UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA: RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

(DS436)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE SUBSTANTIVE MEETING OF THE PANEL

February 15, 2019

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
Chile – Alcoholic Beverages (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
EC – Bed Linen (Article 21.5 – India) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EU – Fatty Alcohols (Panel)	Panel Report, European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia, WT/DS442/R and Add. 1, adopted 29 September 2017, as modified by Appellate Body Report WT/DS442/AB/R and Add. 1

Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Carbon Steel (India) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R, adopted 19 December 2014, as modified by Appellate Body Report, WT/DS/436/AB
US – Countervailing and Anti-Dumping Measures (Panel)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005

US – Countervailing Measures (Article 21.5 – China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/RW and Add.1, circulated 21 March 2018
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (Panel)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW
US – Pipes and Tube Products (Turkey)	Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, WT/DS523/R and Add. 1, circulated 18 December 2018 [on appeal]
US – Section 211 Appropriations Act (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R

US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
US – Washing Machines (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R

TABLE OF ABBREVIATIONS

Abbreviation	**Definition**
AD Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
ASTM	American Society for Testing and Materials
COMPAS	Commercial Policy Analysis System
CVD	Countervailing Duty
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Essar	Essar Steel India Limited
GOI	Government of India
IISCO	India Iron and Steel Company Ltd.
JPC	Joint Plant Committee
JSW	JSW Steel Limited
LTAR	Less than adequate remuneration
MML	Mysore Minerals Ltd
MMTC	Minerals & Metals Trading Corporation
NMDC	National Minerals Development Corporation
RINL	Rashtriya Ispat Nigam Limited
RPT	Reasonable Period of Time
SAIL	The Steel Authority of India Limited

SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SDF	Steel Development Fund
Tata	Tata Steel Limited
TPA	Turkish Prime Ministry Privatization Administration
USDOC	U. S. Department of Commerce
USITC	U.S. International Trade Commission
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.:	**Description**
USA-39	19 CFR § 351.104
USA-40	Memorandum to File Concerning "Verification of the Questionnaire Responses Submitted by Tata Steel Limited," dated April 17, 2008 ("2006 AR Tata Verification Report")
USA-41	2006 AR GOI Supplemental Questionnaire, dated November 6, 2007
USA-42	2006 AR GOI Supplemental Questionnaire Response, dated November 15, 2007: Tex Reports (excerpted)
USA-43	19 CFR § 207.10

I. PUBLIC BODY

Question 1: <u>To both parties</u>: India submits that "there is no positive evidence stating that mining is *per se* a governmental function in India or elsewhere" (para. 92, India's second written submission). Could the parties please comment on the following aspects of record evidence in relation to the USDOC's finding regarding mining iron ore as a "governmental function":

> **a. the extract on page 2 of the Dang Report of section 2 of the *Mines and Minerals (Development and Regulation) Act* 1957", which provides: "[i]t is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided"**
>
> **b. the references in para. 1.27 of the Hoda Report to the "State", the "regulator", and "State organisations" being involved in "min[ing]" and/or the "development of any mineral deposit"**

<u>Response</u>:

1. The record evidence referenced by the Panel's question provides further support for the USDOC's finding. It was among the evidence considered and supports the USDOC's determination that because the GOI owned 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," and that the NMDC was exploiting public resources on behalf of the GOI.[1] As stated previously, the USDOC's finding that mining iron ore is a "governmental function" in India is a finding that could have been reached by an objective and unbiased investigating authority.[2]

Question 2: India submits at para. 92 of its second written submission that:

> **… there must have been positive evidence on record before the USDOC to establish that mining iron ore or at a minimum, mining in general, must be "*ordinarily classified as governmental in the legal order*" of India and that it is also normally classified as a governmental function within other WTO members. The evidence relied upon by the USDOC in this case, however, does not include any reference or assessment of the legal provisions governing the functions of the GOI under the Indian legal set-up. Nor does it contain a study of whether or not mining iron ore or at a minimum,**

[1] United States' First Written Submission, paras. 170-171. *See also* USDOC Section 129 Other Issues Preliminary Determination, p. 6 (Exhibit IND-55); USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60).
[2] United States' Second Written Submission, para. 105.

mining in general, is otherwise classified as a governmental function within WTO member generally. (emphasis original)

d. <u>To both parties</u>: Does your domestic legal and administrative system provide for explicit designations of functions as "governmental"?

<u>Response</u>:

2. The United States responds to Questions 2(d) and 3 together, below.

Question 3: <u>To both parties</u>: Regarding the terms "governmental authority", "governmental functions", and "governmental conduct" referred to by the Appellate Body in relation to "public body" determinations:

a. What is the relationship between these terms? Are they synonyms, or do they refer to different concepts?

b. Is the same evidence/analytical process involved in identifying the possession of "governmental authority" and the performance of "governmental functions" for the purposes of "public body" determinations?

<u>Response</u>:

3. The United States responds to Question 2(d) and subparts a and b of Question 3 together.

4. Each of the terms to which Question 3 refers reflect different, but related concepts. The United States explains below its concerns that the various terms to which the Appellate Body has referred serve to confuse the "public body" inquiry, rather than assist it. At the outset, however, we note that there are different ways in which an entity may have "governmental authority," "and therefore different types of evidence may be relevant in this regard."[3] As the United States has explained previously, examining whether the functions or conduct of an entity are of a kind that are ordinarily classified as governmental is a consideration that *may* be relevant to the public body examination in a particular case; but it is not a factor that must be considered in every case.[4] Some third parties made similar statements in their third party submissions and at the third party session.[5] Rather, the conduct of the entity in question "must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates."[6] Further, "[i]n

[3] *US – Carbon Steel (India) (AB)*, para. 4.29.
[4] United States' Second Written Submission, paras. 102-105.
[5] Canada's Third Party Submission, paras. 8, 12; Japan's Oral Statement, para. 3.
[6] United States' First Written Submission, para. 155 (citing *US – Carbon Steel (India) (AB)*, para. 4.29).

the same way that 'no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.'"[7]

5. Therefore, India's focus on whether mining is a "governmental function" or constitutes the exercise of "governmental authority" misunderstands the requirements of Article 1.1(a)(1) and attempts to read into the Appellate Body's approach an element that is not present.[8] All the while, India fails to demonstrate that the USDOC's finding concerning the government function is not supported by the record evidence. In contrast, as the United States has explained, the USDOC's determination that "the GOI specifically established the NMDC to perform part of this function, *i.e.*, 'developing all minerals other than coal, petroleum oil and atomic minerals'" is based on record evidence and is one that an objective and unbiased investigating authority could have reached.[9]

6. However, as the Panel's question suggests, and as discussed further below in the U.S. response to Question 14, the Appellate Body's approach relating to "governmental function," "governmental conduct," and "governmental authority" appears to have confused both Members and adjudicators, and requires clarification.

7. The Appellate Body has offered a variety of statements on what an investigating authority *may* examine to facilitate its public body analysis.[10] It has correctly stated that a public body analysis should focus on the "core features of the entity and its relationship to the government."[11] But, in certain statements, the Appellate Body could perhaps be taken (erroneously) to have suggested that a public body may be found only where the conduct of that entity exhibits certain characteristics, so that, instead of determining whether the entity itself is "public" in nature (that is, of or pertaining to the public as a whole), the inquiry becomes whether the entity exhibits conduct that is "governmental" in nature. Given the vast array of activities performed by many governments, and the variation among and between governments of WTO Members, a focus on whether certain conduct is "governmental" could have the effect either of reading out of Article 1.1(a)(1) the term "public body" altogether, or establishing essentially different obligations for different Members, depending on the circumstances in each Member's territory at a particular time.

8. Article 1.1(a)(1) does not concern the nature of the behavior or conduct of an entity, however, but the nature or status of the entity itself. That is, Article 1.1(a)(1) of the SCM Agreement concerns whether there is a "financial contribution" by a government or any public body – and provides examples of transactions that may transfer economic resources.[12] The

[7] United States' Second Written Submission, para. 103 (citing *US – Carbon Steel (India) (AB)*, para. 4.29).
[8] United States' Second Written Submission, para. 105.
[9] United States' Second Written Submission, para. 105.
[10] United States' First Written Submission, paras. 155-157.
[11] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 310, 317, 345; *US – Carbon Steel (India) (AB)*, paras. 4.24, 4.36.
[12] For example, under Article 1.1(a)(1), where there is a "a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)," foregone or uncollected

purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government.

9. Thus, if a "financial contribution" 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. 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 there is an entity 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.

10. Thus, anytime an economic value is transferred, through one of the actions described in Article 1.1(a)(1) of the SCM Agreement, and that value belongs to, or is ultimately controlled by, the government, that transfer is necessarily, in the Appellate Body's words, an "exercise of governmental authority." That is, an entity that is meaningfully controlled by the government and engaged in conduct described in Article 1.1(a)(1) has "authority" over government resources.[13] Thus, in such circumstances, when an entity controlled by the government transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

11. Therefore, a proper interpretation of the text of Article 1.1(a)(1), in context, means that a public body is any entity a government meaningfully controls, such that when the entity conveys economic resources – whether acting to confer a benefit or not – it is transferring the government's own resources.[14] The financial contribution flowing to a recipient through the economic activity of an entity meaningfully 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.

