps in the 2006 and 2007 administrative reviews which were used in the relevant administrative reviews, there was never any evidence of Indian domestic private prices for iron ore fines. As a result, Commerce used, as the benchmark, the price for high-grade iron ore fines from the *Tex Report* for Hamersley, Australia in all of the relevant reviews.

<sup>616</sup> 2004 *Preliminary Results*, 71 Fed. Reg. at 1517, (Exhibit IND-17) and 2004 *Issues and Decisions Memorandum*, at Comment 2 (Exhibit IND-18).

**b) 2006 Administrative Reviews**

434. In the 2006 administrative review, Commerce used the Hamersley, Australia lump prices from the *Tex Report* and private DR-CLO lump prices from the Indian domestic market and Brazil.<sup>617</sup> For iron ore fines, Commerce used the *Tex Report*, Hamersley, Australia price.<sup>618</sup> Tata, although a participant in the 2006 review, did not purchase iron ore from the NMDC.

Benchmarks	ISPAT			Essar			JSW		
	Fines	Lumps	DR-CLO	Fines	Lumps	DR-CLO	Fines	Lumps	DR-CLO
2006 Review	H	H	I	H		B	FA	FA	FA

H = Hamersley, Australia High Grade Iron Ore price from Tex Report

I = Indian Domestic Private Proprietary Price for DR-CLO Purchased By ISPAT

B = Brazilian Private Proprietary Price for DR-CLO Imported Into India By Essar

FA =Facts Available

Blank Cells mean there were no transactions for that type of iron or the company was not being reviewed in that period.

**c) 2007 Administrative Review**

435. In the 2007 administrative review, Commerce used private DR-CLO lump prices from Brazil.<sup>619</sup> For iron ore fines, Commerce used the *Tex Report*, Hamersley, Australia price.<sup>620</sup>

Benchmarks	Essar		
	Fines	Lumps	DR-CLO
2007 Review	H		B

H = Hamersley, Australia High Grade Iron Ore price from *Tex Report*

B = Brazilian Private Proprietary Price for DR-CLO Imported Into India By Essar

Blank Cells mean there were no transactions for that type of iron.

<sup>617</sup> 2006 Issues and Decision Memorandum, at Section I.A.4(Exhibit IND-33).

<sup>618</sup> 2006 Issues and Decision Memorandum, at Section I.A.4(Exhibit IND-33).

<sup>619</sup> 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38).

<sup>620</sup> 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38).

**d) 2008 Administrative Review**

436. In the 2008 administrative review, Commerce used facts available because Tata did not respond to Commerce’s questionnaires.<sup>621</sup>

<b>Benchmark</b>	<b>Tata</b>		
	<b>Fines</b>	<b>Lumps</b>	<b>DR-CLO</b>
<b>2008 Review</b>	FA	FA	FA

FA = Facts Available

437. For all of the administrative reviews, where the information was available, Commerce added delivery charges<sup>622</sup> associated with getting the iron ore to the production facility for both the government price and the benchmark.<sup>623</sup>

**2. Commerce was not required by Article 14(d) of the SCM Agreement to determine whether NMDC prices adequately remunerated the NMDC**

438. India argues that Commerce failed to determine whether NMDC’s domestic iron ore prices adequately remunerated the NMDC.<sup>624</sup> This argument is the same as India put forward with respect to its “as such” claims under Article 14(d) in section III.C of its first written submission. As discussed at section III.C above, India is improperly substituting a “cost-to-government” analysis for the “benefit-to-the-recipient” standard required by Article 14 of the SCM Agreement. The essence of a benefit analysis under Article 14 of the SCM Agreement is to determine whether the *recipient* is better off than it would have been absent the government action, which involves assessing whether the *recipient* obtained something “on terms more

<sup>621</sup> 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).

<sup>622</sup> Delivery charges include all transportation costs, shipping and handling charges, packing, taxes and duties to get the input to the factory for use in producing the subject merchandise. For example, in the 2006 administrative review, Commerce added the following charges to the Hamersley price which was an FOB port Australia: ocean freight, haulage charges, tripling charges, siding charges, shipment charges, shore incentive, manual loading and unloading of shipments, and inland freight. Commerce did not include the central sales tax or the import duties and other taxes because Commerce had no information with which to make the adjustment. Commerce therefore left these charges out of both sides of the equation. See, 2006 Review Final Results, at sections I.A.4 and 8 (Exhibit IND-34).

<sup>623</sup> Commerce notes that there were a few instances in which the data were not available to determine the cost of getting the ore from the Indian port to the factory. In those instances, Commerce calculated the benefit based on the price to the Indian port for both the benchmark and the NMDC price. There were also instances in which certain taxes and delivery charges were not available. In those instances, to the extent supported by the evidence, Commerce adjusted the prices for those charges to be as compatible as possible. Commerce also took the specific iron content for each price into consideration so that the prices being compared reflected the same iron content.

<sup>624</sup> India First Written Submission, paras. 279-283.

favorable than those available in the market.”<sup>625</sup> Thus, for the same reasons as discussed above, India’s arguments should be rejected.

### **3. Commerce Did Not Fail To Consider Relevant Indian Domestic Price Information**

439. India argues that Commerce improperly relied on out-of-country benchmarks in the 2006, 2007, and 2008 administrative reviews because suitable in-country price information was available.<sup>626</sup> India identifies two pieces of record evidence – an association chart and a proprietary price quote – from the 2006 administrative review containing iron ore prices and argues that Commerce failed to consider them.<sup>627</sup> India’s claim is without merit.

440. Whenever possible, Commerce relies on private market prices in the country of provision for determining whether a government provision of goods is for less than adequate remuneration. In order to use private market prices, however, the evidence must demonstrate that the prices represent *actual* private market transactions. As explained next Commerce could not have relied on these prices in the chart or the price quote because there is no record evidence, nor an explanation from any of the parties, that indicates that the prices in the chart and price quote were based on *actual* market transactions between private parties.

441. With respect to the association chart, the data provided therein, with three exceptions, does not identify the entities selling the iron ore.<sup>628</sup> Therefore, it is impossible to determine if the prices from the unidentified sellers are private or government prices. In addition, there was no record evidence to show that the prices are for completed transactions as opposed to a notional price list. The association chart is simply a page with no explanation. The record does not contain enough information to make the determination of whether these prices are government or market determined prices.

442. With respect to the three companies are identifiable on the chart, evidence on the record indicates that the MML and Orissa companies are state-owned. Commerce did not use these government prices as benchmarks for the reasons explained above.<sup>629</sup> With regard to the Tata price there is insufficient information on the record to determine what the price represents. It is unclear whether it is a price quote or an actual transaction price. The record does not identify the purchaser. As a result, it cannot be concluded that it is a price between private parties. There is no information on the record identifying what or who S J Harvi is.

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<sup>625</sup> *Canada – Aircraft (Panel)*, para. 9.112 (emphasis added).

<sup>626</sup> India First Written Submission, paras. 284-289.

<sup>627</sup> India First Written Submission, para. 287.

<sup>628</sup> Both the GOI and Tata submitted the same chart. *GOI’s Supplemental Questionnaire Response*, February 12, 2008, at Exhibit 1 (Exhibit IND-61); *Tata’s Supplemental Questionnaire Response*, February 8, 2008, (Exhibit IND-67).

<sup>629</sup> *2004 Preliminary Results*, 71 Fed. Reg. at 1517, (Exhibit IND-17) and *2004 Issues and Decisions Memorandum*, at Comment 2 (Exhibit IND-18); *2006 Preliminary Results*, 73 Fed. Reg. at 1581 (Exhibit IND-32).

443. In addition, other than a general marking of “HG” or “LG” (indicating whether the iron ore is high grade and low grade), the specific percentage of iron content is not indicated. The percentage of iron ore content is important to the price because the specific concentration of iron can affect the price of the iron ore and Commerce made its benchmark calculations on a percentage specific basis because the specific iron content varied.<sup>630</sup> Moreover, the chart does not indicate whether the prices were for actual transactions or merely price quotes. Because the record contains no information on what the chart prices actually represent, Commerce could not rely on them in calculating the benchmark for iron ore.

444. The second piece of record evidence is a price quote from March 4, 2006, provided by Tata. This is a proprietary document. Under Article 12.4 of the SCM Agreement, Commerce may not disclose proprietary information without specific permission of the party submitting the information. Article 12.4 of the SCM Agreement provides:

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

445. The price quote provided by Tata contains data that are so limited in scope that if Commerce used it as a benchmark, the proprietary numbers provided in the quote could be reverse calculated by the companies to which the Tata-based benchmark would be applied. Because Commerce could not use this proprietary price quote without making it easily susceptible to disclosure, and because Commerce did not have Tata’s specific permission to disclose its prices, Commerce could not use the March 4, 2006 price quote as a benchmark.

**4. In The 2006 Administrative Review, Commerce Properly Declined To Use The Indian Market Price For DR-CLO Lump Iron Ore For Essar and JSW Because Do So Would Have Resulted In The Unauthorized Disclosure Of Confidential Information Pursuant To Article 12.4 Of The SCM Agreement**

446. India also argues that Commerce improperly relied on out-of-country benchmarks in the 2006 administrative review because Commerce did not use one company’s proprietary price data as the basis for benchmarks for other companies subject to the review.<sup>631</sup> In that review, Commerce compared the price of ISPAT’s purchases of iron ore from the NMDC to the private prices paid by ISPAT for DR-CLO lumps. India claims that, by not using ISPAT’s prices as a benchmark for other companies’ purchases of iron ore, Commerce’s determinations breached

<sup>630</sup> 2006 Preliminary Results, 71 Fed. Reg. at 1587 (Exhibit IND-32).

<sup>631</sup> India First Written Submission, paras. 290-297.

Article 14(d).<sup>632</sup> India argues that while the SCM Agreement protects confidential information from disclosure, it does not prevent its use.<sup>633</sup> India is wrong.

447. India does not contest that the ISPAT pricing information was confidential to ISPAT. The fact is that private prices ISPAT paid for the DR-CLO lumps would be susceptible to disclosure if released to other parties, including Essar and JSW. Yet India never explains how the ISPAT prices could be used without disclosing those prices to Essar and JSW. As such, for the reasons discussed in the previous section, Commerce acted consistently with Article 14(d) of the SCM Agreement in treating the ISPAT pricing information as confidential, and respecting ISPAT’s request for such treatment.

448. India argues that the requirement not to *disclose* such information does not preempt the *use* of such information. India is incorrect. As a legal matter India’s reliance on Article 39 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS Agreement”) for this proposition is misplaced. India fails to explain what relevance Article 39.2 has to an analysis of the term “disclosed” in Article 12.4 of the SCM Agreement, simply noting that Article 39 is “interesting.”<sup>634</sup> Furthermore, the United States notes that Article 39.2 requires a party with certain information to prevent both the disclosure to and use by other parties. Thus, if Article 39.2 has any relevance to the interpretation of Article 12.4 of the SCM Agreement, it illustrates that Commerce would need to ensure that not only is information not disclosed to other parties, but also that it would need to be conscious of whether, once disclosed, the information would be used by other parties. The fact that Commerce could not ensure the data would not be used once disclosed reinforces that Commerce could not disclose the data under Article 12.4.

449. Second, as a practical matter, Commerce could not use ISPAT’s proprietary price without disclosing that data to other interested parties. To provide a simple example, if the proprietary data of party A is X, and the data of party B for whom Commerce is performing a calculation is 2, if Commerce’s margin calculation is  $X + 2 = 5$ , it is easy for party B to determine that  $X = 3$ . As result, party A’s proprietary data will be disclosed to party B. Given that Commerce did not have ISPAT’s specific permission to disclose the iron ore pricing information, Commerce could not use it as a benchmark for other parties’ DR-CLO purchases. As such, and since there were no other in-country private prices available, Commerce properly relied on an out-of-country benchmark.

##### **5. Commerce’s Use of World Market Prices, Including Freight, Import Duties and Delivery Charges, As Benchmarks For Determining the Benefit For LTAR Sales of Iron Ore Is Consistent With Article 14(d) of the SCM Agreement**

450. India makes three arguments concerning Commerce’s determination of world market prices used as benchmarks. First, India argues that Commerce failed to make a finding that the

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<sup>632</sup> India First Written Submission, para. 297.

<sup>633</sup> India First Written Submission, paras. 292-294.

<sup>634</sup> India First Written Submission, para. 292.

prevailing market conditions for the world market prices are identical to the market conditions in the country of provision.<sup>635</sup> Second, India argues that by using world market prices, Commerce improperly countervailed India’s “comparative advantage.”<sup>636</sup> Third, India argues that including ocean freight and import duties is inconsistent with prevailing market conditions in India.<sup>637</sup> India claims, therefore, that Commerce’s determination of world market prices was inconsistent with Article 14(d). India’s arguments are without merit.

**a) Article 14(d) Permits the Use Of World Market Prices in the  
Absence of Market Prices in the Country of Provision**

451. First, India argues that Article 14(d) requires Commerce to prove that the prevailing market conditions for the world market prices are identical to the prevailing market conditions in India before the world market prices can be used.<sup>638</sup> Article 14 of the SCM Agreement contains no such requirement. Moreover, the Appellate Body has recognized that if there are no market prices in the country of provision, it is appropriate to use world market prices.<sup>639</sup>

452. As discussed in detail above, the Article 14(d) guidelines provide that a benchmark for determining the benefit for goods sold at less than adequate remuneration should be “in relation to prevailing market conditions . . . in the country of provision or purchase.”<sup>640</sup> The Appellate Body has stated that with respect to the phrase “in relation to” in Article 14(d), that although

. . . it implies a comparative exercise . . . its meaning is not limited to “in comparison with.” The phrase “in relation to” has a meaning similar to the phrases “as regards” and “with respect to.” These phrases do not denote the rigid comparison suggested by the Panel, but may imply a broader sense of “relation, connection, reference.”<sup>641</sup>

453. As an initial matter, India agrees that the use of a “[w]orld market benchmark” is appropriate when there are no in-country benchmarks available.<sup>642</sup> Indeed, it is well-established that a Member may resort to out-of-country benchmarks when there are no usable in-country market prices.<sup>643</sup>

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<sup>635</sup> India First Written Submission, at paras. 298-304.

<sup>636</sup> India First Written Submission, paras. 305-309.

<sup>637</sup> India First Written Submission, paras. 310-311.

<sup>638</sup> India First Written Submission, para. 301.

<sup>639</sup> See, *US – Antidumping and Countervailing Duties (AB)*, para. 446; *US – Antidumping and Countervailing Duties (Panel)*, paras. 10.16-10.23.

<sup>640</sup> SCM Agreement, Art. 14(d).

<sup>641</sup> *US – Softwood Lumber IV (AB)*, para. 89.

<sup>642</sup> India First Written Submission, para. 78 and fn. 64 (citing the Appellate Body report from *US – Softwood Lumber IV*).

<sup>643</sup> See, *US – Antidumping and Countervailing Duties (AB)*, para. 446; *US – Antidumping and Countervailing Duties (Panel)*, paras. 10.16-10.23.

454. The Article 14(d) guidelines do not require a Member to prove that the prevailing world market conditions are identical to the prevailing market conditions in the country in question. Nowhere in the text does such a requirement appear. Rather, the standard set forth in Article 14(d) is that the world market price “relates or refers to, or is connected with, prevailing market conditions in the country of provision.”<sup>644</sup> Were a panel to read an “identical to” standard into Article 14(d), the result would be that in the absence of appropriate in-country prices, a Member would never be able to use world market prices since, realistically, no country’s internal market is identical to the world market. Such a result would be contrary to Article 14 which, as India acknowledges, allows for the use of out-of-country benchmarks when in-country benchmarks are unavailable.<sup>645</sup>

455. With respect to the out-of-country benchmarks used by Commerce, based on prices from Australia and Brazil, India specifically argues that Commerce improperly presumed that the Australian and Brazilian market conditions were identical to the prevailing Indian market conditions.<sup>646</sup> India is incorrect. As an initial matter, the Brazilian price represents a price at which an Indian steel company, Essar, purchased DR-CLO from Brazil and had it delivered to its facility in India. The Brazilian delivered price, therefore, is not an out-of-country price, but rather is an in-country price between private parties.

456. The Australian prices for iron ore fines and lumps are out-of-country prices that do relate to the prevailing market conditions in India. Australia exports iron ore that can be imported into India. The *Dang Report* demonstrates that Australia has more iron ore reserves than India and exports 90% of its mined iron ore.<sup>647</sup> Iron ore is one of the most traded commodity products in the world. The Australian and NMDC prices from the *Tex Report* permit the development of a benchmark made pursuant to the specific percentage iron content in the ore. In addition the record contains shipping information for coal from Hamersley, Australia imported into India, which allows the benchmark to be adjusted to reflect transportation. Given that there are no usable Indian market prices for high grade iron ore fines and lumps – as adjusted, to relate to the prevailing market conditions in India – Commerce’s use of the Australian world market prices is a reasonable alternative and consistent with the Article 14(d) guidelines.<sup>648</sup>

## **6. Commerce Properly Relied on World Market Prices in the Absence of Domestic Prices and Properly Made No Adjustment for an Alleged Effect on Comparative Advantage That Was Not Supported By Any Record Evidence**

457. India also argues that by resorting to an out-of-country benchmark, part of the subsidy that Commerce calculated for the NMDC’s provision of iron ore resulted in the improper

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<sup>644</sup> *US – Softwood Lumber IV (AB)*, para. 106.