12. As a result, focus on whether a function or conduct of an entity is "governmental" is not necessary because once the core features of an entity and its relationship with the government establish that an entity is a public body, any conduct by that entity is considered "governmental" for purposes of Article 1.1(a)(1).

Question 4: <u>To both parties</u>: India states at para 90 of its second written submission that "NMDC is one of many commercial entities which are merely permitted to operate or engage in mining" (italics removed). Please address the relevance (if any) of private, commercial entities performing the same function in competition with a governmental

"government revenue," "provid[ing] goods or services other than general infrastructure", "purchas[ing] goods," and "mak[ing] payments to a funding mechanism."

[13] As the Appellate Body has acknowledged, where there is evidence that a government meaningfully controls an entity, such that the government can use that entity's resources as its own, such evidence may be relevant for purposes of determining whether a particular entity constitutes a public body. *See US – Carbon Steel (India) (AB)*, para. 4.20.

[14] United States' First Written Submission, para. 153.

entity, for the purposes of characterising such a function as "governmental". For instance, does the performance of the same function by private, commercial entities remove the possibility that such a function can be characterised as "governmental" for the purposes of a public body determination?

Response:

13. The existence of private, commercial entities that are also engaged in mining in India does not preclude a finding that the function could be characterized as "governmental" for purposes of a public body determination. As detailed in the U.S. response to Question 3, because the focus of a public body analysis must be on the core features of the entity and its relationship with the government, once that analysis is completed and the entity is found to be a public body, any action or conduct by that entity is "governmental" (or better stated, "public") for purposes of Article 1.1(a)(1).

14. Nor does the fact that these private entities are engaged in an activity, that could, if performed by a government or public body, be termed a "governmental function" mean that these entities in fact are public bodies. Rather, while consideration of whether a function is governmental *may* be a relevant consideration in a public body analysis, an investigating authority's examination must determine whether the core features of the entity, and the relationship between the entity and the government demonstrate that the entity is a public body.[15]

Question 6: India appears to propose two alternative grounds on which the USDOC erred under Article 1.1(a)(1) of the SCM Agreement in its treatment of Miniratna status and the GOI's assertion of "enhanced autonomy":

> **a. that the USDOC erred by failing to accord "due significance" to the existing record evidence regarding the implications of Miniratna status (paras. 87 and 229-230 of India's second written submission); and**
>
> **b. that the USDOC erred by failing to seek further evidence and clarifications regarding the implications of Miniratna status, and likewise by failing to accept the voluntarily-submitted evidence on that point (paras. 73-74, India's first written submission)**

To both parties: If the Panel finds that the USDOC did not err by failing to accord "due significance" to the existing record evidence regarding the implications of Miniratna status, would there remain a basis for the Panel to examine the ground regarding a failure to seek further evidence and clarifications? Why/why not?

[15] *US – Carbon Steel (India) (AB)*, para. 4.29. As noted in response to Question 3, a public body is any entity a government meaningfully controls, such that when the entity conveys economic resources – whether acting to confer a benefit or not – it is transferring the public's resources. To the extent a governmental authority is relevant, it is that core authority of government over its resources.

Response:

15. The United States understands this question to relate to India's claim under Article 12.1 of the SCM Agreement, which challenges the USDOC's failure to seek relevant information concerning the NMDC's miniratna status in the Section 129 proceeding. As the United States explained in its submissions, India's claim has no merit. As this proceeding relates to the DSB's recommendations, neither the Appellate Body nor the original panel found that the USDOC had acted inconsistently by failing to seek out further information concerning miniratna. Instead, the Appellate Body faulted the USDOC for failing to consider information *on the existing record*.

16. Specifically, the Appellate Body observed that the USDOC did not "discuss in its determinations *evidence on record* regarding the NMDC's status as a Miniratna or Navratna company that could have been relevant . . . ."[16] The Appellate Body similarly stated that "the Panel did not, in our view, give proper consideration to India's argument that the USDOC failed to consider *evidence before it* regarding the NMDC's status as a Miniratna or Navratna company."[17]

17. Therefore, as these statements illustrate, the Appellate Body's finding was not based upon the USDOC's failure to seek additional information about the *miniratna* status of the NMDC, but rather, was based upon the USDOC's failure to address the information on the record before it. Accordingly, since this proceeding relates to the DSB's recommendations resulting from these findings, the Panel does not have a basis to further examine India's claim.

Question 7: To both parties: How should the Panel construe the following passage of the USDOC's final determination (Exhibit IND-60, p. 21):

> **With respect to the NMDC's "Mini Ratna" categorization, the GOI does not point to supporting record evidence that shows that this categorization reflects "enhanced autonomy" on the part of the NMDC. The Department disagrees that the record was deficient regarding NMDC's "Mini Ratna" status as it related to NMDC's autonomy.**

In particular:

> **a. Did the USDOC find that the existing record evidence regarding Miniratna status demonstrated sufficiently that Miniratna status did not accord the NMDC with a generalised "enhanced autonomy" – and for that reason, that the record was therefore not "deficient" on that point?**
>
> **or**

[16] United States' First Written Submission, paras. 189, 378 (citing *US – Carbon Steel (India) (AB)*, para. 4.54).
[17] United States' First Written Submission, paras. 189, 378 (citing *US – Carbon Steel (India) (AB)*, para. 4.40).

b. Did the USDOC find that there was a paucity of existing record evidence on the question of whether Miniratna status conferred "enhanced autonomy", but that record evidence on other points was sufficiently compelling so as to render questions of "enhanced autonomy" moot – and for that reason, that the record was therefore not deficient regarding Miniratna status and "enhanced autonomy"?

Response:

18. The United States responds to Questions 7 and 8 together, below.

Question 8: To both parties: The United States (para. 190, United States' first written submission; para. 98, United States' second written submission) and India (para. 85, India's second written submission) appear to concur that the USDOC considered that Miniratna status was consistent with a finding that the NMDC constituted a "public body". Do the parties accept that the USDOC used Miniratna status as corroborating evidence for its finding that the NMDC constituted a "public body"?

Response:

19. The United States responds to Questions 7 and 8 together.

20. The USDOC found that the existing record evidence regarding the NMDC's miniratna status demonstrated sufficiently that the status did not accord the NMDC with the alleged "enhanced autonomy," consistent with subpart (a) of Question 7. Specifically, in the Section 129 proceeding, the evidence before the USDOC that explicitly discussed "miniratna" consisted of the NMDC's website that stated that the NMDC was accorded the status of a "Public Sector Company by the GOI 'Mini Ratna' in 'A' category in its categorization of Public Enterprises," and the GOI's assertion in its supplemental questionnaire response that this meant the NMDC was given "enhanced autonomy with regard to investment decisions and personnel matters."[18] As the USDOC explained, despite the GOI's assertion that the NMDC had "enhanced autonomy," the GOI did not point to any record evidence to support a finding that NMDC operated independent of the government.[19]

21. To the contrary, the "miniratna" evidence supported the USDOC's determination that the NMDC was a public body. Specifically, the "miniratna" statement on the NMDC website clearly states that the NMDC was a "Public Sector Company" and that the GOI placed the NMDC in its "categorization of Public Enterprises."[20] The same website that stated that the NMDC was accorded the miniratna status, also stated that the NMDC was under the administrative control of the GOI.[21] Furthermore, as the United States previously explained, the

[18] United States' First Written Submission, para. 190.
[19] United States' First Written Submission, para. 190.
[20] USDOC Section 129 Other Issues Preliminary Determination, p. 6 (Exhibit IND-55).
[21] United States' First Written Submission, para. 179.

record evidence demonstrated that the NMDC's management and day-to-day operations were also meaningfully controlled by the GOI.[22] Therefore, the GOI's exercise of meaningful control over the operations of the NMDC, as extensively documented and examined by the USDOC, was apparently *consistent with* the miniratna status of NMDC.[23] The NMDC's miniratna status thus corroborated the USDOC's determination that the entity was a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Question 9: To both parties: Two ways identified by the Appellate Body for determining the existence of a "public body" are: (i) through "evidence that a government exercises meaningful control over an entity and its conduct"; and (ii) "express delegation of authority in a legal instrument". Are these two ways mutually exclusive, or can they co-exist, in respect of the same entity, for the purposes of a "public body" determination?

Response:

22. As recognized by the Panel's question, when the Appellate Body has provided guidance concerning the public body analysis, it consistently has called for a wide-ranging examination of a variety of kinds of evidence, because "no two governments are exactly alike," and "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[24] Therefore, depending on the facts of a case, there may be instances in which evidence of a government's exercise of meaningful control over an entity, and the express delegation of authority, coexist. As stated in the U.S. response to Question 3, a public body is any entity a government meaningfully controls, such that when the entity conveys economic resources, it is transferring the public's resources.

Question 10: To both parties: The NMDC's website in Exhibit USA-1, p. 2 of 4 (p. 8 of exhibit) states that:

> **NMDC has made valuable and substantial contribution to the national efforts in the mineral sector during the last four decades and has recently been accorded the status of schedule-A Public Sector Company by the GOI "Mini Ratna" in 'A' category in its categorisation of Public Enterprises.**

Does Miniratna status constitute a "legal instrument" that "delegates authority" for the purposes of a "public body" determination in the sense of para. 318 of Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*? Why/why not? Please comment with specific reference to passage of Exhibit IND-56, p. 100 of exhibit, which states (emphasis added):

[22] United States' First Written Submission, paras. 173-175.
[23] United States' First Written Submission, para. 190.
[24] *US – Carbon Steel (India) (AB)*, para. 4.29.

> **In pursuance of these objectives, the Government have decided to grant the enhanced autonomy and *delegation of powers* subject to the guidelines mentioned below. …**
>
> **The Government has decided the *following delegation of decision making authority to* the Boards of [Public Sector Enterprises]…**

Response:

23. With respect to the first portion of the Panel's question, the USDOC did not make a determination that the miniratna status constituted a legal instrument that delegates authority. Rather, the USDOC determined that the evidence demonstrated that the NMDC exercised a governmental function and that the NMDC was meaningfully controlled by the GOI. As discussed in the U.S. response to Questions 7 and 8, the NMDC's miniratna status was consistent with and corroborated the USDOC's determination that the NMDC was a public body.

24. With respect to the second portion of the question, which references Exhibit IND-56, this evidence was not before the USDOC and therefore cannot be considered by the Panel in its evaluation of USDOC's findings, as explained in the U.S. response to Question 15.

Question 13: To both parties: Please refer to the use of the term "administratively controlled" on p. 7 of Exhibit IND-18, and "controlled" on p. 8 of the same exhibit, in the following passages:

> **All the above mines are wholly owned by NMDC and operated by NMDC engineers and workers and are administratively controlled by its Corporate Office situated at Hyderabad, A.P.**
>
> **As stated above, NMDC is having full ownership over its mines and all the operations are controlled by Functional Directors headed by CMD of the NMDC who are based in corporate office located in Hyderabad A.P, India.**

In light of these passages, can the parties comment on the connotations that should be associated with the term "administrative control" as used by the NMDC and by the GOI in their parlance, with particular reference to the apparent suggestion at para. 85 of India's second written submission that the Panel should read the term "administrative control" to mean ownership and an ability to appoint Board members, as opposed to "meaningful control".

Response:

25. The GOI's initial questionnaire response in the 2006 administrative review, to which the question refers, does not define the meaning of "administratively controlled." Regardless, these

statements are consistent with the USDOC's determination that the GOI exercised meaningful control over the NMDC. That the mines of the NMDC are "controlled" – administratively or otherwise – by the NMDC does not change the fact that the NMDC itself, was under the meaningful control of the GOI.[25]

26. With respect to India's argument in its second written submission, to which the question refers, India attempts to undermine the USDOC's determination by citing to the United States' responses to panel questions in the original proceeding concerning the meaning of "administrative control."[26] As the Unites States previously explained, the issue before the Panel is not the reasoning provided by the United States in the original dispute; rather, "the task of a panel [is] to assess whether the *explanations provided by the authority* [in its determination] are 'reasoned and adequate' by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning."[27] The fact that the website of the NMDC stated that the entity was under the administrative control of the GOI was among the evidence on which the USDOC relied upon in determining that the GOI exercised meaningful control over the NMDC.

Question 14: <u>To both parties</u>: The United States argues that "Nothing in Article 1.1(a)(1) suggests that the existence of commercial behavior would be dispositive of whether a government exercises meaningful control over an entity and its conduct" (United States' second written submission, para. 93). How is the existence of non-commercial behaviour relevant to the "public body" analysis? Please respond by reference to the USDOC's finding that "the prices from the NMDC do not represent prevailing market conditions in India because the conditions of the market are being influenced by the GOI's policy considerations and actions, as described above, rather than by the activity of unfettered participants in a private market" (Final Determination, Exhibit IND-60, p. 21). Please also respond by reference to para. 7.61 of Panel Report, *US – Pipes and Tubes (Turkey)*.

<u>Response</u>:

27. As an initial matter, the United States made this assertion in response to India's argument that it "believes that setting-up commercial enterprises like NMDC involve the government operating in the private realm and such commercial enterprises cannot be considered to be public bodies."[28] As the United States explained, neither commercial behavior nor the realm in which an entity operates should be the focus of a public body inquiry.[29] Rather, the inquiry is on the entity itself.[30] This logic accords with the Appellate Body's approach to "public body," where it

[25] United States' First Written Submission, paras. 173-176.
[26] India's Second Written Submission, para. 85.
[27] United States' Second Written Submission, para. 97 (citing *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193) (emphasis added))).
[28] India's Second Written Submission, para. 90.
[29] United States' Second Written Submission, paras. 89-94.
[30] United States' Second Written Submission, para. 91.

has stressed that the focus of the public body examination properly is on the "core features of the entity concerned, and its relationship with the government in the narrow sense".[31]

28. As the United States explained previously, nothing in Article 1.1(a)(1) suggests that the existence of profit-maximizing, commercial behavior – or of non-market-oriented, non-commercial behavior – would be dispositive of, or even relevant to, whether a government exercises meaningful control over an entity and its conduct.[32] Indeed, it is not the case that a government, or a government-controlled entity, cannot act in a commercial manner or operate in the private realm.[33] Similarly, non-profit-maximizing, non-commercial behavior also does not add more to the inquiry of the relationship between the government and the entity. Rather, commercial behavior or non-commercial behavior goes to the issue of whether a benefit has been conferred.[34]

29. The implication of a finding to the contrary would mean that an entity that is otherwise meaningfully controlled by the government, or even vested with governmental authority, but operates in a profit-maximizing manner, could preclude the entity from being a public body. The result would be that all of its behavior – whether it provides a benefit or not – would be shielded from review under the SCM Agreement. Such a conclusion would remove a broad range of transfers of governmental economic resources from the disciplines of the SCM Agreement contrary to the terms of the Agreement.[35]

30. For similar reasons, the Panel should not find the *US – Pipes and Tubes Products (Turkey)* report, which is currently on appeal, to be persuasive. As set out in the U.S. appellant submission in that dispute, and below, the approach of the panel in that dispute was not based on the text of the SCM Agreement, nor did it reflect a correct understanding of the Appellate Body's approach to public body. Specifically, the panel in that dispute erred in its interpretation of Article 1.1(a)(1) of the SCM Agreement by: (1) determining that evidence of commercial behavior of an entity is necessarily relevant to a public body analysis; and (2) requiring evidence that a government has actually exercised control over an entity's operations, collapsing the analysis of public body with the entrustment and direction of a private body. The panel's errors

[31] United States' Second Written Submission, para. 91 (citing *US – Carbon Steel (India) (AB)*, para. 4.24 (emphasis added); *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345).
[32] United States' Second Written Submission, para. 93.
[33] United States' Second Written Submission, para. 93.
[34] *See US – Gasoline (AB)*, p. 23 (cautioning against adopting "a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").
[35] *See* Cartland, Depayre, & Woznowski. *Is Something Going Wrong in the WTO Dispute Settlement?* Journal of World Trade 46, no. 5 (2012), at 1004-05 ("Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing *what kinds of entities might provide 'gifts' to certain other entities*, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others' behaviour) for that entity to be able to provide gifts that might distort trade, *that is, to channel trade distorting government resources to particular recipients in an economy*." (italics added)).

reinforce the fact that the Appellate Body's approach relating to "governmental authority" has confused Members and adjudicators, and requires clarification.

31. With respect to commercial behavior, the panel in *US – Pipes and Tubes Products (Turkey)* erred when it found that such evidence was necessarily relevant.[36] As described above, nothing in the text of Article 1.1(a)(1) suggests that a "public body" cannot engage in "commercial behavior." In addition, the panel's finding in *US – Pipes and Tubes Products (Turkey)* was based on a misunderstanding of the statement by the Appellate Body in *US – Carbon Steel (India)* to which it referred.