<sup>645</sup> *See, US – Antidumping and Countervailing Duties (AB)*, para. 446; *US – Antidumping and Countervailing Duties (Panel)*, paras. 10.16-10.23; *US – Softwood Lumber IV (AB)*, para. 89.

<sup>646</sup> India First Written Submission, para. 302.

<sup>647</sup> *Dang Report*, at 37-38, 39 and 41-43 (attached to 2006 *New Subsidies Allegation (JSW)*), at Exhibit 31 (Exhibit USA-50).

<sup>648</sup> *See, US – Antidumping and Countervailing Duties (AB)*, para. 446; *US – Antidumping and Countervailing Duties (Panel)*, paras. 10.16-10.23.

countervailing of India’s “comparative advantage.”<sup>649</sup> First, as discussed at Section III.H, above, the United States understands India’s arguments concerning “comparative advantage” to relate to adjustments to the benchmark to reflect specific factors that may result in a country having a comparative advantage rather than arguing that Members have an obligation to calculate the amount of subsidy with respect to “comparative advantage” itself.

458. Second, the United States considers that the Panel does not have to reach this issue as neither India nor any of the other interested parties in the case placed any evidence on record that any factors related to iron ore “comparative advantage” exists in India when compared to Australia or any information in an attempt to quantify the difference.

459. Moreover, even before the Panel, India has not provided any evidence of the existence of comparative advantage. India notes that India has “certain raw materials” and the ability to extract and use those materials.<sup>650</sup> India does not explain why this gives India a comparative advantage over, for instance, Australia which also has the same materials and the ability to extract and use (including export) them. In fact, the *Dang Report* demonstrates that Australia has more iron ore reserves and exports more iron ore than India.<sup>651</sup> Therefore, to the extent record information exists that is relevant to any comparative advantage adjustment to the Australian benchmark prices for fines and lumps used by Commerce, it does not appear that such an adjustment would be in India’s favor.

460. Additionally, India appears to focus on one factor of many that go into comparative advantage: the presence of certain resources. India fails to discuss other relevant factors, such as technology and labor supply. Finally, India appears to refer to transportation costs as a comparative advantage. While transportation costs will inevitably affect the final price of a good, it is incorrect to refer to those as a comparative advantage. Moreover, as noted above, Commerce does make adjustments on the basis of delivered prices.

## **7. Commerce Properly Included All Charges for Delivering the Iron Ore to the Steel Mills in the Prices Being Compared**

461. India argues that the “prevailing market conditions” in the Indian market for the NMDC sales should be determined on an ex-mine basis.<sup>652</sup> Consequently, India argues that when Commerce adds delivery charges to the benchmark price and the NMDC price, this adjustment is not “in relation to” prevailing market conditions in India and is thus inconsistent with Article 14(d).<sup>653</sup>

462. India’s argument that the term of the government sale (*e.g.*, “ex-mine”) is a “prevailing market condition” is incorrect. Article 14(d) of the SCM Agreement provides that the adequacy

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<sup>649</sup> India First Written Submission, paras. 305-309.

<sup>650</sup> India First Written Submission, para. 305.

<sup>651</sup> *Dang Report*, at 37-38, 39 and 41-43. (attached to *2006 New Subsidies Allegation (JSW)*), at Exhibit 31 (Exhibit USA-50).

<sup>652</sup> India First Written Submission, paras. 308, 310-311.

<sup>653</sup> India First Written Submission, paras. 308, 310-311.

of remuneration will be determined in relation to the prevailing market conditions in the country of provision. Article 14(d) further defines prevailing market conditions to include “price, quality, availability, marketability, transportation and other conditions of purchase or sale.” India argues that, despite the fact that Article 14(d) provides a list of factors relevant to prevailing market conditions, prevailing market conditions may only be interpreted to be the specific terms of a sale of a product in question. India is incorrect.

463. The scope of the term “prevailing market conditions” should not be read so narrowly. Article 14(d) does not direct that the benchmark must be limited to the specific terms of the government price being compared for benchmark purposes. As explained above, the essence of the benefit analysis is to assess whether the recipient obtained something “on terms more favourable than those available in the market.”<sup>654</sup> The analysis will necessarily include, as is reflected in the non-exclusive list of market conditions in Article 14(d), consideration of the terms of both the government price and benchmark to ensure that when a comparison is made between the two, the comparison occurs at the same point of distribution of the product in question. The result is an “apples-to-apples” comparison of the government price to the benchmark price.

464. The “prevailing market conditions” in the Indian market – or any market – are not limited to an ex-mine term of sale but are much broader than the contract terms of individual government sales. To limit the comparison to the specific terms of the government sale would be to force a Member ignore the actual more general prevailing market conditions such as the fact that the true cost of an input to a producer includes all of the delivery charges to get the input to the producer’s facility for use. A producer cannot use an input which is not delivered to the factory.

465. The “prevailing market conditions” in the Indian market – or any market – are not limited to an ex-mine term of sale but are much broader than the contract terms of individual government sales. To limit the comparison to the specific terms of the government sale would be to force a Member to ignore the actual more general prevailing market conditions such as the fact that the true cost of an input to a producer includes all of the delivery charges to get the input to the producer’s facility for use. A producer cannot use an input which is not delivered to the factory.

466. Moreover, the Article 14(d) guidelines require that the benchmark price be determined based upon “the prevailing market conditions . . . in the country of provision.” Unless the delivery charges are included in a world market benchmark, the world market benchmark does not satisfy the Article 14(d) guideline that the price be based on market conditions in the country of provision. India suggests that the NMDC ex-mine price should be compared to the ex-mine price in Australia. The benchmark would be a pure Australian price and not the price of Australian iron in relation to the prevailing market conditions in the Indian market. India’s position that delivery costs must be excluded from the benchmark price would, in fact, create a

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<sup>654</sup> *Canada – Aircraft (AB)*, para. 157 (emphasis added).

comparison that does not reflect prevailing market conditions. As such, India’s argument is inconsistent with Article 14(d).

467. In contrast, Commerce’s adjustment of the benchmark and government prices to reflect delivery charges is not inconsistent with Article 14d).

### **8. Commerce Properly Excluded the *Tex Report* NMDC Prices to Japan From the Iron Ore Benchmark**

468. India also argues that it was inappropriate for Commerce in the 2006 review to exclude the NMDC prices to Japan from the world market price benchmark.<sup>655</sup> Specifically, India argues that the NMDC price to Japan is a world market price and that removing *government* prices from the world market price pool creates an artificial world market price.<sup>656</sup> In addition, India argues that Commerce did not adequately explain its decision to exclude the NMDC price to Japan from the benchmark in the 2006 review, when the NMDC prices to Japan were included in the benchmark for the 2004 review.<sup>657</sup> Finally, India argues that the NMDC price to Japan is a market price because the GOI, through the NMDC, would not subsidize Japanese steel makers.<sup>658</sup> India’s analysis is incorrect.

469. First, the essence of the benefit analysis under Article 14 of the SCM Agreement is to determine whether the recipient is better off than it would have been absent the government action. The only way to make that determination is to assess whether the recipient obtained something “on terms more favorable than those available in the market.”<sup>659</sup> Because the NMDC is a public body, the NMDC price, whether an internal or export price, is a government price. Comparing the government price with a benchmark price that includes government prices (so long as those prices are not market derived), would result in a circular comparison.<sup>660</sup>

470. Thus, the Appellate Body has stated that the “primary benchmark” for determining the benefit for goods sold at less than adequate remuneration is “prices of similar goods sold by *private* suppliers in the county of provision.”<sup>661</sup> By specifically using the term “private” suppliers, which means the opposite of public,<sup>662</sup> the Appellate Body recognized that the preferred benchmark prices are private prices rather than government prices.<sup>663</sup> The fundamental economic reasoning underlying the need for the SCM Agreement disciplines on subsidies is that governments and public bodies may have interests other than the market’s efficient distribution of resources and have access to funds that allow them to act in a non-market manner. Thus, the exclusion of government and public body prices from the benchmark for determining whether

<sup>655</sup> India First Written Submission, paras. 312-319.

<sup>656</sup> India First Written Submission, paras. 312-313.

<sup>657</sup> India First Written Submission, paras. 315-317.

<sup>658</sup> India First Written Submission, para. 318.

<sup>659</sup> *Canada – Aircraft (Panel Report)*, para. 9.112 (emphasis added).

<sup>660</sup> *US – Softwood Lumber IV (AB)*, para. 93.

<sup>661</sup> *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).

<sup>662</sup> *The New Shorter Oxford English Dictionary*, at 2359(1993) (Exhibit USA-64) (defines “private” as “[o]f a service, business, etc.: provided or owned by an individual rather than the State or public body.”).

<sup>663</sup> *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).

goods are provided at less than adequate remuneration is consistent with Article 14(d) of the SCM Agreement.<sup>664</sup> India’s arguments to the contrary should be rejected.

471. Finally, as to why Commerce used the NMDC price to Japan in calculating the world market price benchmark in the 2004 review and not in the 2006 review, the inclusion in the 2004 review was a mistake.<sup>665</sup> As just explained, it is generally inappropriate to use a government price to benchmark a government price. When this was noticed in the 2006 review, the NMDC price to Japan was excluded from the world market benchmark.

## 9. The United States Has Performed Its Obligations In Good Faith

472. India argues that the United States has not performed its obligations under Article 14(d) of the SCM Agreement “in good faith.”<sup>666</sup> A claim of not acting in good faith is a very serious one that should not be made lightly or as a facile afterthought, as India has done here. Indeed, India has acted contrary to the cautions of the Appellate Body in *EC -- Sardines*:

We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.<sup>667</sup>

473. Fortunately, there is no need for the Panel to engage on India’s claim. India’s panel request contains no claim with respect to “good faith,” and so this claim is outside the Panel’s terms of reference. Furthermore, India has not cited any provision of an agreement listed in Appendix 1 of the DSU as the basis for India’s claim. Nor has India requested a finding by the Panel with respect to “good faith.”<sup>668</sup>

474. Indeed, it is clear that India is simply re-casting its arguments under Article 14 to argue that if there is a breach of Article 14 due to interpreting it in an “unreasonable” manner, then this means a failure to act in good faith. Of course, this means no such thing. As discussed in this submission, India has advanced a number of interpretations that are unreasonable and lack any basis in the covered agreements. The United States would not contend, however, that the

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<sup>664</sup> While the Article 14 guidelines focus on private prices, U.S. law allows the use of competitive government auction prices because they are prices set by competing private parties rather than prices set by the government. 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

<sup>665</sup> India states that Commerce, in the 2004 administrative review, used an average of all *Tex Report* prices from Australia, Brazil and Europe as the world market price. (India First Written Submission, para. 316). India is incorrect. As can be seen in the charts at the beginning of this section, Commerce only used the average of the NMDC and Australian prices contained in *Tex Reports* provided to Commerce at Essar’s verification. These two prices included information on the iron content so that a benchmark could be calculated on an iron content specific basis. *2004 Preliminary Results*, 71 Fed. Reg. at 1517, (Exhibit IND-17) and *2004 Issues and Decisions Memorandum*, at Comment 2 (Exhibit IND-18)).

<sup>666</sup> India First Written Submission, paras. 320-326.

<sup>667</sup> *EC – Sardines (AB)*, para. 278.

<sup>668</sup> India First Written Submission, para. 641.

rejection of those interpretations would mean that India has failed to engage in these procedures in good faith, as called for by Article 3.10 of the DSU.

475. Moreover, the United States notes that the WTO Agreement does not call for a finding as to whether a breach of an agreement occurs in good faith: a measure inconsistent with an agreement would be a breach of that agreement. As was explained above, however, contrary to India’s arguments, all of Commerce’s actions were consistent with the obligations contained in the Article 14(d) guidelines for determining the benefit for goods sold for LTAR based on the prevailing market conditions in the country of provision, to the extent such information was available.

## 10. Conclusion

476. Based on the foregoing, Commerce’s benefit determinations for the NMDC sales of iron ore are fully consistent with Article 14(d) of the SCM Agreement and India’s arguments to the contrary must be rejected.

### **X. Commerce’s Determinations That the Provision of Captive Mining Rights for Iron Ore and Coal Constitutes a Financial Contributions, are Specific to Certain Enterprises, And Provide Benefits To The Recipients Are Not Inconsistent with Articles 12.5, 1.1, 1.2, 2, and 14 of the SCM Agreement**

477. India claims that Commerce’s determinations that the provision of captive mining rights<sup>669</sup> for both iron ore and coal constitute a countervailable subsidy are inconsistent with the SCM Agreement.<sup>670</sup> Specifically, India claims there is no “captive” mining rights program for iron ore in India and that Commerce’s findings of such a program are contrary to Article 12.5 of the SCM Agreement.<sup>671</sup> India also claims that the provision of mineral mining rights do not constitute the provision of goods under Article 1.1(a)(1)(iii).<sup>672</sup> In addition, India claims that the GOI’s provision of mining rights is generally available so they cannot be found to be specific to certain enterprises within the meaning of Article 2.<sup>673</sup> Finally, India argues that Commerce’s determinations of the benefit conferred by both programs were inconsistent with Article 14 of the SCM Agreement.<sup>674</sup> As demonstrated below, each one of India’s arguments is without merit, and Commerce’s determinations are consistent with the SCM Agreement.

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<sup>669</sup> “Captive mining rights,” as defined in a report commissioned by the GOI, are “the allocation of iron ore mines to steel makers so that they can extract iron ore according to the needs of the steel unit and utilizes the same in steel making without the intermediation of standalone mining companies.” (*National Mineral Policy, Report of the High Level Committee (“Hoda Report”)*), at 143 (attached to *2006 New Subsidies Allegation (Tata)*, at Exhibit 10) (Exhibit USA-71).

<sup>670</sup> India First Written Submission, paras. 327-404.

<sup>671</sup> India First Written Submission, paras. 353-357.

<sup>672</sup> India First Written Submission, paras. 358-377.

<sup>673</sup> India First Written Submission, paras. 378-387.

<sup>674</sup> India First Written Submission, paras. 388-404.

**A. Commerce Properly Determined That the GOI Provided Captive Mining Rights for Iron Ore Based on Information on the Record**

478. India states there is no “captive” mining rights program for iron ore in India and that Commerce’s findings of such a program are contrary to Article 12.5 of the SCM Agreement.<sup>675</sup> India’s assertion is inconsistent with the record evidence underlying Commerce’s determinations that the GOI provided captive iron ore mining rights to the respondents in the challenged proceedings.

479. In the 2006 and 2008 administrative reviews, Commerce found that India had captive mining<sup>676</sup> programs for both iron ore and coal.<sup>677</sup> In India all mineral rights are owned by the state governments and mining leases for iron ore are granted with approval from the GOI.<sup>678</sup> Under these programs, the GOI granted leases to mine iron ore and coal, receiving a royalty per unit extracted.<sup>679</sup> As a consequence, Commerce found that India was providing iron ore and coal for LTAR, to a specific group of industries, thereby conferring a benefit on the recipients.<sup>680</sup>

480. India argues that Commerce improperly interpreted India’s laws concerning the granting of mining rights.<sup>681</sup> In its first written submission, India states that its laws provide iron ore mining rights that are generally available to all applicants and that the GOI grants mining rights to “various entities including, steel companies and iron ore miners.”<sup>682</sup> India’s explanations in its first written submission are inconsistent with the record evidence that the GOI has a captive iron ore mining policy under which it has granted captive mining rights to four steel companies.

481. The record evidence presented during the proceedings at issue demonstrates that India has a captive mining program for iron ore. In particular, the record contains 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,

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<sup>675</sup> India First Written Submission, paras. 353-357.

<sup>676</sup> “Captive mining” in this proceeding is limited to Commerce’s findings concerning the GOI’s captive mining policy. *See, Dang Report*, at 52 (“Policy of captive mining leases should remain in place. . .”) (attached to *2006 New Subsidies Allegation (JSW)*, at Exhibit 31 (Exhibit USA-50); *see also, National Mineral Policy, Report of the High Level Committee (“Hoda Report”)*, at 143 (attached to *2006 New Subsidies Allegation (Tata)*, at Exhibit 10) (Exhibit USA-71) (“Captive mining of iron ore refers to the allocation of iron ore mines to steel makers so that they can extract iron ore according to the needs of the steel unit and utilizes the same in steel making without the intermediation of standalone mining companies. . . [the group of steel mill owners with captive mines] argues that iron ore should be reserved for steel makers because iron ore is a limited resource and the indigenous steel industry should have the benefit of iron ore at extraction cost rather than at market price.” “The Steel Authority of India Limited (SAIL) and Tata Steel belong to this group.”).