32. Specifically, the Panel found that:

> In light of the Appellate Body's guidance that evidence that an entity conducts its operations and business on commercial principles may be relevant to the public body assessment, we are of the view that the USDOC's failure to consider this information in any meaningful way runs contrary to an investigating authority's obligation to evaluate and give due consideration to all relevant characteristics of the entity.[37]

33. Contrary to the panel's observations, however, the Appellate Body in *US – Carbon Steel (India)* did not state that Article 1.1(a)(1) requires the examination of evidence concerning whether an entity exhibits "commercial" behavior. Rather, the Appellate Body was addressing whether the underlying panel had considered whether the USDOC had taken into account specific pieces of evidence on its record. The Appellate Body found that the panel did not properly consider India's argument that the USDOC failed to consider evidence regarding the NMDC's possible status as a miniratna or navratna company.[38] India had argued the status meant that the government had conferred greater autonomy on designated public sector enterprises to make them more efficient and competitive, and it was in the context of this discussion that the Appellate Body cited a statement by the GOI that the NMDC "is operating in a commercial, market driven de-regulated environment and conducts its operations and businesses on commercial principles."[39] Therefore, the panel in *US – Pipes and Tubes Products (Turkey)* was simply wrong that the Appellate Body in this dispute found that commercial behavior was necessarily relevant to an analysis of public body.

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[36] *US – Pipes and Tubes Products (Turkey)*, para. 7.61 [on appeal].
[37] *US – Pipes and Tubes Products (Turkey)*, para. 7.61 (emphasis added) [on appeal]. *See also id.*, para. 7.58 ("The Appellate Body has observed that an investigating authority undertaking a public body analysis should take into account all evidence on the record regarding the relationship between the government and the entity at issue, *which may include evidence that the entity operates "in a commercial, de-regulated environment and conducts its operations and businesses on commercial principles.*") [on appeal].
[38] *US – Carbon Steel (India*) (*AB*), paras. 4.40-4.41.
[39] *US – Carbon Steel (India) (AB)*, para. 4.40.

34. Rather, consistent with what the Appellate Body has found, while evidence of a government's conferral of autonomy on an entity may be relevant to determining "the degree of control by the [government] and the degree of autonomy enjoyed by the [entity],"[40] evidence of profit-maximizing, commercial behavior is not.

35. Indeed, the issue under Article 1.1(a)(1) is not whether the *conduct* of the entity is governmental. Rather, as previously discussed, the question is whether the *entity* engaging in the conduct is governmental or pertaining or belonging to the people, i.e., whether the entity is "*a government* or any *public body*."[41] Focus on the specific *conduct* of an entity would be relevant to an analysis of benefit, for example,[42] or when examining whether there was government entrustment or direction of a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement.

36. It is important to recall that Article 1 is defining a subsidy by a Member and begins by identifying those entities which may make a "financial contribution." A Member can make the financial contribution directly through its "government" or through a "public body." In this way, the relevant conduct of the entity is attributable to the Member because of the governmental or "public" nature of the entity. Whether that entity's conduct results in a subsidy, however, will depend on whether a benefit is thereby conferred within the meaning of Article 1.1(b).

37. On the other hand, a "private body" may be found to provide a financial contribution attributable to a Member through the conduct described in Article 1.1(a)(1)(i)-(iii) only when it is "entrust[ed] or direct[ed]" by the government to do so. That is, a private body may make a financial contribution if the government entrusts or directs the private body "*to carry out* one or more of the functions illustrated in (i) to (iii)." Accordingly, as the Appellate Body has correctly explained, the entrustment or direction must be linked to the private body's *conduct*.[43]

38. By requiring specific evidence that the Turkish Prime Ministry Privatization Administration (TPA) in fact *exercised* its veto power or sought to influence Erdemir's pricing, production or financial decisions,[44] the panel in *US – Pipes and Tubes Products (Turkey)* considered that an investigating authority must find that the government (TPA) directed the conduct (pricing, production, and other decisions) of the entity in question. The panel's approach conflates the public body analysis with that of entrustment and direction, which would

[40] *US – Carbon Steel (India) (AB)*, para. 4.44.
[41] The New Shorter Oxford English Dictionary, p. 2404 (1993) (definition of "public": "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation").
[42] For example, Article 14(d) of the SCM Agreement specifies that: "the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to *prevailing market conditions* for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" (emphasis added).
[43] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (a private body is found to have made a financial contribution when there is "an affirmative demonstration of the link between the government and the specific *conduct*" (emphasis in original); "*all conduct* of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause subparagraph (iv)" (emphasis added)).
[44] *US – Pipes and Tubes Products (Turkey)*, para. 7.42 [on appeal].

render the term "public body" meaningless. Under the panel's interpretation, to find a financial contribution involving any entity other than the government in the narrow sense, an investigating authority would need to show the government's control *over the conduct* in question. The panel's approach in *US – Pipes and Tubes Products (Turkey)* effectively denies that any analysis of the entity or its core attributes is necessary to analyze whether the entity is a public body.

39. India's position that commercial behavior is necessarily relevant to a public body inquiry, also essentially assumes that a government must be found to actively control business transactions performed by a public body. Permitting this assumption would mean that a government not exercising control over an entity's business decisions for a period of time (during which profit-maximizing behavior occurs) would result in a finding that an entity is not a public body. Thus, all of the entity's actions would be shielded from the disciplines of the SCM Agreement, even where there is evidence that the government has the ability to intervene and control the entity when it chooses. This would result in the absurd outcome that an entity can be a public body for some periods of time (when the government actively controls the entity's behavior), but not a public body for other periods of time (where there is no evidence the government has exercised its ability to control). This cannot be the case. Therefore, neither profit-maximizing, commercial behavior, nor non-profit maximizing, non-commercial behavior is relevant to a public body analysis.

40. Lastly, the question references the USDOC's conclusion that the NMDC prices did not represent prevailing market conditions in India. The United States confirms that this statement was with respect to the benchmarks issue, and did not relate to the USDOC's public body finding. This is indicated by the preceding sentence that references Comment 4B of the final determination, which concerned the NMDC's export price to Japan as an iron ore benchmark.[45]

Question 15: Exhibit IND-56 is marked "Rejected & Retained Document" by the USDOC:

> **a. <u>To the United States</u>: Was this document admitted to the record (i.e. "retained"), but refused consideration (i.e. "rejected"), or was it rejected from the record and thus fails to appear on the record altogether?**
>
> **b. <u>To the United States:</u> According to the United States' explanation (para. 380, United States' first written submission; para. 109, United States' second written submission) and Exhibit USA-16, the new evidence was rejected because it was filed after the deadline. Should the Panel infer from this that there was a time-period at some stage during the Section 129 reinvestigation during which the GOI would have permissibly been able to submit new evidence to the record? Would this evidence have been accepted if it had been submitted on time during the Section 129 reinvestigation? If not, can the United States explain the substantive rationale as to why no new evidence was permitted to be admitted during the Section 129 reinvestigation regarding "public body"? In particular, can the United States please comment on the considerations referred to in para. 7.254 of Panel**

[45] USDOC Section 129 Final Determination, p. 21 (Exhibit IND-60).

Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, and how/whether similar considerations should be applied by the Panel in the present case?

Response:

41. With respect to subpart a of this question, pursuant to the USDOC's regulations, the GOI's rejected case brief was kept on the record, "solely for the purposes of establishing and documenting the basis for rejecting the document."[46] However, the arguments and exhibits contained within the document were not eligible for consideration because the USDOC's regulations prohibit the agency from using rejected information.[47] Therefore, the content of the rejected case brief was not information on the record.

42. Regarding subpart b, as described in Exhibit USA-16, the USDOC rejected the GOI's case brief (Exhibit IND-56) because the case brief contained untimely filed factual information. Specifically, the new factual information was considered untimely because "[t]he information contained in the GOI's case brief's exhibits and arguments were not placed on the record of the administrative reviews that cover these [Section 129] proceedings."[48] Therefore, because the information did not already exist on the records of the underlying administrative reviews at issue, the USDOC rejected the GOI's attempt to submit the information in the context of the Section 129 proceeding.

43. The Section 129 proceeding with respect to public body was not an opportunity for parties to begin anew and submit additional information they failed to submit in the original proceedings. The Appellate Body did not find that the USDOC had acted inconsistently for failing to permit or seek additional information concerning the issue of public body. Rather, the Appellate Body faulted the USDOC for failing to discuss in its determinations *evidence on the record* that could have been relevant to the evaluation of the relationship between the GOI and the NMDC.[49]

44. The Section 129 proceeding at issue here is not analogous to the proceeding at issue in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. In that dispute, the proceeding involved the participation of a new interested party, and the provision by the interested parties of new evidence on the record.[50] Thus, the panel found that the factual circumstances relating to the new measure was different from the original measure, which was based on the insufficiency of information due to the nonparticipation of interested parties in the

[46] 19 CFR § 351.104(a)(2)(ii) (Exhibit USA-39).
[47] 19 CFR § 351.104(a)(2)(i) ("The Secretary, in making any determination under this part, will not use factual information, written argument, or other material that the Secretary rejects.") (Exhibit USA-39).
[48] Letter to S. Seetharaman, Representatives to the Government of India, "Section 129 Implementation of DS436; United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Rejection of Case Brief," March 30, 2016 (Exhibit USA-16).
[49] *US – Carbon Steel (India) (AB)*, para. 4.54.
[50] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.247.

original proceeding.[51] Here, on the other hand, the underlying administrative reviews involved the same parties as the ones in the Section 129 proceeding, and were not based on the insufficiency of information due to the nonparticipation of those parties. And because the United States was not obliged to accept or seek out new information in order to bring its determination into compliance with Article 1.1(a)(1), no new evidence was accepted in this respect.