<sup>677</sup> *2006 Preliminary Results*, 73 Fed. Reg. 1591-1592(Exhibit IND-32); *2006 Issues and Decisions Memorandum*, at Sections I.A.8 and 9 (Exhibit IND-33).

<sup>678</sup> GOI Questionnaire Response, November 8, 2007, at 12 (Exhibit USA-53).

<sup>679</sup> *2006 Preliminary Results*, 73 Fed. Reg. 1591-1592(Exhibit IND-32); *2006 Issues and Decisions Memorandum*, at Sections I.A.8 and 9 (Exhibit IND-33).

<sup>680</sup> *2006 Preliminary Results*, 73 Fed. Reg. 1591-1592(Exhibit IND-32); *2006 Issues and Decisions Memorandum*, at Sections I.A.8 and 9 (Exhibit IND-33).

<sup>681</sup> *See, e.g.*, India First Written Submission, para. 357.

<sup>682</sup> India First Written Submission, paras. 327-334, 354.

specifically identifies a GOI policy of having captive mining leases.<sup>683</sup> 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.<sup>684</sup> In addition, the *Hoda Report* identifies one of the interested groups in the discussion as “steel mill owners with captive mines.”<sup>685</sup> The *Hoda Report* goes on to state that “. . .captive mines are a reality in India, and many of them are run efficiently.”<sup>686</sup> The evidence of captive mining programs in these GOI-commissioned reports is supported by several articles from Indian newspapers. For example, an 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.<sup>687</sup>

482. 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 the Indian steel companies, SAIL, TISCO (now known as Tata), JSPL and JVSL (now known as JSW) had captive mines for iron ore.<sup>688</sup> The *Times of India* article identifies SAIL and Tata Steel as having captive mines.<sup>689</sup> 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.<sup>690</sup> 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 . . .”<sup>691</sup> 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 Commerce.

483. India also argues that Commerce failed to comply with Article 12.5 of the SCM Agreement because it did not support its findings with “objective and verifiable evidence/data” and that “Article 12.5 of the SCM Agreement does not allow the US to make its determinations based on the basis of bare assertions of the interested parties.”<sup>692</sup>

484. Article 12.5 requires that an investigating authority “shall . . . satisfy [itself] as to the accuracy of the information supplied . . . upon which [its] findings are based.”<sup>693</sup> The provision, therefore, states that an investigating authority must determine the information it relies on is accurate. In this case, Commerce found that because the information relied upon is from (1) official reports commissioned by the GOI to which members of the Indian steel industry contributed, and (2) newspaper articles by independent press sources, the information was accurate. Commerce did not rely on “bare assertions.” Accordingly, Commerce’s finding of the

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<sup>683</sup> *Dang Report*, at 52 (“Policy of captive mining leases should remain in place. . .”) (attached to *2006 New Subsidies Allegation (JSW)*, at Exhibit 31 (Exhibit USA-50).

<sup>684</sup> *National Mineral Policy, Report of the High Level Committee (“Hoda Report”)*, at 143 (attached to *2006 New Subsidies Allegation (Tata)*, at Exhibit 10) (Exhibit USA-71).

<sup>685</sup> *Hoda Report* at 143 and 158, fn 4 (Exhibit USA-71).

<sup>686</sup> *Hoda Report* at 159 (Exhibit USA-71).

<sup>687</sup> *2006 New Subsidies Allegation (Tata)*, Exhibit 11, at 1 ((Exhibit USA-71).

<sup>688</sup> *Dang Report*, at 48 (Exhibit USA-50).; *Hoda Report*, at 143 and 158, fn 4 (Exhibit USA-71)..

<sup>689</sup> *2006 New Subsidies Allegation (Tata)*, Exhibit 11, at 1 (Exhibit USA-71).

<sup>690</sup> *2006 New Subsidies Allegation (Tata)*, Exhibit 14 (Exhibit USA-71).

<sup>691</sup> *2006 New Subsidies Allegation (Tata)*, Exhibit 13(Exhibit USA-71).

<sup>692</sup> India First Written Submission, para. 353.

<sup>693</sup> SCM Agreement, Art. 12.5.

existence of a captive mining program for iron ore is supported by record evidence determined by Commerce to be accurate, and therefore Commerce acted within the obligation of Article 12.5.

**B. Commerce’s Determination That the Granting of Mineral Rights to Iron Ore and Coal was a Good Provided for Less Than Adequate Remuneration Is not Inconsistent with Article 1.1(a)(iii) of the SCM Agreement**

485. India claims that the GOI’s granting of mineral rights does not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii).<sup>694</sup> India is incorrect. As demonstrated below, and consistent with the reasoning of the Appellate Body in *U.S.-Lumber*,<sup>695</sup> Commerce properly determined that the provision of the right to mine iron ore constitutes the provision of goods as set out in Article 1.1(a)(1)(iii) of the SCM Agreement, and therefore is a financial contribution under Article 1.1(a)(1) of the SCM Agreement.

**1. Iron Ore and Coal Deposits are “Goods” within the Meaning of Article 1.1(a)(1)(iii)**

486. The first requirement that must be met to determine if a countervailable subsidy exists is whether there is a “financial contribution by a government or any public body” within the meaning of Article 1.1(a)(1) of the SCM Agreement. India does not dispute that iron ore and coal are goods.<sup>696</sup> India’s argument is contingent on the meaning of “provides” in Article 1.1(a)(1)(iii).<sup>697</sup>

487. Nevertheless, for the sake of clarity, the United States will briefly address the meaning of “goods” in Article 1.1(a)(1)(iii). As used in Article 1.1(a)(1)(iii), the ordinary meaning of “goods” is tangible items, including those severable from land, capable of being possessed.<sup>698</sup> In the context of Article 1.1(a)(1)(iii), the term “goods” is used without limitation. As the Appellate Body noted in *US – Softwood Lumber IV*, the only “explicit exception” in Article 1.1(a)(1)(iii) to the conclusion that the provision of a good will constitute a financial contribution is “general infrastructure.”<sup>699</sup> Thus, the Appellate Body concluded that, “[i]n the context of Article 1.1(a)(1)(iii), all goods that might be used by an enterprise to its benefit – including even goods that might be considered *infrastructure* – are to be considered “goods” within the meaning of the provision, unless they are infrastructure of a *general* nature.”<sup>700</sup> The limited exclusion for “general infrastructure” reinforces the broad meaning of “goods” as used in this provision. The

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<sup>694</sup> India First Written Submission, paras. 360-371.

<sup>695</sup> The Appellate Body rejected Canada’s argument that the Canadian government is not providing a financial contribution to lumber producers when it sells “tenures” to lumber producers, *i.e.*, the right to harvest timber on government lands. *US – Softwood Lumber IV (AB)*, para. 75.

<sup>696</sup> Nor does India dispute that the Indian government provides the mining rights for iron ore and coal.

<sup>697</sup> India First Written Submission, paras. 360-371.

<sup>698</sup> *US – Softwood Lumber IV (AB)*, para. 59.

<sup>699</sup> *US – Softwood Lumber IV (AB)*, para. 60; *see also*, Article 1.1(a)(1)(iii) of the SCM Agreement (“...a government provides goods or service other than general infrastructure...”).

<sup>700</sup> *US – Softwood Lumber IV (AB)*, para. 60 (emphasis original).

ordinary meaning of the term “goods” in the context of Article 1.1(a)(1)(iii) therefore includes iron ore and coal deposits.<sup>701</sup>

## 2. Captive Mining Leases “Provide” Iron Ore and Coal

488. India argues that the GOI did not “provide” iron ore and coal to steel producers, because there is “no reasonable proximate relationship” between the provision of mining rights and the provision of the minerals themselves.<sup>702</sup> India’s suggested interpretation is not supported by the text of the SCM Agreement: the ordinary meaning of “provides” is to “make available” in addition to “supply or furnish for use” and “to put at the disposal of.”<sup>703</sup> India does not appear to contest this interpretation,<sup>704</sup> even though a mining lease makes available, supplies and furnishes for use, and puts at the disposal of the owner the good that is covered by the lease.

489. Rather, India argues that the ordinary meaning of “provides” is somehow limited or circumscribed. According to India, “there must ... be a ‘reasonable proximate relationship’ between what has been provided by government on the one hand and the ‘good’ in question on the other.”<sup>705</sup> The basis for India’s “proximate relationship” test appears to be a phrase, taken out of context, from the Appellate Body report in *US – Softwood Lumber IV*. India quotes a passage from that report in which the Appellate Body, considering an argument by Canada that the provision of rights to a good by a government cannot be considered the provision of a good because, in that case, the term “would capture every property law in a jurisdiction.”<sup>706</sup> In rejecting that contention, the Appellate Body stated that it could not see “how ... general governmental acts” of the type referred to by Canada would fall within the Appellate Body’s interpretation of “provides a good” since such acts would be “too remote” from the act of provision.<sup>707</sup> Rather, the “government must have some control over the availability of a specific thing being ‘made available.’”<sup>708</sup> Viewed in its entire context, the Appellate Body’s reference to “proximate relationship” is intended to distinguish “general acts” of government from those where the government controls the good in question and then makes those goods available to a recipient. As discussed next, it is clear that the GOI act in question – the provision of mining rights for iron ore and coal – is not “general,” but rather is a specific provision of rights to goods over which the government has control. Accordingly, India has no basis for reading its proposed limitation into the ordinary meaning of the term “provides.”

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<sup>701</sup> In *US – Softwood Lumber IV*, the Appellate Body considered and rejected an argument by Canada that standing trees are not “goods” under Article 1.1(a)(1)(iii). The Appellate Body found that the term “goods” was broad and included standing timber. This finding is directly relevant to the issue here, where the GOI provides unexploited natural resources – iron ore and coal – that it owns. Though those goods are not yet severed from the land, the iron and coal ore are capable of being severed and thus qualify as “goods” under Article 1.1(a)(1)(iii) of the SCM Agreement. (See, *US – Softwood Lumber IV (AB)*, para. 67).

<sup>702</sup> India First Written Submission, para. 366.

<sup>703</sup> *US – Softwood Lumber IV (AB)*, para. 69.

<sup>704</sup> See, India First Written Submission, paras. 360-361.

<sup>705</sup> India First Written Submission, para. 362.

<sup>706</sup> *US – Softwood Lumber IV (AB)*, para. 70.

<sup>707</sup> *US – Softwood Lumber IV (AB)*, para. 71.

<sup>708</sup> *US – Softwood Lumber IV (AB)*, para. 70.

490. Not only has India misunderstood the phrase “proximate relationship” as used in the *US – Softwood Lumber IV* Appellate Body report, the conclusion that India appears to draw from it – that the provision of rights to iron ore and coal are not the provision of goods – is not supported by that report. India’s precise rationale for reaching this conclusion is not clear, but the United States will examine India’s reasoning and demonstrate that it is flawed.

491. First, if India is suggesting that provision of a right to a good by the government is not “reasonably proximate” to the provision of the good,<sup>709</sup> India is incorrect. As the Appellate Body has found, when a government provides a right to a good, the government “makes available” the good itself.<sup>710</sup> Thus, even if mining rights are viewed as simply providing the right to access or extract the iron ore and coal rather than providing the iron ore and coal itself, the GOI’s granting of mining rights nevertheless “makes available” the government-owned iron ore and coal to the steel producers.

492. If, however, India accepts that the government provision of some types of rights to goods constitute the provision of goods, but is arguing that the provision of some other types of rights to goods – including captive mining rights to iron ore and coal – are insufficiently “proximate,” then India appears to have misread the Appellate Body report from *US – Softwood Lumber IV*. As stated, it is clear that, in this case, the provision of mining rights for iron ore and coal to steel producers is not a “general governmental act” like a “property law.”<sup>711</sup> Rather, the provision of mining rights is a specific act to provide the rights to goods controlled by Indian government entities to steel producers.

493. Evidence submitted to Commerce demonstrates that the Indian government, *i.e.*, the state governments, own all of the minerals in India, and the mining leases are approved by the central government.<sup>712</sup> In return for the right to mine the iron ore and coal from public land, mining and steel companies pay the GOI a per unit extraction fee.<sup>713</sup> From the point of view of the GOI, it can either mine and sell the iron ore and coal itself, or sell the mining rights to the iron ore and coal in the ground so that someone else may extract those minerals. In either event, the purpose of the transaction is to provide the government-owned iron ore and coal to certain enterprises for use. Similarly, from the point of view of the recipient, the object of the transaction, whether to directly purchase iron ore and coal from the GOI or to obtain the mining rights from the GOI to extract those minerals itself, is to obtain the iron ore and coal. When a government gives a company the right to take a government-owned good, such as iron ore and coal from government lands, the government is “providing” the goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

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<sup>709</sup> India First Written Submission, paras. 366-370.

<sup>710</sup> *US – Softwood Lumber IV (AB)*, para. 75. (“[W]e disagree with Canada’s submission that the granting of an intangible right to harvest standing timber cannot be equated with the act of providing that standing timber ... by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters.”).

<sup>711</sup> *US – Softwood Lumber IV (AB)*, para. 71.

<sup>712</sup> *DANG Report*, at 79 (attached to *2006 New Subsidies Allegation (JSW)*, Exhibit 31 (Exhibit USA-50)).

<sup>713</sup> *Tata 2006 Verification Report*, at 8 (Exhibit USA-71); *GOI 2006 Verification Report*, at 5 (Exhibit USA-72).

494. The concept that the provision of mining rights results in the provision of the goods (in this case, iron ore and coal) for the purposes of Article 1 of the SCM Agreement is further bolstered by the fact that the miners pay a per unit extraction fee.<sup>714</sup> In other words, the miners only pay for the iron ore and coal that they extract from the ground, not for the products that remain in the ground. The evidence thus demonstrates that the GOI is providing mining rights for the sole purpose of providing iron ore and coal, leaving no doubt that the GOI, through mining rights, is providing “goods” – iron ore and coal.<sup>715</sup> Thus, the provision of rights to iron ore and coal by the GOI to steel producers is of the same nature as the provision of standing timber by the Government of Canada.<sup>716</sup>

495. Moreover, India’s interpretation of Article 1.1(a)(1) would weaken the disciplines of the SCM Agreement on injurious subsidization, which rather aimed “to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions.”<sup>717</sup> Under India’s interpretation of a government “providing” goods, a government could provide a broad array of *in situ* minerals to specific industries without any discipline as long as the government structured the transaction to sell the rights to the mineral as opposed to an outright sale of the mineral itself. This would allow a government to provide *in situ* mineral deposits that had not yet been mined for less than adequate remuneration (or even for free) without being subject to the disciplines of the SCM Agreement. As the Appellate Body found in *US – Softwood Lumber IV*, there is no basis for such an interpretation in Article 1.1 of the SCM Agreement.<sup>718</sup>

496. Finally, India suggests that while the provision of rights to some goods, such as the right to harvest a stand of timber, may constitute the provision of a good under Article 1.1(a)(1)(iii), the right to *in situ* mineral deposits does not constitute the provision of goods because the provision of the minerals is “too remote” from the government action of providing a good. India appears to make this distinction in rights of goods on the basis that it takes more effort to find and mine minerals than it does to harvest a stand of trees.<sup>719</sup> There is no such distinction contained in Article 1.1(a)(1)(iii), nor in the Appellate Body’s guidance on the provision of rights to a good as a financial contribution under Article 1.1(a)(1)(iii).<sup>720</sup>

497. Rather, India relies entirely on a footnote from the panel report in *US – Softwood Lumber IV*, in which the panel indicated that in deciding that harvesting rights to timber constituted the

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<sup>714</sup> Tata’s Questionnaire Response, November 1, 2007, 12 (iron ore extraction fees) and 16 (For coal, “Tata was paying the mining royalties in terms of the MMDR Act.”) (Exhibit IND-65).

<sup>715</sup> *US – Softwood Lumber IV (AB)*, para. 73 (“In any event, in our view, it does not make a difference, for purposes of applying the requirements of Article 1.1(a)(1)(iii) of the *SCM Agreement* to the facts of this case, if “provides” is interpreted as “supplies”, “makes available” or “puts at the disposal of”. What matters for determining the existence of a subsidy is whether all elements of the subsidy definition are fulfilled as a result of the transaction, irrespective of whether all elements are fulfilled *simultaneously*.”).

<sup>716</sup> *US – Softwood Lumber IV (AB)*, para. 75.

<sup>717</sup> *US – Softwood Lumber IV (AB)*, para. 64.

<sup>718</sup> *US – Softwood Lumber IV (AB)*, para. 67.

<sup>719</sup> India First Written Submission, para. 371.