Question 16: <u>To both parties</u>: How, if at all, may the Panel use Exhibit IND-56, including its new factual information that was rejected by the USDOC but has been resubmitted in the present compliance proceedings? In particular, would it be permissible for this Panel to use such material as corroborating evidence in assessing whether the USDOC's establishment and evaluation of the facts on the record was unbiased, objective, and proper?

In your response, please also comment on the use by the panel and Appellate Body in *EU–Fatty Alcohols* of "documents authored by the interested parties but not placed on the record of the anti-dumping investigation at issue" (Panel Report, *EU – Fatty Alcohols* fn 224 and para. 7.65; and Appellate Body, *EU – Fatty Alcohols*, fns 262 and 302). Does the use of documents not placed on the record of investigation by the panel and Appellate Body in in *EU – Fatty Alcohols* reflect an approach that the Panel could adopt in the present case?

<u>Response</u>:

45. As discussed above, the content of the rejected case brief was not information on the record. Because "the task of a panel [is] to assess whether the explanations provided by the authority [in its determination] are 'reasoned and adequate' by testing the relationship between *the evidence on which the authority relied* in drawing specific inferences, and the coherence of its reasoning,"[52] the Panel should decline India's invitation to conduct *de novo* review of evidence and argumentation that could not be considered by the USDOC.

46. Because the USDOC could not consider the rejected case brief, the Panel also should not consider the document as "corroborating evidence" because a panel should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[53] To the extent that the panel in *EU – Fatty Alcohols* relied on non-record evidence to make its findings, those findings would not comport with this standard. Therefore, the approach of the panel in *EU – Fatty Alcohols* is not one that this, or any, panel should adopt.

47. Moreover, the situation faced by the panel in *EU – Fatty Alcohols* was not similar to the situation in this dispute. There, the panel used non-record evidence to "corroborate" existing

[51] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.245.
[52] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193) (emphasis added).
[53] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).

record evidence.[54] Here, on the other hand, India seeks for the Panel to use non-record evidence to attack (and not corroborate) the existing record evidence. With respect to the Appellate Body's footnote citation to non-record documents, it is not clear the reason, or basis upon which, this reference was made; the Appellate Body did not discuss, much less endorse, the panel's use of non-record evidence as corroborating evidence.[55]

Question 18: <u>To both parties</u>: India states that the export restriction "was a legal mandate applied by the GOI to all iron ore exporters and *it is not the case that the NMDC voluntarily decided to not export iron ore*" (para 78, India's first written submission, emphasis added). Can the parties please comment on how this argument relates to the statement of the NMDC Chairman that the "NMDC is exporting iron ore *only* to meet its commitment under long term contract" (Dang Report, (Exhibit USA-2) p. 185, emphasis added). In particular, does limiting exports to only those under long term contracts involve "voluntarily decid[ing] not to export iron ore" in circumstances where the volume of exports under those contracts was lower than the legal maximum under the export cap (as indicated in India's second written submission, para. 100 (quoting Verification Report, Exhibit IND-13, p. 8))?

<u>Response</u>:

48. As explained in the United States' first written submission, the GOI-appointed board of directors' involvement in price negotiations, and the GOI's export restriction policy on high-grade iron ore were some of the means by which the GOI exercised meaningful control over the NMDC and its conduct (*i.e.*, the sale of high grade iron ore).[56]

49. Specifically, the GOI's control over the board of directors was one of the means by which the GOI exercised meaningful control over the NMDC and ensured that the NMDC did not exceed the export caps.[57] The USDOC explained that it was the GOI-appointed board of directors – not the staff members – that were the ones that held the negotiations with the customers to discuss the actual price and quantity of the contracts.[58] Furthermore, as the United States previously explained, record evidence also indicated that the NMDC's chairman, who was selected by the GOI, must approve such negotiations before the contract was submitted to the Board for ratification.[59] The USDOC also explained that additional record evidence demonstrated that the NMDC's chairman recommended that the export of iron ore be disallowed

[54] *EU – Fatty Alcohols (Panel)*, para. 7.65.
[55] *EU – Fatty Alcohols (AB)*, nn. 262, 302.
[56] United States' First Written Submission, paras. 174-175.
[57] United States' First Written Submission, para. 173.
[58] United States' First Written Submission, para. 174 (citing USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60); 2004 AR Verification Report, p. 6 (Exhibit USA-3)).
[59] United States' First Written Submission, para. 175 (citing USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60); 2004 AR Verification Report, p. 6 (Exhibit USA-3)).

except for long term contracts – a position that was consistent with the GOI's policies and actions, and not demonstrative of unfettered participants in a private market.[60]

50. Furthermore, the fact that the NMDC did not exceed the export cap only serves to corroborate the USDOC's finding that this export restriction was closely monitored and enforced by the GOI.[61] As the USDOC explained in the Section 129 Final Determination, the GOI officials told the USDOC that through "canalization restrictions," the GOI "capped the volume of the NMDC's high grade iron ore that could leave the country and designated the MMTC, a trading company, as the sole firm eligible to export NMDC's high grade iron [ore]."[62] Furthermore, "[t]he Ministry of Commerce monitors the export of high grade through the MMTC and the MMTC keeps records of all high-grade iron ore that is exported to make sure that Bailadila [mine] does not exceed its caps."[63] Therefore, the fact that the NMDC followed the GOI's export restriction policy and never exceeded the export caps supports the USDOC's determination that the export restriction policy was another means by which the GOI exercised meaningful control over the NMDC.

Question 19: <u>To both parties</u>: The NMDC is cited in the Dang Report as recommending that the "[e]xport of lump ore should be discouraged to meet domestic demand", and that "[t]he raw material being natural reserves should be available adequately for the domestic industry and exports should not be at the cost of domestic industry" (Dang Report, (Exhibit USA-2) pp. 204 and 206). The Hoda Report states that "[i]t is clear from the description given above that it is the GOI's intention to restrict export of iron ore with Fe content higher than 64 per cent, with a view to ensuring that exports do not take place at the cost of supplies to domestic steel producers" (Hoda Report, Exhibit USA-8, para 7.61). Please explain the relevance of these aspects of evidence, if any, to the USDOC's conclusion (Final Determination, Exhibit IND-60, p. 16, fn omitted) that "the NMDC's export prices are set with GOI policy considerations in mind and, therefore, record evidence establishes that they are unreliable as a viable Tier II benchmark." Could the <u>United States</u> also please identify the "GOI policy considerations" that were being referred to?

<u>Response</u>:

51. The conclusion to which the question refers relates to the USDOC's determination that the NMDC export prices were not viable as a benchmarking source. As explained in the United States' submissions, in its Section 129 Determinations, the USDOC explained that the NMDC export prices could not be used as a benchmark because they were not market determined. Specifically, the USDOC explained that the NMDC export prices did not represent a market

[60] United States' First Written Submission, para. 174 (citing USDOC Section 129 Final Determination, pp. 20-21 (Exhibit IND-60); *Dang Report*, p. 185 (Exhibit USA-2)).
[61] United States' Second Written Submission, para. 173.
[62] United States' First Written Submission, para. 175 (citing USDOC Section 129 Final Determination, pp. 14, 21 (Exhibit IND-60); 2004 AR Verification Report, p. 8 (Exhibit USA-3)).
[63] United States' First Written Submission, para. 175 (citing USDOC Section 129 Final Determination, pp. 14-15 (Exhibit IND-60); 2004 AR Verification Report, p. 8 (Exhibit USA-3)).

derived price because they were distorted by the fact that the GOI controlled the price, through: (1) controlling government ownership of both NMDC and the exporter MMTC; (2) the domination of the two entities by India appointed officials; (3) the corporate directors' key role in setting export prices; (4) the GOI's export restrictions on iron ore by placing caps on the quantities exported; and, (5) the close monitoring of both entities by the Ministry of Steel as "strategic companies."[64]

52. The USDOC's reference to the GOI's policy considerations referred to the GOI's export restrictions policy on high-grade iron ore exports.[65] Specifically, GOI officials told the USDOC that the NMDC was the only mining company that mines in Bailadila, where the mines contain high grade iron ore, and that "[o]ther mines do not have this restriction limit."[66] The USDOC then observed that evidence demonstrated that through "canalization restrictions," the GOI "capped the volume of the NMDC's high grade iron ore that could leave the country and designated the MMTC, a trading company, as the sole firm eligible to export NMDC's high grade iron [ore]."[67] The GOI also disclosed at verification that the MMTC, a trading company, was the sole firm eligible to export the NMDC's high grade iron ore, and that "[t]he Ministry of Commerce monitors the export of high grade through the MMTC and the MMTC keeps records of all high-grade iron ore that is exported to make sure that [the] Bailadila [mine] does not exceed its caps."[68] The USDOC then further explained that the GOI was able to ensure that its export restrictions were followed by means of its control over both the NMDC and MMTC.[69] The information within the *Dang Report* and the *Hoda Report* to which the question refers provides further support to the USDOC's determination that because of the GOI's export restrictions policy, the NMDC export prices were not a reliable source for benchmarks.

Question 20: <u>To both parties</u>: How does the following answer by the GOI in its questionnaire response in Exhibit IND-18 (p. 7 of exhibit) relate to the USDOC's explanation regarding the NMDC's process for price negotiations, and India's rebuttal of that explanation at para. 77 of India's first written submission?

[64] United States' First Written Submission, paras. 304-309, 315-319.
[65] United States' First Written Submission, para. 305; USDOC Section 129 Final Determination, pp. 14-15 (Exhibit IND-60).
[66] United States' First Written Submission, para. 183 (citing 2004 AR Verification Report, p. 8 (Exhibit USA-3)).
[67] United States' First Written Submission, para. 305 (citing USDOC Section 129 Final Determination, p. 14 (citing 2004 AR Verification Report, p. 8 (Exhibit USA-3)) (Exhibit IND-60)).
[68] United States' First Written Submission, para. 305 (citing USDOC Section 129 Final Determination, pp. 14-15 (citing 2004 AR Verification Report, p. 8 (Exhibit USA-3)) (Exhibit IND-60)).
[69] United States' First Written Submission, para. 306.

> d. Explain how high-grade iron ore prices were set by the NMDC during the POR.
>
> *For fixation of prices during the year 2005-06, an expert committee was set up by the GOI which has suggested formula based fixation of prices related to at which NMDC exports its iron ore to Japanese Steel Mills (JSMs). The long-term agreements signed during 2005-06 with various domestic steel producers incorporated the pricing formula suggested in Ganeshan Committee recommendations for fixation of prices during 2005-06 and onwards (up to 2009-10). Prices for the year 2005-06 and 2006-07 have been fixed as per the guidelines suggested by Ganeshan Committee.*

Response:

53. The statement referenced in the question is consistent with the description provided by the NMDC and MMTC officials at the 2004 administrative review verification, where the officials described how international sales prices were set and how the Tex Report functions as a guideline.[70] Thus, while there is a "formula based fixation of prices" that serve as a guideline, the NMDC officials also explained at the verification that the directors – not the staff members – were the ones that held the negotiations with the customers to discuss the actual price and quantity of the contracts.[71] Furthermore, as the United States previously explained, record evidence also indicated that the NMDC's chairman, who is selected by the GOI, must approve such negotiations before the contract is submitted to the Board for ratification.[72]

54. Therefore, the information referenced in the question does not undermine the USDOC's determination that the GOI was involved in the day-to-day operations of the NMDC, including its price negotiations. Indeed, the statement discusses the fact that "an expert committee was *set up by the GOI* which has suggested formula based fixation of prices related to at which NMDC exports its iron ore to Japanese Steel Mills." Thus, the GOI's response to this question provides further support for the USDOC's determination that the GOI exercised meaningful control over the NMDC, such that it found the entity to be a public body within the meaning of Article 1.1(a)(1).

II. BENEFIT – ARTICLE 14(D)

Question 23: To the United States: At para. 277 of the United States' first written submission, the United States remarks:

> **India then argues that the association chart contained actual prices that the USDOC could have used, specifically the 2005-**

[70] 2004 AR Verification Report, pp. 6-7 (Exhibit USA-3).
[71] United States' First Written Submission, para. 174 (citing USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60); 2004 AR Verification Report, p. 6 (Exhibit USA-3)).
[72] United States' First Written Submission, para. 174 (citing USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60); 2004 AR Verification Report, p. 6 (Exhibit USA-3)).

> **06 column allegedly covered at least the first quarter of the 2006 period of investigation. However, as explained above, 2006 was also contained in the "2006-07 (P)" column that listed provisional prices (footnotes omitted).**

How does the United States intend the Panel to understand this argument? In responding, please address, in particular, whether the United States accepts that the 2005-06 column of the association price chart (Exhibit IND-36, p. 24) contained data that: (i) was not designated "P"; and (ii) overlapped, in part, with the period of investigation. If the United States does not accept this, please explain why, by reference to record evidence as appropriate.

Response:

55. The United States responds to Questions 23 and 26 together, below.

Question 26: To both parties: India states that "the actual prices pertaining to 2005-06 cover at least the first quarter of the period of investigation" (para 126, India's second written submission).

a. Can the parties please clarify for the Panel why the 2005-06 would overlap only with the first quarter of the POI, as opposed to e.g. the first half-year?

b. Can the parties please comment on whether anything in the association price chart or otherwise on the reinvestigation record shows whether, and how, the 2005-06 prices listed in that chart could have been disaggregated to match the period of investigation in order to reliably evince market-determined prices prevailing during that period?

Response:

56. The United States responds to Questions 23 and both subparts a and b of Question 26 together.

57. India's assertion that the 2005-06 column of the association chart contained actual prices and cover at least the first quarter of 2006 is unsupported. While the 2005-06 column was not designated with the (P) marker, and therefore were not labelled as provisional prices, it was also unknown whether they reflected actual transactions.[73] Thus, contrary to India's assertion, the association chart is *not* clear that the 2004-05 and 2005-06 columns represent the "prevailing market prices in the relevant period," nor does it "specifically state[] that these are prices of iron

[73] United States' Second Written Submission, para. 142.

ore and not notional or price estimates."[74] The chart also does not state that the prices are transactional.[75]

58. The association chart also was not accompanied by any explanation or evidence that demonstrated what period of 2006 was contained in the 2005-06 column. Therefore, not only was it unclear whether the 2005-06 column contained actual transactions, but it was also not possible for the USDOC to disaggregate the data. All that the chart affirmatively demonstrated was that 2006-07 column was followed by a "(P)" marker, which was defined in the chart as "provisional."[76] Therefore, an objective and unbiased investigating authority, upon reviewing such evidence, could have determined that the association chart did not demonstrate that the 2006 prices were actual transactions, and thus, it was not an appropriate benchmarking source.

Question 27: To <u>both parties</u>: Do the parties agree that the 2004-05 prices in the association price chart fall outside of the period of investigation, and are therefore not relevant to the Panel's analysis of the USDOC's treatment the association price chart? If not, please explain how the 2004-05 prices are relevant to the Panel's analysis.

<u>Response</u>:

59. The 2004-05 column could be relevant if it were to provide additional explanation as to what the prices in the 2004-05 and 2005-06 column meant. However, because the 2004-05 column does not provide anything further, the prices are not relevant to the issue of whether the association chart was an appropriate benchmarking source for the 2006 calendar year.

Question 28: To <u>both parties</u>: Is there any record evidence that evinces: (i) the clarifications made by India in parentheses in para. 152 of India's second written submission; and (ii) India's assertion in para. 153 "[i]t is clear from the names of the three entities listed in the second column that these are <u>selling</u> entities i.e. Mysore Minerals Ltd., SJ Harvi Mines, and TATA" (underlining added)? Please explain, by reference to record evidence, how or why it would be "clear" to an investigator that these were "<u>selling</u> entities". For instance, could the following aspects of the Panel Report in the original proceedings suggest that Tata and MML could also have been purchasers of iron ore: Panel Report, *US – Carbon Steel (India)*, paras. 7.148 and 7.459.

<u>Response</u>:

60. The United States responses to Questions 28, 29, 30 and 31 together, below.

Question 29: <u>To the United States</u>: In its Preliminary Determination, the USDOC appeared to consider the entities listed for some transactions in the association price chart to be "selling entities": "With respect to the association chart, the data provided therein,

[74] India's Second Written Submission, para. 124.
[75] United States' Second Written Submission, para. 142 (citing Tata's Supplemental Questionnaire Response, p. 17 (Exhibit IND-33); GOI Supplemental Questionnaire Response, p. 5 (Exhibit IND-34)).
[76] United States' Second Written Submission, para. 142.

with three exceptions, does not identify the entities selling the iron ore" (Preliminary Determination Exhibit IND-55, p. 10, underlining added). In the Final Determination, the USDOC appeared to consider it unclear as to whether the entity listed was a buying or selling entity: "It is not clear the selling or the buying party [sic]" (Final Determination, Exhibit IND-60, p. 10, underlining added). Can the United States confirm that the final conclusion of the USDOC was that, for the entities listed for some transactions in the association price chart, it was unclear whether they were the selling entities or the buying entities? If so, can the United States also please point to any material on the record or in the determinations that explains this apparent change in approach by the USDOC?

Response:

61. The United States responds to Questions 28, 29, 30, and 31 together, below.

Question 30: To both parties: Is it possible that the NMDC was one of the transacting entities for each of the prices listed in the association price chart (at p. 24 of Exhibit IND-36)? Please explain how/why, including by reference to record evidence as appropriate.

Response:

62. The United States responds to Questions 28, 29, 30, and 31 together, below.

Question 31: To both parties: Is it possible that a government entity or a related party was a purchaser for each of the prices listed in the association price chart (at p. 24 of Exhibit IND-36)? Please explain how/why, including by reference to record evidence as appropriate.