<sup>720</sup> See, e.g., *US – Softwood Lumber IV (AB)*, para. 67.

provision of goods, it was not deciding whether the provision of rights to *in situ* minerals constituted the provision of goods.<sup>721</sup> The footnote does not support India’s argument. As noted, the panel explicitly stated that it was not expressing a view as to whether extraction rights did or did not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii). Moreover, the panel suggested that the distinction it might draw was not on the basis of the nature of the *good* to which rights were provided, but rather the nature of the *right*. The panel stated that if the right at issue in that dispute had consisted of “the right to explore a particular site and the chance of finding something,” the panel might have viewed the provision of rights differently. In the present case, the provision of rights by Indian government entities is not a right of exploration, but a right to mine iron ore and coal that is known to exist and for which the recipients pay for only if they actually extract the good. The footnote relied upon by India is therefore inapposite.<sup>722</sup>

498. In sum, as determined by Commerce, India provided the rights to iron ore and coal to the steel producers, and therefore made a financial contribution within the meaning of Article 1.1(a)(1)(iii). Through an examination of the text of the SCM Agreement and in light of the object and purpose of the SCM Agreement, the Panel should find the United States’ determinations that the provision of captive mining rights constitutes the provision of “goods,” and thus a financial contribution to be consistent with Article 1.1(a)(1)(iii) of the SCM Agreement. India’s claim to the contrary, therefore, should be rejected.

### **C. Commerce’s Determinations that The GOI Provided Captive Mining Rights for Iron Ore and Coal to Certain Enterprises Were not Inconsistent with Article 2 of the SCM Agreement**

499. India argues that Commerce’s specificity determination with regard to its provision of mining rights for iron ore and coal are inconsistent with Article 2 of the SCM Agreement.<sup>723</sup> Specifically, India argues that there is no “captive” mining program and that mining rights under India’s laws are generally available and thus cannot be specific.<sup>724</sup> With regard to the provision of captive mining rights for coal, India argues that Tata’s lease is not subject to the laws restricting coal mining to public companies, power companies and steel companies.<sup>725</sup> After briefly discussing the proper legal standard, the United States will demonstrate that Commerce’s determinations are consistent with Article 2 of the SCM Agreement and supported by positive evidence of both *de facto* and *de jure* specificity. In doing so, 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 a *de novo* review of the facts of the case ‘or substitut[ing] its judgement for that of the competent authorities’.”<sup>726</sup>

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<sup>721</sup> India First Written Submission, para. 368 (citing *US – Softwood Lumber IV (Panel)*, fn. 99).

<sup>722</sup> The United States also notes that the Appellate Body did not refer to or endorse this potential line of analysis in its consideration of the provision of rights to a good as a financial contribution.

<sup>723</sup> India First Written Submission, paras. 378-387.

<sup>724</sup> India First Written Submission, paras. 378-384.

<sup>725</sup> India First Written Submission, paras. 385-387; *see also*, paras. 372-376.

<sup>726</sup> *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).

## 1. Article 2 of the SCM Agreement

500. As explained above, Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is “specific in accordance with the provisions of Article 2.” Article 2.1(a) addresses the situation in which the subsidy is *de jure* specific, *i.e.*, where the law or regulations of the country in question provides that the subsidy program is accessible only to a limited number of enterprises (*i.e.*, “certain enterprises”).

501. Article 2.1(c) addresses the situation in which a subsidy is not *de jure* specific on its face, but in implementation is, in fact specific. Among the factors an investigating authority is directed to consider in determining whether a subsidy is *de facto* specific is whether “the use of a subsidy programme by a limited number of certain enterprises.”

502. Article 2.4 requires that “[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.” The Appellate Body has explained that “the term ‘positive evidence’ relates” to “the quality of the evidence that authorities may rely upon in making a determination.”<sup>727</sup> Further, the Appellate Body has stated that “[t]he word ‘positive’ means” “that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.”<sup>728</sup>

503. The Appellate Body has explained that a determination of specificity under Article 2 is not about “whether or not a subsidy has been granted,” “but whether *access* to that subsidy has been explicitly limited.”<sup>729</sup> In other words, according to the Appellate Body, it is the “eligibility for” a subsidy, and not the actual receipt of a subsidy, which is the key element in determining specificity under Article 2.<sup>730</sup> Thus, where an investigating authority clearly substantiates, on the basis of positive evidence, that access to a subsidy is limited to an enterprise, industry, or group of enterprises or industries, by a granting authority, then the determination of specificity made by that authority is consistent with the requirements of Article 2 of the SCM Agreement. The object and purpose of the SCM Agreement is to “discipline trade-distorting subsidies,” and as the Panel stated in *US-CVD China*, the purpose of Article 2, “in particular” is to “establish that the

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<sup>727</sup> *US – Hot-Rolled Steel (AB)*, para. 192. In *EC – LCA (Panel)*, the Panel cited the Appellate Body’s analysis in its analysis of Article 15.1 of the SCM Agreement (para. 7.2079). See also, *Thailand – H-Beams (AB)*, para. 107 (in which the Appellate Body relied on the underlying Panel’s statement that “the dictionary meaning of the term ‘positive’ suggests that ‘positive evidence’ is ‘formally or explicitly stated; definite, unquestionable (positive proof).’”

<sup>728</sup> *US – Hot-Rolled Steel (AB)*, para. 192.

<sup>729</sup> In *US – Antidumping and Countervailing Duties (AB)*, the Appellate Body stated that the issue is not “whether or not a subsidy has been granted (under (a)) but whether *access* to that subsidy has been explicitly limited.” (para. 368). For specificity, the Appellate Body stated that the focus is *not* on whether the certain enterprises *received* a benefit, but instead if certain enterprises “are eligible for the subsidy.” (para. 368). The Appellate Body repeated this analysis in *EC – LCA (AB)*, para. 943.

<sup>730</sup> *US – Antidumping and Countervailing Duties (AB)*, para. 368. The panel in *US – Antidumping and Countervailing Duties* was particularly clear on this point in noting that “the specificity requirement is not about the existence of a subsidy, which is dealt within Article 1.1, but rather about access thereto.” (para. 9.21) “In short, the issue under Article 2 of the Agreement is the limitation, on some basis, of access to the subsidy. Subsidies to which access is limited in *any* of the ways referred to in that provision are specific and thus covered by the SCM Agreement.” (para. 9.21) (emphasis original).

subsidies deemed under the Agreement to be potentially trade distortive are those targeted in some way to particular beneficiaries, rather than being broadly available through the economy of the Member.”<sup>731</sup>

504. As demonstrated below, Commerce’s specificity determinations concerning the GOI’s provision of iron ore and mining rights for iron ore and coal at less than adequate remuneration are consistent with the requirements of Article 2 of the SCM Agreement.

## **2. India Has A “Captive” Iron Ore Mining Program Which Is De Facto Specific To A Limited Group Of Industries.**

505. India’s argument on specificity repeats its contention that it does not have a “captive” iron ore mining program.<sup>732</sup> As a result, India argues that in the absence of a “captive” mining program for iron ore, mining rights are generally available under India’s mining lease laws and thus are not specific pursuant to Article 2 of the SCM Agreement.<sup>733</sup> But, as set out in full above, India’s arguments are not consistent with the record evidence.

506. In sum, and as explained above, the evidence shows that the GOI does have a captive mining program for iron ore and that it is limited to a few steel companies. The *Dang Report* states that the Indian steel companies, SAIL, TISCO (now known as Tata), JSPL, and JVSL (now known as JSW) have captive mines for iron ore.<sup>734</sup> Newspaper articles in the *Times of India* and *Financial Express* identify SAIL, Tata Steel, JSW, and JSPL as having captive mines,<sup>735</sup> including in the case of Tata Steel getting “...all of its iron ore and two-thirds of its coal supplies from captive mines . . .”.<sup>736</sup> Therefore, the evidence demonstrates India’s policy of granting captive mining leases and that those leases are limited to certain steel companies listed in the documents cited. Pursuant to Article 2.1(c), because India has a captive iron ore mining program which is limited to four steel companies, the program is *de facto* specific because the captive mining rights are provided to a limited group of enterprises. This determination is also based on the positive evidence just described, in accordance with Article 2.4 of the SCM Agreement. Therefore, Commerce properly found that the subsidy conferred by captive mining rights of iron ore were specific within the meaning of Article 2.1(c), based on positive evidence as required by Article 2.4.

507. The United States has established that India has not demonstrated that Commerce failed to establish a factual foundation for its determination of specificity; therefore, the Panel need not examine the rest of India’s claims with respect to specificity. Nevertheless, the United States will address the remainder of India’s claims next.

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<sup>731</sup> *US – Antidumping and Countervailing Duties (Panel)*, para. 9.21.

<sup>732</sup> India First Written Submission, para 378.

<sup>733</sup> India First Written Submission, para. 383.

<sup>734</sup> *Dang Report*, at 48 (Exhibit USA-50).

<sup>735</sup> *2006 New Subsidies Allegation (Tata)*, Exhibits 11 (at 1) and 14 (Exhibit USA-71).

<sup>736</sup> *2006 New Subsidies Allegation (Tata)*, Exhibits 13 (Exhibit USA-71).

### **3. Commerce’s Determinations That The GOI’s Provision Of Coal Through The Granting Of Captive Mining Rights Was De Jure Specific Is Not Inconsistent With Article 2 Of The SCM Agreement**

508. Contrary to India’s contentions, Commerce’s *de jure* specificity determination concerning the GOI’s provision of coal through the granting of captive mining rights is supported by positive evidence and is consistent with Article 2.1(a) of the SCM Agreement. In the 2006 and 2008 administrative reviews, Commerce found that the GOI’s provision of captive mining rights for coal was *de jure* specific because the relevant GOI law specifically provides that captive coal mining rights are accessible only to three industries, the steel, cement and power industries.<sup>737</sup>

509. 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 companies and power companies, respectively, were permitted to mine coal for captive use.<sup>738</sup> In 1996, the law was again modified to include the cement industry.<sup>739</sup> 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.”<sup>740</sup>

510. India argues that Tata Steel obtained its mining lease long before the government limited the mining of coal to captive mining by public companies, steel companies and power companies.<sup>741</sup> As a result, it asks the Panel to conclude that the law does not apply to Tata Steel’s lease.<sup>742</sup> There is no evidence that Tata is exempted from these requirements.

511. As India acknowledges, “in 1976 GOI introduced a condition that coal mining rights will be restricted to companies in the public sector, companies engaged in the production of steel and power, washing of coal and such other uses the GOI may prescribe.”<sup>743</sup> India does not identify any specific language in the amended law that exempts Tata Steel’s mining lease from restrictions in the law. Instead, India relies on a recitation of a prior law that exempted Tata’s coal *mines* from nationalization.<sup>744</sup> The word “mines” is emphasized because what India fails to explain in its submission is that while Tata Steel’s “mining facilities” may have been exempt

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<sup>737</sup> 2006 Preliminary Results, 73 Fed. Reg. at 1592 (Exhibit IND-32); 2006 Issues and Decisions Memorandum, Analysis of Programs, 1. Programs Determined to Be Countervailable, A. GOI Programs, 9. Captive Mining of Coal (Exhibit IND-33); 2008 Preliminary Results, 75 Fed. Reg. at 1502 (Exhibit IND-40); 2008 Final Issues and Decision Memorandum, Memo II. Analysis of Programs, A. Programs Administered by the Government of India, 8. Captive Mining of Iron Ore (Exhibit IND-41).

<sup>738</sup> 2006 New Subsidies Allegation (Tata), at 11 and Exhibits 18 (Coal Mines Amendment Act 1976 at section 3) and 19 (Coal Mines Amendment Act 1993 at section 1) (May 23, 2007) (Exhibit USA-71).

<sup>739</sup> 2006 New Subsidies Allegation (Tata), Exhibit 20 (Ministry of Coal, Notification S.O. 199(E) March 15, 1996) (Exhibit USA-71).

<sup>740</sup> 2006 New Subsidies Allegation (Tata), Exhibit 23, at A.9 (Guidelines for Allocation of Captive Blocks) (Exhibit USA-71).

<sup>741</sup> India First Written Submission, paras. 372-375.

<sup>742</sup> India First Written Submission, para. 375.

<sup>743</sup> India First Written Submission, para. 375.

<sup>744</sup> India First Written Submission, para. 375.

from the nationalization law, the coal that Tata Steel is mining was not. Tata Steel pays the GOI a royalty under the coal mining laws to extract the coal, the rights to which it is purchasing on a per unit basis from the GOI for internal consumption.<sup>745</sup> Clearly, even though the lease has not been reissued, Tata is required by the coal law to pay the GOI the royalties established by the law. There is no evidence to suggest that the amended law restricting the mining of coal to a limited group of enterprises does not apply to Tata Steel, regardless of whether the lease was reissued. Moreover, there is no evidence that Tata Steel does anything other than captively consume the coal it mines. As a result, there is no evidence to support India’s claim that Tata Steel is exempt from the amended law.

512. Because positive evidence shows that Indian law expressly limits the captive mining of coal to three industries, including the steel industry, Commerce’s determination that the GOI’s granting of captive coal mining rights is *de jure* specific is supported by affirmative evidence and is consistent with Article 2.1(a) of the SCM Agreement.

513. In sum, Commerce’s determinations that the captive mining rights program was *de facto* specific pursuant to Article 2.1(c) and that captive mining rights for coal was *de jure* specific pursuant to Article 2.1(a) are supported by positive evidence pursuant to Article 2.4. India’s claims concerning Commerce’s specificity determinations with respect to captive mining rights programs for iron ore and coal should therefore be rejected.

**D. Commerce’s Determinations that The GOI Provided Mining Rights For Iron Ore and Coal at Less Than Adequate Remuneration Are Consistent With Article 14(d) of the SCM Agreement.**

514. India argues that Commerce’s calculations of the benefit for its leasing of captive mining rights for iron ore and coal are inconsistent with Article 14(d) of the SCM Agreement.<sup>746</sup> As it did in its “as such” challenge to Commerce’s benefit regulation, India argues that Article 14(d) requires Commerce to consider whether the compensation received by the GOI covers the cost of provision, independent of any benefit conferred on the recipients. Again, India is proposing a cost-to-government analysis to determine if the government is being adequately recompensed for the provision of the mining rights.<sup>747</sup> India also argues that Commerce should have analyzed the GOI’s mining rights pricing policies and compared India’s mining rights to mining rights benchmark in other countries.<sup>748</sup> India also argues that Commerce should not have constructed a cost to the company for the iron ore and coal the company mined and compared it to iron ore and coal benchmarks.<sup>749</sup>

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<sup>745</sup> Tata’s Questionnaire Response, November 1, 2007, at 16 (With respect to both of Tata’s coal mines, “TATA was paying the mining royalty in terms of the MMDR Act.”) (Exhibit IND-65).

<sup>746</sup> India First Written Submission, paras. 388-396.

<sup>747</sup> India First Written Submission, paras. 388, 393-395.

<sup>748</sup> India First Written Submission, paras. 388-396 and 401-402.

<sup>749</sup> India First Written Submission, para. 389.

To provide context, in subsection 1 below the United States will first describe Commerce’s benefit calculation for captive mining rights for iron ore and coal. In the remainder of this section, the United States will then explain why India’s claims are without merit.

## 1. Commerce’s Benefit Calculations for Captive Mining Rights

515. Consistent with the benefit calculation guidelines in Article 14(d) of the SCM Agreement, Commerce determined the benefit to the recipient based on the prevailing market conditions in the country of provision. Similar to the circumstances in the *US – Softwood Lumber IV* dispute, there were no private or non-government prices for coal and iron ore royalties available in India that could be used as a benchmark. Commerce constructed the cost of the iron ore and coal to Tata by adding Tata’s actual royalty payments, actuals costs of extracting the iron ore and coal, actual costs of delivering ore and coal to Tata’s steel factory, and profit based on data provided Tata.<sup>750</sup> For the iron ore benchmark, with respect to which Tata’s costs were compared, in the 2006 administrative review Commerce used a 2006 world market price for iron ore from Hamersly, Australia, as found in the *Tex Report*.<sup>751</sup> For the coal benchmark in the 2006 administrative review, Commerce used the prices Tata actually paid for coal from Hamersly, Australia, plus actual delivery costs to Tata’s factory.<sup>752</sup>

## 2. Commerce Properly Calculated Benefit with respect to the Recipients

516. India again argues that determination of the existence of benefit should be determined by reference to the cost to the government of the financial contribution. India states that adequate remuneration “in Article 14(d) of the SCM Agreement relates to the compensation receivable by the provider [the government] and is independent of the benefit, if any, that may be conferred on the receiver.”<sup>753</sup> In place of Commerce’s benefit calculation that focused on the benefit to the recipients, India argues that Commerce should rely on (1) the analysis of a consultant retained by the GOI concerning GOI pricing policies compared with foreign government mining rite prices, and (2) the GOI’s explanations of the GOI’s pricing policies.<sup>754</sup>

517. As discussed extensively at section III.C above, the Article 14 guidelines for determining benefit state that a benefit calculation shall be based on the benefit to the recipient.<sup>755</sup> The essence of the benefit-to-the-recipient calculation is to determine whether the recipient is better off than it would have been absent the government action, and the only way to make that determination is to assess whether the recipient obtained something “on terms more favorable

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<sup>750</sup> 2006 *Issues and Decisions Memorandum*, at Sections I.A.8 and 9 (Exhibit IND-33); 2008 *Issues and Decisions Memorandum*, at Sections II.A.8 and 9 (Exhibit IND-41).