Response:

63. The United States responds to Questions 28, 29, 30, and 31 together.

64. In the Section 129 Final Determination, the USDOC determined that it was unclear whether the association chart listed buying or selling entities.[77] The USDOC altered its findings in the final determination because, after revaluating the chart, it determined that the chart could not support its preliminary determination that the chart contained selling entities.[78]

65. Therefore, while it may certainly have been possible that entities such as Mysore Minerals Ltd. ("MML"), Tata, the NMDC, or a government entity or a related party were purchasers, the association chart does not demonstrate one way or another the answer to that question. Because the association chart was unclear, India has not shown that an objective and unbiased investigating authority could not have reached a determination that the association chart

[77] USDOC Section 129 Final Determination, p. 10 (Exhibit IND-60).
[78] USDOC Section 129 Final Determination, p. 10 (Exhibit IND-60).

did not clearly indicate the buying and selling entities, as the USDOC determined in the Section 129 Final Determination.[79]

Question 32: <u>To both parties</u>: According to p. 4 of Exhibit IND-35, the GOI provided the association price chart in response to the following question: "Please provide information, if any is available to the GOI regarding market prices in India for iron that is available to consumers in India".

a. Did the USDOC make clear, or was it otherwise apparent from the surrounding circumstances, how the USDOC intended to use the information requested through the question extracted above from Exhibit IND-35? Please explain by reference to appropriate evidence or explanations on the record.

b. Was the question extracted above from Exhibit IND-35 the only occasion where the USDOC sought information from the GOI, and/or from other interested parties, on in-country prices of iron ore for the purposes of establishing a benchmark to ascertain whether the NMDC's sales of high-grade iron ore conferred a benefit? If not, please identify the other instances where such information was sought, and please identify the response (if any) that was provided.

c. In the question extracted above from Exhibit IND-35, the USDOC requested "information… regarding market prices in India". Did the USDOC prescribe – either in the originally-challenged investigation or the Section 129 reinvestigation – what elements that information should entail, such as e.g. price lists or transaction- specific prices listing the identities of the buyer/seller and the terms of sale? If the USDOC prescribed that the information must contain certain elements after posing the question extracted above, was the GOI or any other interested party afforded an opportunity to resubmit the information in order to comply with the parameters prescribed by the USDOC? Please explain by reference to appropriate evidence or explanations on the record.

d. Did the USDOC deem the information submitted by the GOI in response to the question extracted above from Exhibit IND-35 to be insufficient? If so, was the GOI treated as uncooperative in that regard? Please explain by reference to appropriate evidence or explanations on the record.

e. Assuming that the USDOC considered the association price chart to be lacking clarity in important respects, did the USDOC take any steps to

[79] USDOC Section 129 Final Determination, p. 10 (Exhibit IND-60).

achieve clarification of those points, either in the original reviews or the Section 129 reinvestigation?

f. Can the United States please explain the context in which the USDOC was provided the association price chart and the price quote by Tata at the verification visit, as reflected in Exhibit IND-36 pp. 23-24? For instance, does anything on the record demonstrate: (i) the specific information request made of Tata by the USDOC; (ii) whether this was the first and/or only time that this specific information request was made of Tata by the USDOC; and (iii) whether the USDOC deemed the information provided by Tata in response to that request for information to be insufficient, with Tata being treated as uncooperative in that regard?

g. Can the parties please comment on the matters raised in subparagraphs (a)-(f) of this Question in relation to the Appellate Body's considerations in the original proceedings at paragraph 4.152, namely that the benefit analysis under Article 14(d) requires investigating authorities to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts?

Response to subparts a-e, and g:

66. The United States responds to subparts a through e, and subpart g together.

67. Exhibit IND-35 is one of the supplemental questionnaires that was issued to the GOI in the 2006 administrative review. In the initial questionnaire sent to the GOI, the USDOC first explained that in the previous administrative review, it had found that the GOI provided high grade iron ore for less than adequate remuneration.[80] Therefore, the USDOC sought information concerning the 2006 prices for high grade iron ore. The USDOC requested the 2006 Tex Report prices for high-grade iron ore, and stated that the GOI could provide "any other pricing information available to the GOI regarding the price of high-grade iron ore lumps and fines during the calendar year 2006."[81] The questionnaire also stated: "Please indicate the source of the information and the unit of measure and currency in which the prices are expressed. Please indicate whether these prices are f.o.b. or ex-mine."[82]

68. After the GOI responded to the initial questionnaire, the USDOC issued a supplemental questionnaire, asking the GOI to provide the Tex Reports that it had relied upon in its initial

[80] 2006 AR GOI Initial Questionnaire Response, p. 5 (Exhibit IND-18).
[81] 2006 AR GOI Initial Questionnaire Response, pp. 5-6 (Exhibit IND-18).
[82] 2006 AR GOI Initial Questionnaire Response, pp. 5-6 (Exhibit IND-18).

response.[83] The GOI provided the Tex Reports that the USDOC requested.[84] The USDOC then decided to issue another supplemental questionnaire (Exhibit IND-35), and asked again for information concerning the pricing of iron ore. Specifically, the USDOC asked the GOI whether it could provide market prices in India for iron ore that is available to consumers in India.[85] Therefore, the second supplemental questionnaire (Exhibit IND-35) was not the only occasion where the USDOC sought information from the GOI and other interested parties on prices of iron ore for the purposes of establishing a benchmark. It was in response to the second supplemental questionnaire that the GOI provided the association chart, but without further explanation, as it did in its response to the initial questionnaire.[86]

69. The USDOC did not deem the GOI's response to this request insufficient, nor did it deem the GOI uncooperative. The USDOC accepted the association chart as a potential benchmarking source, but ultimately determined that it was not an appropriate Tier 1 benchmark because the prices were provisional and the chart was unclear as to whether the entities were buying or selling.[87]

70. Thus, the USDOC requested the GOI three times to provide information concerning the price of iron ore during the relevant period of investigation. The USDOC accepted the information provided by the GOI and considered it, but ultimately determined that Australia prices in the Tex Report were the appropriate benchmarking source. Therefore, consistent with the Appellate Body's considerations in the original proceedings, the USDOC conducted a "sufficiently diligent 'investigation' into, and solicitation of, relevant facts."[88]

Response to subpart f:

71. The context of the provision of the Tata price quote and association chart is clear from the 2006 administrative review Tata verification report. The purpose of verification was to verify information previously provided by Tata in its initial and supplemental questionnaire responses. The report explains that at the verification, the USDOC discussed with Tata the proposed adjustments to the iron ore benchmark prices that Tata had previously submitted.[89] The company officials explained the basis for its proposed adjustments by providing a variety of source documents, which included the price quote (marked as VE-12, p. 85).[90] Notably then, Tata did not provide the price quote to the USDOC for use as the benchmarking source. Rather,

[83] 2006 AR GOI Supplemental Questionnaire, dated Nov. 6, 2007 (Exhibit USA-41).
[84] *See* 2006 AR GOI Supplemental Questionnaire Response, dated Nov. 15, 2007: Tex Reports (Exhibit USA-42) (excerpted).
[85] 2006 AR GOI Supplemental Questionnaire Response, p. 4 (Exhibit IND-35).
[86] *Compare* 2006 AR GOI Initial Questionnaire Response, p. 6 (Exhibit IND-18) *with* 2006 AR GOI Supplemental Questionnaire Response, p. 4 (Exhibit IND-35).
[87] United States' First Written Submission, para. 276.
[88] *US – Carbon Steel (India) (AB)*, para. 4.152.
[89] Memorandum to File Concerning "Verification of the Questionnaire Responses Submitted by Tata Steel Limited," dated April 17, 2008 ("2006 AR Tata Verification Report"), p. 9 (Exhibit USA-40).
[90] 2006 AR Tata Verification Report, p. 9 (Exhibit USA-40); 2006 AR Tata Verification Exhibits, p. 23 (containing a "12" and "85" in the bottom right hand corner of the document) (Exhibit IND-36).

the price quote was provided to support Tata's request to receive certain adjustments to the benchmark.

72. As for the association chart, the document is marked as VE-14.[91] The verification report explains that the USDOC "collected a readable copy of Exhibit 67(a) of Tata's February 8, 2008, questionnaire response as VE-14 (page 1 of 1)."[92] Therefore, the association chart was a document that was previously submitted by Tata in its questionnaire response.

73. The USDOC did not deem Tata's response to the USDOC's inquiries insufficient, nor did it deem Tata uncooperative. Rather, the information provided by Tata at verification was accepted and evaluated by the USDOC.

Question 33: To both parties: India argues (para. 116, India's first written submission) that "[t]he information on record suggests that the prices reported in Tex Report are also not actual transaction prices". Did any interested parties or interested Members raise questions about the reliability of the Tex Report as a source of market-determined pricing data?