<sup>751</sup> 2006 *Issues and Decisions Memorandum*, at Sections I.A.8 (Exhibit IND-33).

<sup>752</sup> 2006 *Issues and Decisions Memorandum*, at Sections I.A.9 (Exhibit IND-33); 2008 *Issues and Decisions Memorandum*, at Sections II.9 (Exhibit IND-41).

<sup>753</sup> India First Written Submission, para. 388. Additionally, the heading of one of India’s arguments is, “Without prejudice, the United States failed to examine whether the value of the extracted mineral (cost plus royalty plus profit) was ‘adequate remuneration’ to the GOI.” (See, India First Written Submission, p. 138).

<sup>754</sup> India First Written Submission, para. 393-394.

<sup>755</sup> Article 14 of the SCM Agreement (“Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient . . . the method used by the administering authority to calculate the benefit to the recipient . . . shall be consistent with the following guidelines . . . the provision of goods . . .”)

than those available in the market.”<sup>756</sup> A government price generally cannot be used to determine what the market price is or, absent data on actual private transactions, what the market price would be. As the Appellate Body has explained, a proper benefit analysis involves determining the benefit to the recipient of the provision of rights to unexploited government-owned resources.<sup>757</sup> This interpretation is fully supported by the Appellate Body’s recognition that the “primary benchmark” for determining the benefit for goods sold at less than adequate remuneration is “prices of similar goods sold by *private* suppliers in the country of provision.”<sup>758</sup>

518. Therefore, and for the reasons discussed at section III.C above, India’s claims based on a cost-to-government standard should be rejected.

### 3. India’s Other Claims are Misplaced

519. India claims that Commerce was required to compare the mining rights at issue to a benchmark based on mining rights values sourced in other countries.<sup>759</sup> India is incorrect. As explained above, the benefit potentially provided by a mining rights program is the mineral that is obtained by the producer using the input. It would be inappropriate in this case to use the price of mining rights in other countries as a benchmark because the use of such a price would not reflect the prevailing market conditions in India as required by the guidelines in Article 14(d): the price of mining rights in a third country are not available in the Indian market. By contrast, the iron ore and coal benchmarks Commerce used were based on prices available in the Indian market, consistent with Article 14(d).

520. India also argues that by including the mining costs in the GOI price of iron ore and coal, Commerce is creating allegedly arbitrary subsidy margins because the calculation for a more efficient miner will result in a higher subsidy rate.<sup>760</sup> As a result, India claims that this calculation is inconsistent with Article 14(d) of the SCM Agreement.

521. As an initial matter, India makes this argument as part of its position that the United States violated an unspecified obligation of good faith. As discussed in Section IX.C.9 above, Members’ obligations are set out in the WTO Agreement. India’s arguments at paragraphs 397-400 are not made with respect to any provision of the WTO Agreement. This is not only reflected by India’s failure to make these arguments on the basis of a provision of the WTO Agreement, but also in the fact that India has not requested the panel to make findings as to a

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<sup>756</sup> *Canada – Aircraft (Panel Report)*, para. 9.112 (emphasis added).

<sup>757</sup> With regard to India’s reference to the preamble to Commerce’s regulations suggesting that if there is no available method of calculating a benefit the recipient, Commerce may consider using a cost to government analysis, India is correct. In the rare circumstances in which there is no manner in which to make a benefit-to-the-recipient analysis, an analysis based on the government’s cost, or other alternative methods may be considered to establish if a benefit exists. However, as explained below, in this case, there exists a method of determining the benchmark for unexploited government owned resources on a benefit-to-the-recipient basis in the country of provision which an Appellate Body finding supports. Therefore, there is no need to resort to an analysis based on the government’s costs, as suggested by India.

<sup>758</sup> *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).

<sup>759</sup> India First Written Submission, paras. 389-390, 393-394.

<sup>760</sup> India First Written Submission, paras. 397-400.

breach of a “good faith” obligation.<sup>761</sup> Since India has failed to make a claim that can be considered by the Panel, the Panel should not consider Section VIII.F.2 of India’s First Written Submission.

522. Moreover, India’s arguments are incorrect. As an initial matter, we note that India’s argument amounts to unsupported assertions of the purported efficiency differences between hypothetical mining companies.<sup>762</sup> Commerce’s determination that the iron ore recipient is better off than it would have been absent the government action is consistent with Article 14(d).<sup>763</sup> By using the company’s actual mining and delivery costs and profit, and comparing that result to a market benchmark, Commerce determined the degree to which the government-provided good actually benefited the producer being examined. There is no basis for a presumption that “efficient” miners or vertically integrated producers receive a smaller subsidy in such circumstances when all relevant factors (costs, profits, and delivery charges) are taken into account.

523. Finally, India challenges the selected benchmarks for coal and iron ore.<sup>764</sup> The iron ore benchmark prices used for the mining rights program were the same ones used for the NMDC’s provision of iron ore, *i.e.*, the price from Hamersly, Australia. For the reasons explained above, Commerce’s use of the delivered Hamersly, Australia prices to benchmark the iron ore mining rights program is consistent with Article 14(d) of the SCM Agreement.

524. With regard to the benchmark for the coal mining program, Commerce used an actual delivered private price for coal from Australia that an Indian steel company purchased and had delivered to its facilities in India. India argues that using a delivered price is inconsistent with Article 14(d) of the SCM Agreement.<sup>765</sup> The private price at which an Indian steel company purchases imported iron ore for use in its steel production, including any delivery costs, is an actual in-country price and appropriate for use as a benchmark. The inclusion of the delivery costs is consistent with Article 14(d) of the SCM Agreement for the reasons explained above in the sections concerning the consistency of Commerce’s regulation with Article 14 of the SCM Agreement and the use of delivered iron ore benchmarks.

## **E. Conclusion**

525. Based on the foregoing, Commerce’s determinations that the GOI provided captive mining rights for both iron ore and coal to a specific group of enterprises for less than adequate remuneration that the provided a benefit to the recipients are consistent with Articles 12.5, 1.1, 1.2, 2, and 14 of the SCM Agreement. India’s claims to the contrary should be rejected.

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<sup>761</sup> India First Written Submission, para. 641.

<sup>762</sup> India First Written Submission, para. 399.

<sup>763</sup> *Canada – Aircraft(AB)*, para. 157 (emphasis added).

<sup>764</sup> India First Written Submission, paras. 403-404.

<sup>765</sup> India First Written Submission, para. 404.

## **XI. THE UNITED STATES COMPLIED WITH ARTICLES 1, 14, AND 22 OF THE SCM AGREEMENT WITH REGARD TO ITS FINDINGS RELATING TO THE SDF PROGRAM IN THE CHALLENGED DETERMINATIONS**

526. India challenges three aspects of Commerce’s treatment of the loans provided through the Steel Development Fund (“SDF”). First, India challenges Commerce’s determination that the SDF Managing Committee was a “public body” within the meaning of Article 1.1(a)(1)(i) that made financial contributions to Indian steel producers when it provided loans to these producers at interest rates lower than those of comparable commercial loans. Next, India challenges Commerce’s calculation of the benefit for these loans, arguing that 1) in the case of the 2006 administrative review, Commerce did not use interest rates for “comparable commercial loans” in accordance with Article 14(b) of the SCM Agreement, and 2) for all the challenged proceedings, Commerce did not provide adjustments or credits for costs allegedly incurred by Indian steel producers. Finally, India also claims that Commerce violated Article 22.5 of the SCM Agreement during the investigation, because it insufficiently explained its finding that the loans provided under the SDF Program were countervailable subsidies, unlike loans provided under the European Coal and Steel Community (“ECSC”) Program.<sup>766</sup>

527. India’s claims are without merit. First, under any conceivable standard, the SDF qualifies as the government or a public body under Article I of the SCM Agreement. Second, Commerce properly used the Reserve Bank of India’s published prime lending rates for loans comparable to the SDF loans as a benchmark commercial interest rate during the 2006 review, and properly declined to make “adjustments” for costs purportedly incurred by steel producers. Third, Commerce fully complied with Article 22.5 by explaining in its determination that funds used in the SDF Program were mandatory levies imposed on and paid by consumers, analogous to taxes.<sup>767</sup> Consequently, the Panel should reject India’s claims under Articles 1 and 14, and 22, and find that Commerce’s determinations were not inconsistent with the SCM Agreement.

### **A. Commerce’s Finding was Consistent with a Proper Interpretation of “Public Body” under Article 1.1(a)(1) of the SCM Agreement**

528. India argues that Commerce’s finding with respect to the SDF Managing Committee was inconsistent with Article 1.1(a)(1) of the SCM Agreement because neither the SDF Managing Committee nor the JPC was properly determined to be a public body in accordance with Article 1.1(a)(1). The United States submits that its determination regarding the SDF Managing Committee was consistent with a proper interpretation of Article 1.1(a)(1)(i).

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<sup>766</sup> See *Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany*, 62 Fed. Reg. 54990, 54993 (October 22, 1997) (Exhibit USA-73).

<sup>767</sup> *Investigation Issues and Decision Memorandum* (Exhibit U.S.-4) at Comment 1 (Exhibit IND-7).

## 1. The SDF Managing Committee is a Public Body Controlled by the GOI

529. As demonstrated in section IX.A.1 above, the term “public body” in Article 1.1(a)(1) of the SCM Agreement means an entity controlled by the government such that the government can use the entity’s resources as its own. The determination shows that SDF meets this standard.

530. The GOI’s description of the purpose and goals of the SDF program during verification, and the GOI’s administrative orders setting up the SDF program make clear that the GOI used its power to regulate or control the steel sector in India in order to ensure it was productive, efficient, and that it continued to make technological progress.<sup>768</sup> The GOI effectuated these goals through the SDF Program generally, and the SDF Managing Committee specifically.

531. The GOI initiated the SDF Program through a series of administrative orders. In 1971, the GOI issued an administrative order setting up the Joint Plant Committee (“JPC”) “for the purpose of giving effect to the provisions of” the Iron and Steel (Control) Order, 1956.<sup>769</sup> Subsequently, in 1978, the GOI issued an amendment to the 1971 order, which allowed the JPC to increase prices charged to consumers of certain steel products, and to levy monies for the creation of “a fund for modernisation, research and development with the object of ensuring the production of iron and steel in the desired categories and grades by the main steel plants.”<sup>770</sup> Thus, the proceeds collected from consumers from the mandated price increases were remitted to the SDF by each of the member steel producers.<sup>771</sup>

532. The GOI confirmed in this amendment that the operation of this fund was subject to GOI control and direction, noting that “[i]n the matter of operation of this fund, the Committee shall perform its functions in accordance with and subject to such regulations or directions as may be issued by the Central Government from time to time.”<sup>772</sup> Finally, the GOI noted that the JPC may use the levied funds to “implement specific schemes entrusted to it by the Central Government.”<sup>773</sup> Similarly, the GOI issued an amendment on January 16, 1992, reiterating that the JPC was authorized to levy funds “towards the Steel Development Fund for financing schemes and projects and other capital expenditures.”<sup>774</sup> Again, the GOI explained that the Committee “shall perform its functions relating to the Steel Development Fund in accordance

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<sup>768</sup> Investigation Verification Report of GOI Responses (Exhibit USA-74); *see also* GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 20: “Ministry of Steel Notification of 1978 (March 20, 2001) (Exhibit USA-75).

<sup>769</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 22: “Ministry of Steel Notification of 1971” (Exhibit USA-75).

<sup>770</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 20: “Ministry of Steel Notification of 1978”. (Exhibit USA-75).

<sup>771</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p. 1-3 (Exhibit USA-75).

<sup>772</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 20: “Ministry of Steel Notification of 1978” (Exhibit USA-75).

<sup>773</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p. 2 (Exhibit USA-75).

<sup>774</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: “Ministry of Steel Notification of 1992” (Exhibit USA-75).

with the subject to such orders or directions as may be issued by the Central Government in this behalf from time to time.”<sup>775</sup>

533. 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”*.<sup>776</sup> 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 comprised 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.<sup>777</sup>

534. 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. Because this committee decided whether or not to provide loans to Indian steel companies at advantageous rates, and because this committee was comprised exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own.

## **B. Commerce’s Finding was Consistent with the Interpretation of “Public Body” Set Out by the Appellate Body**

535. In the alternative, even under the interpretation of “public body” set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, Commerce’s determination is consistent with Article 1.1(a)(1). The Appellate Body held that a “public body” within the meaning of the SCM Agreement “must be an entity which possesses, exercises or is vested with governmental authority.”<sup>778</sup> Regarding the relationship between the government and the public body, the Appellate Body further explained that “where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.”<sup>779</sup>

### **1. The SDF Managing Committee and the JPC Performed Government Functions When They Levied and Redistributed Funds To Implement GOI Policies in the Steel Sector**

536. 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-*

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<sup>775</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: “Ministry of Steel Notification of 1992.” (Exhibit USA-75).

<sup>776</sup> Investigation Verification Report of GOI Responses at p. 3 (Exhibit USA-74) (emphasis added).

<sup>777</sup> Investigation Verification Report of GOI Responses at p. 3 (Exhibit USA-74) (emphasis added).

<sup>778</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

<sup>779</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

*Dumping and Countervailing Duties* because 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.

537. As described above, 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.<sup>780</sup> Specifically, steel producers could only sell products at the prices set by the JPC, and 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.”<sup>781</sup> The proceeds collected from consumers from the mandated price increases were remitted to the SDF by each of the member steel producers.<sup>782</sup> Companies that contributed to the fund were eligible to take out long-term loans at advantageous rates.<sup>783</sup>

538. 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 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.”<sup>784</sup> 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.

539. It is well recognized that imposing mandatory taxes and collecting revenue is a function of government, as is redistribution of these funds to further government policy and goals.<sup>785</sup> Through taxing and redistribution, a government exercises control over its citizens and resources. The mandatory levies imposed here on consumers of certain steel products were in the nature of taxes mandated and collected by a government. Here, contributions were not voluntary, and the integrated steel producers did not determine the amounts to be levied and paid into the SDF fund.<sup>786</sup> Rather, the JPC sequestered 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

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<sup>780</sup> *Investigation Final Determination*, 66 Fed. Reg. at 49,637 (Exhibit IND-8); *see also* GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p. 2 (Exhibit USA-75).

<sup>781</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p. 2-3 (Exhibit USA-75).

<sup>782</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p. 2-3 (Exhibit USA-75).

<sup>783</sup> Investigation Verification Report of GOI Responses at 2 (Exhibit USA-74).

<sup>784</sup> Investigation Verification Report of GOI Responses at 4 (Exhibit USA-74).

<sup>785</sup> The Oxford English Dictionary defines tax to include a “*contribution to State revenue, compulsorily levied on people, businesses, property, income, commodities, transactions, etc.*” New Shorter Oxford English Dictionary, at 3229 (1993) (emphasis added). “State,” in turn, has been defined to include “[t]he political organization or management which forms the supreme civil rule and government of a country or nation.” *Id.* at 3036 (Exhibit USA-64).

<sup>786</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 (Exhibit USA-75).

steel sector.<sup>787</sup> In collecting funds and redistributing them pursuant to the GOI’s goals and policies, the SDF Managing Committee, both alone and through the JPC, was executing government functions, and this indicates that the SDF Managing Committee possessed and was vested with government authority.<sup>788</sup>

540. India contends that Commerce made its determination that the SDF Managing Committee was a public body “solely on the composition of the members of the SDF Managing Committee.”<sup>789</sup> To the contrary, Commerce’s determination regarding the SDF Managing Committee was based also on its determination that “the SDF levies . . . are analogous to tax revenues collected from consumers as mandated by the GOI”<sup>790</sup>, and that the SDF Managing Committee was the ultimate decision-maker “regarding the issuance, terms and waivers of SDF loans.”<sup>791</sup>

541. As the Appellate Body put it, “...the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority....”<sup>792</sup> Based on the structure and purpose of the SDF program and the SDF Managing Committee, the ability of the JPC to levy funds, and the authority vested in the SDF Managing Committee to make all decisions regarding the issuance and forgiveness of loans, the SDF Managing Committee, at a minimum, exercised governmental authority such that it is a public body even under the interpretation of of Article 1.1(a)(1) set out by the Appellate Body.

## **2. The GOI Exercised Meaningful Control Over the SDF Managing Committee**

542. The Appellate Body reasoned in *US – Anti-Dumping and Countervailing Duties (China)* that “where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.”<sup>793</sup> In this case, the JPC was formed by an administrative order issued by the GOI,<sup>794</sup> and was chaired by the GOI’s Development Commissioner for Iron and Steel.<sup>795</sup> The SDF Managing Committee reviewed and granted the “ultimate approval of the proposals put forth by the JPC.”<sup>796</sup> The GOI explained that the JPC handled the “day-to-day affairs of the SDF, such as

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<sup>787</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 (Exhibit USA-75) and at Exhibits 20-22 (March 19, 2001).

<sup>788</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

<sup>789</sup> India First Written Submission, para. 424.

<sup>790</sup> *Investigation Issues and Decision Memorandum (IND-7)* at Comment 1.

<sup>791</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>792</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.

<sup>793</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

<sup>794</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), Exhibit 20: Ministry of Steel Notification of 1978 (Exhibit USA-75).

<sup>795</sup> GOI’s January 26, 2001 Questionnaire Response (Inv.), at II-23 (January 29, 2001) (Exhibit USA-75).

<sup>796</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

overseeing and administering the SDF loans,” but that the SDF Managing Committee was the ultimate decision-maker “regarding the issuance, terms and waivers of SDF loans.”<sup>797</sup>

543. The SDF Managing Committee, in turn, was comprised entirely of senior GOI officials.<sup>798</sup> Specifically, the SDF Managing Committee had four members. The Secretary of the Ministry of Steel, one level removed from the Minister of Steel, was the Chairman of the SDF Managing Committee.<sup>799</sup> The other three members of the SDF Managing Committee were the Secretary of Expenditure, the Secretary of Planning Commission, and the Development Commissioner for Iron and Steel.<sup>800</sup> Because the SDF Managing Committee was comprised entirely of senior GOI officials and made all final decisions on loans, the GOI fully controlled the distribution of SDF funds, as well as determining all terms and waivers of SDF loans.

544. India contends that the GOI’s administrative orders vested the authority to operate the SDF Program only with the JPC, and that because the majority of the members in the JPC were representatives of the participating steel producers, there was no effective government control of the JPC.<sup>801</sup> In focusing on the membership of the JPC, India understandably seeks to diminish the membership and role of the SDF Managing Committee in the operation of the SDF program, and attempts to cast the SDF Managing Committee’s role as less than authoritative.<sup>802</sup> This claim is directly contradicted, however, by the GOI’s own admission that the SDF Managing Committee was the ultimate decision-maker “regarding the issuance, terms and waivers of SDF loans”<sup>803</sup>, and that no funds were disbursed under this program without the Managing Committee’s prior approval.<sup>804</sup> Indeed, even India concedes later in its submission that the SDF Managing Committee had a “supervisory role over the JPC.”<sup>805</sup>

545. The Appellate Body has found that “the standard of review applicable to a panel reviewing a countervailing duty determination precludes a panel from engaging in a *de novo* review of the facts of the case ‘or substitut[ing] its judgement for that of the competent authorities’.”<sup>806</sup> Commerce’s determination must therefore be reviewed in terms of its reasonability and permissibility under the SCM Agreement. Based on the facts described above, the Panel should therefore find that Commerce’s factual determinations supported the conclusion that the SDF Managing Committee was, at a minimum, a “public body” even under the interpretation of Article 1.1(a)(1) of the SCM Agreement set out by the Appellate Body.

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<sup>797</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>798</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>799</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>800</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>801</sup> India First Written Submission at paras. 418-419.

<sup>802</sup> India First Written Submission at para. 437.

<sup>803</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

<sup>804</sup> Investigation Verification Report of GOI Responses at pgs. 2-4 (Exhibit USA-74)..

<sup>805</sup> India First Written Submission at para. 435.

<sup>806</sup> *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).

### C. The SDF Loans Constituted “A Direct Transfer of Funds” Within the Meaning of Article 1.1(a)(1)(i)

546. India contends that the SDF loans may not be considered “a direct transfer of funds” within the meaning of Article 1.1(a)(1)(i), because “the SDF levy was not [the GOI’s] own fund and is not tax revenue.”<sup>807</sup> To the contrary, however, the facts demonstrate that Commerce reasonably concluded that the SDF levy operated precisely as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. Consequently, the loans provided using these funds constituted a “direct transfer” within the meaning of Article 1.1(a)(1)(i).

547. Article 1.1(a)(1)(i) of the SCM Agreement 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*). . . .”<sup>808</sup> The Appellate Body has interpreted this provision to cover any government practice the effect of which is to improve the financial position of the recipient may constitute a direct transfer of funds. In *Japan – DRAMS (Korea)*, the Appellate Body observed that:

... the words “grants, loans, and equity infusion” are preceded by the abbreviation “e.g.,” which indicates that grants, loans, and equity infusion are cited examples of transactions falling within the scope of Article 1.1(a)(1)(i). This shows that transactions that are similar to those expressly listed are also covered by the provision. Debt forgiveness, which extinguishes the claims of a creditor, is a form of performance by which the borrower is taken to have repaid the loan to the lender. The extension of a loan maturity enables the borrower to enjoy the benefit of the loan for an extended period of time. An interest rate reduction lowers the debt servicing burden of the borrower. In all of these cases, *the financial position of the borrower is improved and therefore there is a direct transfer of funds within the meaning of Article 1.1(a)(1)(i).*<sup>809</sup>

548. The Appellate Body reviewed this and other past findings in *US – Large Civil Aircraft (Second Complaint)* to hold 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.”<sup>810</sup> The Appellate Body further found in that case that before any determination can be made pursuant to one of the subparagraphs of Article 1.1(a)(1), a measure must be properly characterized according to its design, operation and effects. It stated:

<sup>807</sup> India First Written Submission at para. 457.

<sup>808</sup> SCM Agreement, Article 1.1(a)(1)(i) (emphasis added).

<sup>809</sup> *Japan – DRAMS (AB)*, para. 251 (emphasis added).

<sup>810</sup> *US – LCA (AB)*, para. 614. (emphasis added)

a proper determination of which provision of the WTO agreements applies to a given measure must be grounded in a proper understanding of the measure's relevant characteristics. In this regard, we note that the classification of a transaction under municipal law is not "determinative"<sup>811</sup> of whether that measure can be characterized as a financial contribution under Article 1.1(a)(1) of the SCM Agreement.<sup>812</sup>

549. As the panel in *Japan – DRAMS (Korea)* put it, “it is appropriate to look beyond the simple form of a transaction, and analyze its effects, in determining whether or not a transaction constitutes a “direct transfer of funds”.”<sup>813</sup>

550. As explained above, Commerce determined that the SDF was a government entity that made a financial contribution within the meaning of Article 1.1(a)(1), and that it directly transferred funds to steel producers in the form of loans at advantageous terms pursuant to subparagraph (i) of that provision. These funds were first collected by imposing a mandatory levy, or tax, on consumers through the sales of certain steel products sold by the participating Indian steel producers.

551. India argues that “subsidies have generally been linked directly to the taxation function of the government and as a general rule, monetary resources or contributions derived from this taxation function would be owned and under the complete control of the government.”<sup>814</sup> According to India, the “SDF funds were not government funds and in fact, it is a matter of record that SDF was financed solely by producer levies and other non-GOI sources.”<sup>815</sup> India also cites as support a decision by the Supreme Court of India, where that Court held that the SDF levy did not constitute a tax.<sup>816</sup> However, as noted above, a judicial interpretation of a municipal law is not binding for purposes of WTO legal interpretation.<sup>817</sup> Rather, the investigating authority made its determination based on an analysis of the design and operation of the program at issue.

552. Here the facts demonstrate that, contrary to India’s claims, the SDF funds did operate as a tax, and once collected by the JPC, the funds were in complete control of the GOI, and in particular, the SDF Managing Committee. First, as explained above, the funds levied for the SDF program were not “producer levies,” as alleged by India, but “consumer levies” that operated much as a tax on certain products. Further, 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.<sup>818</sup> Rather, the JPC determined the amounts to be levied, sequestered the resulting funds, and then the SDF Managing

<sup>811</sup> See *US – Softwood Lumber IV (AB)*, para. 56.

<sup>812</sup> *US – LCA (AB)*, para. 586 (citing *China – Auto Parts (AB)*, para. 171)

<sup>813</sup> *Japan – DRAMS (Panel)*, para. 7.444, as upheld by the Appellate Body.

<sup>814</sup> India First Written Submission at para. 453.

<sup>815</sup> India First Written Submission at para. 456 (citations omitted).

<sup>816</sup> India First Written Submission, at para. 457 (citation omitted).

<sup>817</sup> *US – LCA (AB)*, para. 586, citing to Appellate Body Report, *US – Softwood Lumber IV*, para. 56.

<sup>818</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 (Exhibit USA-75).

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.<sup>819</sup> Thus, the SDF Managing Committee determined the ultimate allocation and use of these funds, and therefore effectively controlled them.

553. India also contends that the disbursement of these funds as loans cannot constitute a “direct transfer of funds,” because a direct transfer may only be provided where the “public body itself owns the ‘financial contribution’ in question.”<sup>820</sup> Contrary to India’s contention, however, the Appellate Body has not required that any direct transfer of funds be accomplished through the transfer of ownership of the relevant funds from the government to the recipient. 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 resources, and/or financial claims are *made available to a recipient*.”<sup>821</sup> In this case, the GOI has mandated that an additional price element be included in the sale of steel, and also mandated that this amount be transferred to the JPC. The JPC then recommends distributing these funds in the form of better-than-market rate loans to steel companies, and the SDF Managing Committee makes a final decision as to the disbursement of such loans. Therefore, through the consumer levy and the JPC, these resources are “made available” to recipient companies by the SDF Managing Committee.

554. Indeed, elsewhere in its submission, India concedes that once the funds were remitted to the SDF, producers did not control or own these funds, did not have the freedom to invest them profitably as they chose, and “suffered the cost of lost opportunity in terms of the interest revenue on such funds.”<sup>822</sup> This only serves to underscore the fact that steel producers did not determine the amounts to be collected from consumers and remitted to the SDF program. Steel producers did not own or control the funds that had been collected, either individually, or through association with the JPC. Rather, as admitted by GOI officials during the investigation, the SDF Managing Committee retained complete control over the funds, and made all decisions “regarding the issuance, terms and waivers of SDF loans.”<sup>823</sup>

555. 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 in accordance with Article 1.1(a)(1)(i), and the Panel should reject India’s claims.

**1. Commerce Was Not Required to Determine Whether the GOI “Entrusts or Directs” the SDF Managing Committee to Make Financial Contributions Because the SDF Managing Committee Is Not a Private Body**

556. Article 1.1(a)(1)(iv) of the SCM Agreement provides that a subsidy also may exist where a government “entrusts or directs” a *private* entity to provide a financial contribution to a

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<sup>819</sup> GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 and Exhibits 20-22 (Exhibit USA-75).

<sup>820</sup> India First Written Submission at para. 446.

<sup>821</sup> *US – LCA (AB)*, para. 614. (emphasis added)

<sup>822</sup> India First Written Submission at paras. 477-478.

<sup>823</sup> Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).

producer of subject merchandise, and thereby confer a benefit. The GOI maintains that Commerce failed to make a determination that the GOI entrusted or directed JPC or the SDF Managing Committee to make loans at advantageous rates.<sup>824</sup> However, as described above, Commerce properly determined that the SDF Managing Committee was a public body, and not a private body. Having made this determination, no further determination was needed pursuant to Article 1.1(a)(1)(iv) for either JPC or the SDF Managing Committee. Therefore, the Panel should reject India’s claims under Article 1.1(a)(1)(iv).

#### **D. Commerce’s Benefit Calculations In the Challenged Proceedings Were In Accordance With Article 14(b) of the SCM Agreement**

557. India challenges two aspects of Commerce’s benefit calculation for the loans provided through the SDF Program. First, India challenges Commerce’s benchmark calculation in the 2006 administrative review, arguing that Commerce did not compare the amount paid for the SDF loans with the amount that Tata would have paid on a “comparable commercial loan” in accordance with Article 14(b) of the SCM Agreement.<sup>825</sup> Second, India challenges Commerce’s benefit calculation overall, in the challenged proceedings, as not accounting for Indian steel producers allegedly contributing their own funds and incurring certain costs to participate in the SDF program.<sup>826</sup>

558. India’s claims are without merit. During the 2006 administrative review Commerce properly used as a commercial benchmark interest rate an average of certain Prime Lending Rates (“PLRs”), compiled and published by the Reserve Bank of India, for loans similar to the SDF loans in currency, structure and maturity, and this rate was comparable within the meaning of Article 14(b) of the SCM Agreement.<sup>827</sup> Further, Commerce acted consistently with Article 14 in not providing a “credit” in its benefit calculations for the funds that were levied on consumers and remitted by steel producers to the SDF fund, or any administrative fees incurred to obtain the SDF loans.

559. Before turning to India’s claims, the United States will briefly discuss the Article 14 guidelines as they relate to loans provided by a government.

#### **1. Article 14(b) of the SCM Agreement**

560. Article 14 of the SCM Agreement contains the obligations related to the calculation of a subsidy benefit. Article 14(b) concerns the calculation of a benefit when a Member provides a loan. In relevant part, Article 14 provides:

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant

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<sup>824</sup> India First Written Submission, paras. 409, 413, 460-461.

<sup>825</sup> India First Written Submission, paras. 464-475.

<sup>826</sup> India First Written Submission, paras. 476-484.

<sup>827</sup> 2006 Issues and Decisions Memorandum, at section “B- Long-Term Benchmarks and Discount Rates.” (Exhibit IND-33).

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. Furthermore, any such method shall be consistent with the following guidelines:

\* \* \*

(b) a loan by a government shall not be considered as conferring a benefit, unless 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. In this case the benefit shall be the difference between these two amounts;

561. The Appellate Body has found that Article 14 of the SCM Agreement provides guidelines, which afford Members flexibility in the calculation of benefit.<sup>828</sup> As the panel in *EC – DRAMs* explained:

In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could actually be obtained on the market. . . . In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology.<sup>829</sup>

562. More recently, the panel in *US – AD/CVD* examined the text of Article 14(b) of the SCM Agreement and noted, at the outset, that:

[T]he chapeau of Article 14 indicates that the provisions set forth in sub-paragraphs (a)-(d) of this provision are “guidelines”, and that while investigating authorities must respect these guidelines in calculating the benefits from the particular kinds of financial contributions identified in the respective sub-paragraphs, they have flexibility as to the precise methodology that they use, so as to be able to take into account the particular facts of a given investigation.<sup>830</sup>

563. This observation is consistent with prior Appellate Body reports that have analyzed the meaning of Article 14. The Appellate Body has explained that “[t]he reference to ‘any’ method

<sup>828</sup> See, *US – Softwood Lumber IV (AB)*, paras. 91-92; *Japan – DRAMS (AB)*, para. 191.

<sup>829</sup> *EC – DRAMS*, para. 7.213 (emphasis added).

<sup>830</sup> *US – AD/CVD (Panel)*, para. 10.107.

in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”<sup>831</sup> Moreover, the Appellate Body has emphasized the importance of the word “guidelines”:

[T]he term ‘guidelines’ suggests that Article 14 provides the ‘framework within which this calculation is to be performed’, although the ‘precise detailed method of calculation is not determined’ . . . . [T]hese terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States’ submission that the use of the term ‘guidelines’ in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as ‘rigid rules that purport to contemplate every conceivable factual circumstance’.<sup>832</sup>

564. The Appellate Body has summarized the flexibility provided to investigating authorities under Article 14 as follows:

The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.<sup>833</sup>

## **2. The Reserve Bank of India’s Published Prime Lending Rate Was A “Comparable” Lending Rate Within the Meaning of Article 14(b) of the SCM Agreement**

565. India claims that Commerce violated the chapeau of Article 14 and Article 14(b) of the SCM Agreement when it used the PLR in its benefit calculations without explaining how the PLR constitutes a rate for a “comparable commercial loan.” To the contrary, as demonstrated below, the PLR was an appropriate proxy for what steel producers would have paid on comparable commercial loans because it accounted for the currency, structure, and maturity of the SDF loans.<sup>834</sup>

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<sup>831</sup> *US – Softwood Lumber IV (AB)*, para. 91.

<sup>832</sup> *US – Softwood Lumber IV (AB)*, para. 92.

<sup>833</sup> *Japan – DRAMS (AB)*, para. 191.

<sup>834</sup> Commerce’s regulations define “comparable” as follows: “In selecting a loan that is ‘comparable’ to the government-provided loan, the Secretary normally will place primary emphasis on similarities in the structure of the loans (*e.g.*, fixed interest rate *v.* variable interest rate), the maturity of the loans (*e.g.*, short-term *v.* long-term), and the currency in which the loans are denominated.” *See* 19 C.F.R. § 351.505(a)(2)(i) (Exhibit USA-76). As explained below, Commerce’s regulations are fully consistent with Article 14 of the SCM Agreement.

566. During the 2006 administrative review, to calculate the benefit to the recipients of the SDF loans, Commerce compared the amount paid on the SDF loans to, as follows:

- 1) Where the steel producer in question had company-specific long term loans, Commerce used the weighted average of these “comparable long-term, rupee-denominated loans for all the required years.”<sup>835</sup>
- 2) For those years in which Commerce did not have company-specific commercial loan information, Commerce used “comparable long-term, rupee-denominated benchmark interest rates from the immediately preceding year.”<sup>836</sup>
- 3) Where there were no company-specific, comparable long-term commercial loans during the year in question or the immediately preceding year, Commerce used in its benefit calculation a weighted average of certain PLRs published by the Reserve Bank of India for loans comparable to the SDF loans.<sup>837</sup>

567. Specifically, the loans provided through the SDF program were rupee-denominated, long-term, variable rate loans.<sup>838</sup> Consequently, in constructing a comparable commercial benchmark, Commerce reviewed a compilation issued by the Reserve Bank of India, of the rupee-denominated prime lending rates of term lending institutions.<sup>839</sup> From these, Commerce chose as a commercial benchmark an average of only those rates noted as “long-term (over 36-month) PLR.”<sup>840</sup> Further, because the SDF loans were variable interest rate loans, Commerce chose only those interest rates that corresponded to the particular period under review.<sup>841</sup> Finally, Commerce calculated a weighted average of the relevant interest rates, corresponding to the period under review.<sup>842</sup> To summarize, Commerce constructed a benchmark interest rate that took into account the currency (*i.e.* rupee-denominated loans), the structure (*i.e.* variable interest rate), and the maturity (*i.e.* long term) of the SDF loans. In doing so, Commerce based its

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<sup>835</sup> 2006 Issues and Decisions Memorandum, at section “B- Long-Term Benchmarks and Discount Rates.” (Exhibit IND-33)

<sup>836</sup> 2006 Issues and Decisions Memorandum, at section “B- Long-Term Benchmarks and Discount Rates.” (Exhibit IND-33).

<sup>837</sup> 2006 Issues and Decisions Memorandum, at section “B- Long-Term Benchmarks and Discount Rates.” (Exhibit IND-33)

<sup>838</sup> GOI Initial Questionnaire Response-2006 Administrative Review, at “P-Steel Development Fund (SDF) Loans,” (April 23, 2007) (Exhibit USA-49).

<sup>839</sup> Memorandum to the File re: India’s Prime Lending Rate (2006 AR) at 1, 4 (November 28, 2007) (Exhibit USA-77).

<sup>840</sup> Memorandum to the File re: India’s Prime Lending Rate (2006 AR), at 1, 4 (November 28, 2007) (Exhibit USA-77).

<sup>841</sup> Memorandum to the File re: India’s Prime Lending Rate (2006 AR), at 4-5 (November 28, 2007) (Exhibit USA-77).

<sup>842</sup> Memorandum to the File re: India’s Prime Lending Rate (2006 AR), at 4-5 (November 28, 2007) (Exhibit USA-77).

benefit calculation for the SDF loans on the amount that Indian steel producers would have paid on comparable commercial loans, in accordance with Article 14(b) of the SCM Agreement.

568. Commerce’s methodology for calculating benefit conforms to the guidelines outlined in Article 14. Specifically, Commerce’s first preference when measuring the benefit of a government-provided loan is to use an interest rate from a loan taken by the firm from a lending institution in a commercial market.<sup>843</sup> Where, as in the 2006 administrative review, the firm has received no comparable commercial loans, Commerce’s regulations provide that it may “use a national average interest rate for comparable commercial loans.”<sup>844</sup> Here, Commerce determined to use a weighted average of the PLRs for rupee-denominated, long-term loans as published by the Reserve Bank of India, as the “national average interest rate” in the absence of company-specific interest rates. We note that these were the only long-term loan interest rates placed on the record of the administrative review proceeding. Further, Commerce chose only those PLRs that corresponded to the period under consideration in the administrative review.<sup>845</sup> Consequently, this was an appropriate proxy for the rate that the steel producers would have paid on a “comparable commercial loan” because it accounted for the currency, structure, and maturity of the SDF loans.

569. India also argues that the benchmark Commerce calculated was not a national average interest rate, and that “it was not in relation to any particular category of loans.”<sup>846</sup> To the contrary, as noted above, Commerce constructed a benchmark using interest rates published by the Reserve Bank of India that *were* “in relation to a particular category of loans” – namely rupee-denominated, long-term loans. Further, India argues that “Benchmark Prime Lending Rate” offered by Indian banks was a better “reference rate” because it accounted for various costs and expenses.<sup>847</sup> However, as noted above, the Appellate Body has held that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.<sup>848</sup> Commerce’s decision to use the PLRs published by the Reserve Bank of India does not violate the guidelines in Article 14, merely because other interest rates were available for use in the calculation. Indeed, even India has not explained why the “Benchmark Prime Lending Rate” is any more comparable within the meaning of Article 14(b), with regard to the structure and maturity of the loans in question. In fact, we note that the interest rates that the GOI referred to as the “Benchmark Prime Lending Rate” (or BPLRs) were provided to Commerce by the GOI, as the “reference rates” for short-term loan programs,

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<sup>843</sup> 19 C.F.R. § 351.505(a)(2)(ii) (Exhibit USA-76).

<sup>844</sup> 19 C.F.R. § 351.505(a)(3)(ii) (Exhibit USA-76).

<sup>845</sup> The SDF loans were variable rate loans, for which the interest rate was adjusted each fiscal year, after the grace period for these loans had elapsed. *See* GOI’s April 23, 2007 Questionnaire Response (2006 AR), at “P-Steel Development Fund (SDF) Loans,” (April 23, 2007) (Exhibit USA-49). Commerce could not use as its benchmark a long-term variable interest rate in effect at the time of the loan agreement, because there were no data on the record for long-term, variable rate loans issued at the same time that the SDF loans were issued. Therefore, in the absence of interest rates from actual comparable loans issued to the steel producers, Commerce used the average of the long-term fixed rates published by the RBI that, *that were specific to the period under review*. By doing so, Commerce accounted for the yearly variation in the interest rates of the SDF loans by using its calculation only those interest rates listed for the year under review.

<sup>846</sup> India First Written Submission, para. 474.

<sup>847</sup> India First Written Submission, para. 474.

<sup>848</sup> *US – Softwood Lumber IV (AB)*, para. 91.

Because the record evidence indicates that these BPLRs vary quarterly, they are not comparable to the long-term variable SDF loan interest rates.”<sup>849</sup>

570. In short, the record shows that, despite India’s claims, Commerce used appropriate benchmarks for interest rates. Accordingly, the determination fully complies with the guidance in Article 14 that a benefit should be determined by comparing the government-provided loans to “a comparable commercial loan which the firm could actually obtain on the market.”

### **3. Commerce Properly Declined to Provide Credits For Alleged Expenses When Calculating Benefit**

571. India argues that Commerce’s benefit calculations in all of the challenged proceedings are inconsistent with Article 14 of the SCM Agreement, because Commerce does not take into account the various alleged costs to steel producers of participating in the SDF program.<sup>850</sup> Specifically, India contends that steel producers “contributed their own funds to the SDF Program and as a result, lost the interest that they could otherwise obtain on their own funds had it been invested elsewhere.”<sup>851</sup> Further, India argues that there were various other “administrative expenses” and charges incurred by the steel producers participating in the SDF Program.<sup>852</sup> Finally, India contends that the overall effect of the GOI’s price controls was to put Indian steel producers “in a worse off position.”<sup>853</sup> Thus, India argues that Commerce was obligated to make adjustments to account for these alleged “terms” of the SDF loans.

572. As an initial matter, the United States notes that contrary to India’s repeated assertions, the funds remitted to the SDF were *not* the Indian steel producers’ “own funds,” but rather, they were funds collected from levies imposed on *consumers* who purchased certain steel products. As discussed in detail above, the GOI established price increases that were to be added to certain steel products, and then remitted to the SDF Program.<sup>854</sup> These price increases were paid by consumers purchasing these steel products. Thus, India’s characterization of these funds as steel producer’s “own funds” is incorrect.

573. India’s argument also fails because India misreads Article 14 of the SCM Agreement. Article 14(b) clearly states that a benefit is conferred where there is a “difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.” No other credits or adjustments are provided for in the SCM Agreement.

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<sup>849</sup>See GOI’s April 23, 2007 Questionnaire Exhibits (July 24, 2007) (2006 AR) (Exhibit USA-49); see also GOI’s April 23, 2007 Questionnaire Response at 44-48 and Appendix pages 19-22 (Exhibit USA-49).

<sup>850</sup>India First Written Submission, paras. 476-479.

<sup>851</sup>India First Written Submission, para. 477.

<sup>852</sup>India First Written Submission, para. 478.

<sup>853</sup>India First Written Submission, para. 483.

<sup>854</sup>GOI’s March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 and Exhibits 20-22 (Exhibit USA-75).

574. As explained above, Article 14 of the SCM Agreement provides investigating authorities flexibility in the methodology applied to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided. Further, contrary to India’s contention,<sup>855</sup> the text of Article 14 of the SCM Agreement contains no requirement to consider that the recipient of a government subsidy is required separately to adhere to certain price controls. Nor does Article 14 contain any requirement to provide a credit when calculating the benefit of a subsidy to account for costs associated with obtaining the subsidy.<sup>856</sup> Instead, the text of Article 14 explicitly pertains to the calculation of the “benefit” to the recipient. The Appellate Body has explained that the ordinary meaning of “benefit” includes:

an “advantage”, “good”, “gift”, “profit”, or, more generally, “a favourable or helpful factor or circumstance”. Each of these alternative words or phrases gives flavour to the term “benefit” and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that “the ordinary meaning of ‘benefit’ clearly encompasses some form of advantage.”<sup>857</sup>

575. The concept of “benefit” relates only to situations in which a firm receives a “favourable or helpful factor or circumstance” or “an advantage,” rather than a detriment or disadvantage. Thus, it is plain that the Article 14 guidelines do not state that Members must provide a credit (or offset) for instances in which a government does *not* confer a favorable circumstance or advantage (*i.e.*, instances where the government provides no benefit, or reduces profits in some way) when calculating a subsidy benefit.

576. In sum, Article 14 of the SCM Agreement concerns the proper calculation of benefit (*e.g.* the “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”). Article 14 does not require, or even contemplate, a “credit” in the benefit calculation when a government reduces a subsidy recipient’s profits through price controls that are entirely unrelated to the subsidy at issue.

577. Accordingly, this Panel should dismiss India’s claims pursuant to Article 14 of the SCM Agreement.

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<sup>855</sup> India First Written Submission, para. 483. Here India notes, without any support, that the overall effect of GOI price controls was that Indian steel producers were “in a worse off position.”

<sup>856</sup> For example, Article 14 of the SCM Agreement is entitled “Calculation of the Amount of a Subsidy in Terms of the *Benefit* to the Recipient.” (emphasis added). There is no reference in Article 14 of the SCM Agreement to instances when a government provides “no benefit” nor is there any reference to providing a credit to Members when they provide a good for adequate remuneration.

<sup>857</sup> *Canada – Aircraft (AB)*, para. 153 (citations omitted).

## **XII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 AND 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDY ALLEGATIONS EXAMINED IN ADMINISTRATIVE REVIEWS**

578. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to its review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. In India’s view, then, despite the fact that the same product is being examined, where subsidies programs are raised in the context of a review that were not included in the original investigation, the authority must essentially start again and, concurrently with the administrative reviews, initiate a new investigation into the same product with respect to the additional subsidies. That is, India claims that the United States was required to examine new subsidies programs only upon receipt of a complete written application complying with Articles 11.1, 11.2 and 11.9; that it was required to initiate a new investigation into these programs pursuant to Article 11.1; that it was required to invite India for consultations regarding its examination of these new programs pursuant to Article 13.1 as a result of its initiation of a new investigation; and that it was similarly required to issue a public notice upon “initiation” of a new investigation in compliance with Articles 22.1 and 22.2. As a result of its having examined these subsidies programs instead in the context of administrative reviews, under Article 21, India claims that the United States has additionally violated Articles 21.1 and 21.2 of the SCM Agreement.

579. The United States submits that India not only misinterprets the requirements of the SCM Agreement with respect to reviews of existing countervailing duties, but India’s interpretation would create an absurd result, whereby multiple investigations, reviews and duty determinations would exist simultaneously with respect to a single product. Because they are all premised on the same erroneous interpretation, each of India’s claims under Articles 11, 13, 21 and 22 of the SCM Agreement must fail.

### **A. Terms of Reference**

580. Before moving on to the substance of the claims, the United States reminds the panel of its Preliminary Ruling Request with respect to India’s claims under Article 11.<sup>858</sup> As discussed in our request, India claims that the United States acted inconsistently with Articles 11.1 and 11.2, and with Article 11.9, “by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies”.<sup>859</sup> It further claims that the United States failed to initiate an investigation into alleged new subsidies programs in violation of Article 11.1 of the SCM Agreement. These subparagraphs of Article 11 were not listed in India’s panel request, nor was the United States put on notice as to the substance of the claims regarding the NMDC and TPS programs by the language that was included in India’s panel request, which stated that the

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<sup>858</sup> See section II above.

<sup>859</sup> India First Written Submission, headings XII.C.1 and XII.C.2.

United States acted inconsistently with “Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.”

581. Therefore, the United States requests that the Panel make a preliminary determination that all India’s claims under Article 11 fall outside its terms of reference. In the event the Panel finds these claims not to be outside its terms of reference, however, we have addressed them substantively below.

## B. Background

582. Commerce examined newly identified subsidies during in the 2001-2002, 2004, 2006, and 2007 administrative reviews, which were conducted in accordance with Article 21 of the SCM Agreement. In each of the administrative reviews in which newly identified subsidies were examined, domestic parties served copies of the new subsidy allegations on both the GOI and the respondents being reviewed.<sup>860</sup> Importantly, in accordance with its own administrative practice, Commerce required parties submitting the new subsidy allegations to “allege the elements necessary for the imposition of the duty imposed by section 701(a).”<sup>861</sup> Commerce further required that the allegations “be accompanied by information reasonably available to petitioner supporting those allegations.”<sup>862</sup> Commerce only examined those newly identified subsidies, for which domestic parties submitted reasonably available evidence demonstrating that “(1) there is a ‘financial contribution’ by ‘a government of a country or any public entity within the territory of the country’ and (2) a benefit is thereby conferred.”<sup>863</sup> Commerce also required domestic parties to provide reasonably available evidence demonstrating that the alleged subsidy was specific.<sup>864</sup>

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<sup>860</sup> 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).

<sup>861</sup> See, e.g. 2004 New Subsidies Memorandum, at 1 (July 19, 2005) (Exhibit IND-16); see also, 2006 JSW NSA Memorandum (Exhibit IND-29); 2006 Tata NSA 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).

<sup>862</sup> 2004 New Subsidies Memorandum, at 1-2 (Exhibit IND-16).

<sup>863</sup> 2004 New Subsidies Memorandum, at 2 (Exhibit IND-16). For example, during the 2006 period of review, Commerce determined that it would examine subsidies allegedly provided to Ispat by the State Government of Maharashtra, relating to certain tax exemptions and deferrals on purchases. However, Commerce determined not to examine exemptions and deferrals Ispat may have received on sales of goods, because Commerce had previously determined that these exemptions and deferrals to the seller are not countervailable. See Memorandum to Melissa G. Skinner regarding Countervailing Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India: Ispat at 3 (September 13, 2007) (2006 AR) at 3 (Exhibit IND-28).

<sup>864</sup> 2004 New Subsidies Memorandum, at 2 (Exhibit IND-16).

583. For each of these administrative reviews, Commerce published a notice of initiation in the *Federal Register*.<sup>865</sup> Further, for each of these administrative reviews, Commerce published preliminary and final determinations in the *Federal Register*.<sup>866</sup>

**C. India’s Claims Related to Articles 11, 13, 21 and 22 of the SCM Agreement are based on an Erroneous Interpretation of the SCM Agreement**

584. The SCM Agreement sets out a process by which Member countries may investigate instances of subsidization affecting its domestic producers, and, where appropriate, impose duties to countervail those effects. Once duties have been imposed, the SCM Agreement separately allows interested parties to request a “review” of those duties to determine whether they are still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, suggests 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.<sup>867</sup>

585. Article 21 provides for the review of countervailing duties already in force pursuant to a final determination in an investigation. Article 21.1 provides that “[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.” The following two subparagraphs provide the substantive rules governing a review of a countervailing duty order, and state:

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

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<sup>865</sup> See First Review Initiation (Exhibit USA-80); 2004 Initiation (Exhibit USA-81); 2006 Initiation (Exhibit USA-47); 2007 Initiation (Exhibit USA-82).

<sup>866</sup> See First Review Preliminary Results (Exhibit IND-12); First Review Final Results (Exhibit IND-14); 2004 Preliminary Results (Exhibit IND-17); 2004 Review Final Results (Exhibit IND-19); 2006 Preliminary Results (Exhibit IND-32); 2006 Review Final Results (Exhibit IND-34); 2007 Preliminary Results (Exhibit IND-37); 2007 Review Final Results (Exhibit IND-39).

<sup>867</sup> See *US – Carbon Steel (AB)*, para. 72; *US – OCTG from Argentina (AB)*, para. 294; *US – Corrosion Resistant Steel Sunset Review*, para. 152; and *US – Zeroing (EC) (Panel)*, para. 7.181.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review. (Internal footnote omitted)

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

586. Article 12 of the SCM Agreement is incorporated by reference, and therefore applies, in the context of a review proceeding, all the detailed evidentiary rules and procedural protections of that Article, including the requirement 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”.<sup>868</sup>

587. Pursuant to Article 21, an interested party requesting the review of a countervailing duty order must submit “positive information substantiating the need for a review”, and the authority will examine “whether the continued imposition of the duty is necessary to offset subsidization” and/or “whether the injury would be likely to continue or recur if the duty were removed or varied”. If the authorities determine that the duty is no longer warranted, it must be terminated, and if it is not reviewed within 5 years, it must also be terminated.

588. Of particular note, given India’s arguments, is what Article 21 does not require. Article 21 does not require that reviews examining “subsidization that is causing injury” be limited to the specific subsidy programs in place at the time of the original investigation. Nor does Article 21 suggest that the phrase “positive evidence substantiating the need for a review” imports the requirements of Article 11 which govern the initiation of an original investigation. Rather, the text of the Agreement is clear that the investigating authority must determine whether the product continues to benefit from subsidization. Reviewing “the need for the continued imposition of the duty, where warranted,” necessarily requires the investigating authority to consider any and all programs that benefit the product, including new subsidies brought to the attention of the investigation authority. Therefore, the structure and content of Article 21 reveal that a review performed under that Article is different in nature and form than the original investigation, and that it should be carried out “expeditiously”.

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<sup>868</sup> See Article 12.1 of the SCM Agreement.

589. By contrast, Article 21.4 contains an express cross-reference to the evidentiary rules and due process protections contained in Article 12, thereby incorporating those rules into Article 21 such that they apply to “review” proceedings as well as “investigations”. Given this cross-reference, an interpreter would expect that, were the rules of any other provision to be similarly incorporated into Article 21, those rules would also be incorporated by cross-reference. The Appellate Body has frequently relied on the presence of cross-references to determine that the requirements of one WTO provision apply also under another provision, and has also found that their absence indicates an intention on the part of the negotiators *not* to import into a particular provision the requirements of any other provision.<sup>869</sup>

**1. The Text of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 Demonstrates That These Provisions are Limited in Application to the Original Investigation**

590. In addition to the structure of the SCM Agreement, the text of Articles 11, 13 and 22 expressly limits the application of these provisions to the original investigation.

591. Article 11 of the SCM Agreement is entitled “Initiation and Subsequent Investigation”. While the term “investigation” is not defined, the structure of the SCM Agreement – the inclusion of one set of provisions covering “an investigation” and another set covering the “review” of countervailing duties – as well as the use of the singular term “investigation”, reveal the negotiators’ intent to identify obligations that are specific to the investigation rather than reviews.<sup>870</sup>

592. The various subparagraphs of Article 11 reinforce this interpretation. India’s claims relate specifically to subparagraphs 11.1, 11.2 and 11.9, which relate to the initiation of an investigation and to the sufficiency of the written application for initiation.

593. Article 11.1 provides:

Except as provided in paragraph 6, *an investigation* to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

594. Thus, by its very terms, the requirement that a written application be submitted by or on behalf of the domestic industry applies to the initiation of one, singular, “investigation”.

595. Articles 11.2 and 11.9, in turn, refer directly back to the requirements of written applications in Article 11.1, and are therefore also limited to the initiation of an “investigation”.

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<sup>869</sup> See, e.g., *US – Carbon Steel (AB)*, para. 69.

<sup>870</sup> The panel in *US – Zeroing (EC)*, at para. 7.186, emphasized the fact that no panel or Appellate Body decisions have relied on the dictionary definition of the term “investigation”, but have instead interpreted that term as it is used in the context of the SCM and AD Agreements.

Article 11.2 begins with the phrase, “*An application under paragraph 1 shall include...*”, and goes on to describe the information that must be included in the application. The Article does not reference subsequent review proceedings in its many subparts. Similarly, Article 11.9 begins with the phrase, “*An application under paragraph 1 shall be rejected and an investigation shall be terminated...*”, and then goes on to describe the circumstances under which an application must be rejected or an investigation terminated. Again, no reference is made to subsequent review proceedings.

596. Article 13.1 requires an investigating authority to invite Members involved in a potential investigation for consultations aimed at “clarifying the situation” alleged in written applications submitted pursuant to Article 11. This requirement, however, is expressly limited in its application to a particular point in the overall proceedings. That is, the obligation to invite a Member for consultations comes into effect “[a]s soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation”. An invitation to consult need not, therefore, be made with respect to every event or proceeding involving a countervailing duty order. Rather, and as the temporal language of the provision indicates, it is a requirement triggered at the outset of the investigation into the subsidization of a product, but before it begins doing so.

597. Articles 22.1 and 22.2 are similarly limited in their application, and take as their triggering event “the initiation of an investigation”. Article 22.1 requires that a public notice be made to Members and other interested parties, and specifies that this requirement is triggered “[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11”. Thus, like Article 13.1, the public notice requirement of Article 22.1 arises during a particular phase of the investigation, at the outset of the proceeding. Article 22.2, for its part, sets out the content requirements for the public notice referred to in Article 22.1, restricting its scope to “[a] public notice of the initiation of an investigation”.

## **2. The Interpretation that Articles 11, 13 and 22 of the SCM Agreement Apply Only to an Original “Investigation” is Consistent with the Findings of Panels and the Appellate Body**

598. Given the language and structure of the SCM Agreement, and the similar language and structure of the AD Agreement, findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*.<sup>871</sup> As the panel in *US – Zeroing (EC)* found:

relevant Appellate Body and panel reports reveal a clear pattern: the concept of an ‘investigation’ in countervailing duty and anti-dumping proceedings, when used to refer to a proceeding or phase of a proceeding, has been consistently distinguished from duty

<sup>871</sup> *US – Zeroing (EC)*, para. 7.181; *US – Carbon Steel (AB)*, para. 72; *US – Corrosion Resistant Steel Sunset Review*, para. 152; *US – OCTG from Argentina*, para. 294.

assessment and reviews as a unique phase with a distinct purpose, and, as a consequence, rules applicable to investigations have been found not to be *ipso facto* applicable to other phases of countervailing duty and anti-dumping proceedings.<sup>872</sup>

599. Of particular note are the findings by the Appellate Body in *US – Carbon Steel*, which held that the rules relating to due process in an investigation under Article 12 of the SCM Agreement also apply to reviews under Article 21, but only because Article 21 contains an express cross-reference to Article 12.<sup>873</sup>

600. The Appellate Body in that case further found that the *absence* of such a cross-reference similarly indicated the negotiators’ intention *not* to incorporate the requirements of one provision into another. Based upon this reasoning, the Appellate Body thus found that the *de minimis* requirements regarding an injury determination under Article 11.9 of the SCM Agreement – which governs investigations – did not apply to the injury determination made in the context of a sunset review under Article 21.3 of the SCM Agreement – which governs reviews. It stated that “the technique of cross-referencing is frequently used in the *SCM Agreement*,” and found that:

These cross-references suggest to us that, when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in another context, they did so expressly. In the light of the many express cross-references made in the *SCM Agreement*, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9.<sup>874</sup>

601. The Appellate Body also clearly distinguished investigations from subsequent reviews in *US – Oil Country Tubular Goods Sunset Reviews*. In that case, the Appellate Body found that, despite the fact that both provisions relate to the determination of injury to the domestic industry, Article 3.3 of the AD Agreement, which allows for a cumulative assessment of imports from more than one country, does not allow the same assessment for purposes of sunset reviews under Article 11.3 of the AD Agreement. The Appellate Body suggested that, in order for the requirements of an “investigation” provision to apply also to a “review” provision, either the former would need to expressly indicate that it applies to proceedings other than the original investigation, or one of the provisions must contain some reference to the other.<sup>875</sup>

602. The same reasoning applies to the provisions at issue here. That is, as described above, the terms of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 indicate that their requirements apply to events occurring early on in an “investigation”, and the provisions do not contain any reference that would broaden their scope to events or proceedings occurring after the completion

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<sup>872</sup> *US – Zeroing (EC)*, para. 7.186.

<sup>873</sup> *US – Carbon Steel (AB)*, para. 72.

<sup>874</sup> *US – Carbon Steel (AB)*, para. 69.

<sup>875</sup> *US – OCTG from Argentina*, paras. 294-300. The Appellate Body nevertheless went on to find that cumulation was permitted in sunset reviews because it was consistent with the policies underlying the Anti-Dumping Agreement.

of such an investigation. Furthermore, as also described above, Article 21, which does apply to subsequent “review” proceedings, does not contain a reference incorporating these provisions of Article 11, 13 and 22.

603. Based on the foregoing, then, it is clear that India’s claims regarding to Articles 11, 13 and 22 cannot succeed with respect to actions taken by Commerce in the context of administrative review proceedings. The United States therefore request the panel to find that India has failed to demonstrate that Commerce acted inconsistently with its obligations in this respect.

**D. Commerce’s Determination to Examine Additional Subsidies During Administrative Reviews Was Not Inconsistent with Articles 21.1 and 21.2 of the SCM Agreement**

604. 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 novel claim – that an investigating authority is prohibited from levying countervailing duties on subsidy programs during administrative reviews that were not examined in the original investigation – is a further result of its erroneous interpretation of the SCM Agreement.

605. Article 21 is entitled “*Duration and Review of Countervailing Duties and Undertakings*”, and sets out the circumstances under which an authority must “review the need for the continued imposition of [a] duty”, and what such a review may consist of.<sup>876</sup> Article 21 further specifies the circumstances under which a duty must be terminated.<sup>877</sup> Finally, Article 21 further provides that “the provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article.”<sup>878</sup>

606. India recognizes the distinction between “investigations” and “reviews” under the SCM Agreement, and concedes 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.”<sup>879</sup> Nevertheless, India suggests that a new investigation *is* required any time a Member grants a “new” subsidy for the production of a product already subject to a countervailing duty order. India’s interpretation would lead to an absurd result and would frustrate the ability of WTO Members to apply countervailing duties in the face of unfair trade practices.

607. India’s interpretation would allow an exporting country to receive a zero subsidy margin in every review simply by changing its programs. It would also require an investigating authority to orchestrate multiple investigations and reviews simultaneously. If such a process were necessary simply because the methods of subsidization identified in the review were not

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<sup>876</sup> See Article 21.2 of the SCM Agreement.

<sup>877</sup> See Articles 21.2 and 21.3 of the SCM Agreement.

<sup>878</sup> Article 21.4 of the SCM Agreement.

<sup>879</sup> India First Written Submission para. 622, citing *US - Carbon Steel*, para. 87; *US – OCTG from Mexico*, para. 119; *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107.

identical to those identified in the original investigation, Article 21 of the SCM Agreement would be rendered meaningless, and the purposes of the SCM Agreement with respect to countervailing duties would be undermined.

608. The SCM Agreement, through Article 12, provides for extensive procedural and evidentiary rules during review proceedings. And as explained above, Commerce also applied its own procedures to the initiation of these review proceedings. And as described above, Commerce also applied its own procedures to the initiation and conduct of these reviews. Notwithstanding Commerce’s actions in the reviews at issue, however, 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. As described above, 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 makes clear that the purpose of subsequent reviews is to “examine whether the continued imposition of a duty is necessary to offset subsidization.” By including in its reviews of this countervailing duty order allegations of additional subsidization programs with respect to the same product and the same companies at issue in the original investigation, Commerce was doing just that.

609. For these reasons, the Panel should reject India’s claims under Articles 21.1 and 21.2 of the SCM Agreement.

### **XIII. Commerce’s Determinations Were Not Inconsistent with Article 22.5 of the SCM Agreement**

610. India argues that Commerce did not adequately explain its rejection of a few specific arguments put forth by the respondents with respect to the SDF program, captive mining rights for iron ore and coal, and the sale of high grade iron ore by the NMDC.<sup>880</sup>

611. Article 22.5 of the SCM Agreement provides

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, *all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking*, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, *as well as the reasons for the acceptance*

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<sup>880</sup> India First Written Submission, paras. 625-639.

*or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.*<sup>881</sup>

612. Accordingly, the investigating authority must provide public notice of its determinations, including explanations of the legal and factual bases of the determination, and reasons for the acceptance and rejection of parties' relevant arguments. For each of the parties' arguments cited by India, Commerce explained the reasons for rejection, and thus met the obligations of Article 22.5. While it is clear that India disagrees with those reasons, the fact remains that Commerce did provide the information required under Article 22.5.

#### **A. In Relation to the SDF Programs**

613. During the challenged investigation, certain parties argued that the SDF Program was similar to the ECSC Program, which Commerce had investigated in an unrelated proceeding and found to be not countervailable.<sup>882</sup> Commerce rejected this argument, explaining that there were significant differences between the two programs, including that the ECSC Program operated using funds from producers' voluntary contributions, whereas the SDF Program operated using funds from a GOI-mandated consumer levy. India now contends that Commerce violated Article 22.5 of the SCM Agreement, because it did not provide sufficient explanation for its disagreement with parties' arguments regarding the ECSC Program. To the contrary, Commerce explained in detail its reasons for rejecting this argument.

614. During the investigation, certain parties noted Commerce's prior determination in a separate proceeding that the ECSC program did not provide a countervailable benefit where producers received payments from an operational budget funded by producers' voluntary contributions.<sup>883</sup> Those parties argued that Commerce should similarly find the SDF program not countervailable, because the funds for SDF loans was also created using Indian steel producers' funds. Commerce rejected this argument, responding:

In addition, we do not agree with respondents' contention that the SDF levies, much like the ECSC program, represented the integrated steel producers' own money and, thus, cannot constitute a government financial contribution. Under the ECSC program, producers make voluntary contributions to a pool of money using their own funds. Under the SDF program steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers. *Thus, rather than constituting the steel producers' own funds, the SDF levies, as*

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<sup>881</sup> SCM Agreement, Art. 22.5 (emphasis added).

<sup>882</sup> *Investigation Issues and Decision Memorandum*, at Comment 1 (Exhibit IND-7); see also *Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany*, 62 Fed. Reg. 54990, 54993 (October 22, 1997) (Exhibit USA-73).

<sup>883</sup> *Investigation Issues and Decision Memorandum*, at Comment 1 (Exhibit U.S.-4); see also *Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany*, 62 Fed. Reg. 54990, 54993 (October 22, 1997) (Exhibit USA-73).

*noted by petitioners, are analogous to tax revenues collected from consumers as mandated by the GOI.*<sup>884</sup>

615. Thus, Commerce clearly explained its reasons for finding that the SDF levies operated differently than the funds collected for the ECSC program. Unlike the ECSC funds, the SDF funds were collected from consumers, through mandatory price increases on certain steel products.

616. India contends that this explanation was not sufficient, and that the SDF funds cannot be characterized as a tax because “the JPC was not controlled by the GOI.”<sup>885</sup> India’s argument only highlights the fact that India’s disagreement is not with the adequacy of Commerce’s explanation for its decision, in accordance with Article 22.5 of the SCM Agreement, but rather with the substance of the decision itself. India cites to alleged similarities between the two programs, such as the fact that both the SDF and ECSC programs were initiated pursuant to government action, and that the High Authority of the ECSC was authorized to place levies on the production of steel and coal.<sup>886</sup> Neither of these alleged facts rebut Commerce’s explanation that unlike the ECSC levies imposed on *producers*, the SDF levies were the equivalent of a GOI-mandated tax imposed on and paid by *consumers*.

#### **B. In Relation to the Provision of High Grade Iron Ore by the NMDC**

617. India states that Commerce failed to consider in-country prices for iron ore where such prices were available.<sup>887</sup> As discussed at sections IX.C.3-IX.C.4, above, Commerce explained its determinations with respect to these arguments.

#### **C. In Relation to Captive Mining Rights for Iron Ore and Coal**

618. Finally, India argues that Commerce incorrectly assessed the grant of mining rights to Tata.<sup>888</sup> As discussed at section X.C, above, Commerce explained its determinations with respect to the grant of mining rights to Tata.

619. For the above reasons, this Panel should reject India’s claims under Article 22.5 of the SCM Agreement.

### **XIV. CONCLUSION**

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

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<sup>884</sup> *Investigation Issues and Decision Memorandum*, at Comment 1 (Exhibit U.S.-4) (emphasis added).

<sup>885</sup> India First Written Submission, para. 630.

<sup>886</sup> India First Written Submission, para. 629 (citations omitted).

<sup>887</sup> India First Written Submission, paras. 631, 638-639.

<sup>888</sup> India First Written Submission, paras. 632-637.