Response:

74. The United States responds to Questions 33, 34, 35, and 36 together, below.

Question 34: To both parties: In its questionnaire to the GOI, the USDOC asked "[i]f you have questions concerning the Tex Report, please contact the officer in charge" (Exhibit IND-18, p. 5 of exhibit). Did the GOI respond to the USDOC's invitation to put questions concerning the Tex Report? If not, why not?

Response:

75. The United States responds to Questions 33, 34, 35, and 36 together, below

Question 35: To both parties: Does the use of the Tex Report by GOI, NMDC, and other producers in the aspects of record evidence set out below shed light on whether the pricing data contained in the Tex Report is reliable and market-determined? Why/why not?

a. Exhibit IND-18, p. 8 of exhibit: "Please provide a copy of any price lists the GOI or the NMDC uses to base its negotiations on prices" – GOI response: "[t]he price of NMDC iron ore during 2005-06 onwards are decided based on the FOB prices of NMDC iron ore as appearing in the Tex Report".

b. Verification Report, (Exhibit USA-3), p. 7: "Once the price percentages are

[91] 2006 AR Tata Verification Exhibits, p. 24 (marked as "Ex 14 (Ex 67a)" in the top right hand corner of the document") (Exhibit IND-36).
[92] 2006 AR Tata Verification Report, pp. 9-10 (Exhibit USA-40).

> **negotiated, they are published in a Tex Report, which is printed in Japan every year and provided through a subscription. The report functions as a guideline for international iron ore prices. The officials stressed that India must compete with Australia, Brazil and other countries so it must follow the Tex Report's prices to remain competitive. In response to our request for copies of the Tex Report that were applicable for 2004 contracts, the NMDC stated that they do not have any copies with them and that we should be able to obtain copies from Essar… The NMDC official also stated that the goal of the NMDC is to get the highest price possible for iron ore in order to remain competitive. Most contracts are for a length of five years, with prices negotiated on an annual basis using the Tex Report as a benchmark".**
>
> **c. Exhibit IND-41, p. 3 of exhibit: "Please provide the Tex Report that includes the 2006-2007 prices for the Bailadila and Dominali lumps and fines and the Hamersley, Australia fines." Essar response: "The copy of the Tex Report that includes the 2006 and 2007 prices as requested above is at Exhibit 4".**

Response:

76. The United States responds to Questions 33, 34, 35, and 36 together, below

Question 36: To both parties: India argues (at para. 116, India's first written submission) that "There is no clear finding by the USDOC in the final Section 129 determination that prices reported in Tex Report, unlike the in-country benchmark prices, are based on actual transaction prices." Please explain how this argument relates to the aspects of the materials referred to by the USDOC in footnote 29 of the Final Determination (Exhibit IND-60) wherein the Tex Report is described as "*concluded* negotiations", "*concluded* talks", and "*negotiated* iron ore prices".

Response:

77. The United States responds to Questions 33, 34, 35, and 36 together.

78. In the underlying administrative reviews, neither the interested parties nor any interested Members raised questions about the reliability of the Tex Report as a source of market-determined pricing data. As the excerpts set out in Question 35 illustrate, the record is clear that the interested parties, including the GOI and respondents, repeatedly referred to information contained in the Tex Report, and did not contest the reliability of that source. Moreover, record evidence also demonstrates that the NMDC used the Tex Report as a guideline for setting

international iron ore sale prices and that the prices of its long term contracts are "negotiated on an annual basis using the Tex Report as a benchmark."[93]

79. Furthermore, in its questionnaires, the USDOC provided parties an opportunity to contact the officer in charge if there was questions concerning the Tex Report.[94] The GOI did not contact the officer in charge or submit questions concerning the Tex Report. Instead, in response to the USDOC's questionnaire, the GOI submitted prices *from* the Tex Report.[95]

80. Therefore, in the Section 129 Determination, the USDOC determined to continue to use the Australian prices from the Tex Report as the benchmark. Contrary to India's assertion that the Tex Report does not contain actual transactions, the USDOC determined that the record evidence demonstrated that these prices were "*concluded* negotiations," "*concluded* talks," and "*negotiated* iron ore prices," as recognized in Question 36.[96] Indeed, the GOI submitted two years of complete Tex Reports on the record, which reflect the prices of coal, iron ore, and steel among other inputs.[97] These Tex Reports identify when the 2006 prices were agreed to by the Japanese steel mills and the Hamersley, Australia companies, in addition to identifying the terms of sale.[98] Therefore, the USDOC properly determined to rely upon the Tex Report as the benchmarking source because it reflected market-determined prices.

Question 37: To <u>both parties</u>: India argues at para. 195 of India's second written submission that:

> **The USDOC was required to provide adequate explanation for "refining it approach". Mere use of the expression "Refinement of approach" in and of itself cannot be considered as adequate reasoning for coming to an entirely opposite decision in the 2006 AR."**

Is there a requirement in Article 14(d), or elsewhere in the SCM Agreement, for an investigating authority to explain changes in methodology or approach as between an original investigation and a subsequent review investigation? Please comment in particular on whether the Panel should take into account the panel's consideration in that

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[93] 2004 AR Verification Report, p. 7 (Exhibit USA-3).
[94] 2006 AR GOI Initial Questionnaire Response, p. 5 (Exhibit IND-18).
[95] 2006 AR GOI Initial Questionnaire Response, pp. 5-6 (Exhibit IND-18); 2006 AR GOI Supplemental Questionnaire Response, dated Nov. 15, 2007: Tex Reports (Exhibit USA-42) (excerpted).
[96] USDOC Section 129 Final Determination, p. 12 n. 29 (Exhibit IND-60); 2004 AR Preliminary Results, 71 Fed. Reg. 1,517 (Exhibit IND-14).
[97] 2006 AR GOI Supplemental Questionnaire Response, dated Nov. 15, 2007 (Exhibit USA-42) (excerpted). The GOI submitted the Tex Reports, which were issued several times a week, covering the period from April 2005 through March 2007. Relevant to the question at hand, the United States has submitted two Tex Reports that further support the USDOC's determination that the Tex Reports contained actual transaction prices.
[98] 2006 AR GOI Supplemental Questionnaire Response, dated Nov. 15, 2007: Tex Report, dated May 22, 2006, p. 1 (page 3 of PDF) ("Hamersley Iron Settles New Fines Ore Price With Japanese Mills") (Exhibit USA-42); 2006 AR GOI Supplemental Questionnaire Response, dated Nov. 15, 2007: Tex Report, dated May 29, 2006, p. 2 (page 26 of PDF) ("Nippon Steel Settles 2006 Iron Ore Prices With Australian Suppliers") (Exhibit USA-42).

EU – Footwear (China) **that "[t]here is nothing in the AD Agreement that requires an investigating authority to follow the same methodology in an expiry review as it did in the original investigation, and thus we see no reason why a different methodology requires explanation" (at para. 7.858).**

Response:

81. Neither the text of Article 14(d), nor other provisions in the SCM Agreement, require an investigating authority to explain changes in its methodology or approach as between an original investigation and a subsequent administrative review. As the question recognizes, the panel in *EU – Footwear (China)* came to the same conclusion under the AD Agreement.

82. The Appellate Body has found that "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[99] As explained in the United States' previous submissions, in the Section 129 Determinations, the USDOC demonstrated, based on the totality of the record evidence that the NMDC export prices were not market determined, and thus not suitable as a benchmark.[100]

III. BENEFIT – ARTICLE 14(B)

Question 38: To both parties: India argues that "steel producers are voluntarily contributing funds derived from price increase[s] to the SDF and therefore it is a cost to such loan recipient steel producers".

> **a. Was membership of the Joint Plant Committee – and being subject to its price controls – voluntarily or mandatory? Please respond by reference to record evidence as appropriate.**
>
> **b. Were the determinations by the Joint Plant Committee – including as to price, and as to additional pricing components such as the SDF levy – voluntary or mandatory? Please respond by reference to record evidence as appropriate, including aspects such as:**
>
> > **Indian Supreme Court Judgment, Exhibit IND-8, p 8.: "It were the members of the [JPC]… were made bound to add an element of ex-works price and to remit that amount for the constitution of the SDF" (underlining added)**

[99] United States' First Written Submission, para. 314 (citing *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis omitted)).
[100] United States' First Written Submission, paras. 304-309.

> **GOI's supplemental questionnaire response 2001, Exhibit USA-14, p. 3 "The SDF component, which was also <u>equally applied to all</u> the member producers" (underlining added)**

<u>Response</u>:

83. The United States responds to Questions 38, 39, and 40 together, below.

Question 39: <u>To both parties</u>: India argues that the SDF levy represents "pooling the collective 'profits' of the participating steel enterprises". Please respond to this argument by reference to the following aspects of the GOI's supplemental questionnaire response 2001, Exhibit USA-14, pp. 2 and 3:

> **"The JPC determined prices for the products manufactured by these steel producers".**
>
> **"Prior to 1992, these producers could not unilaterally increase the price for their products, and they could only sell their products at the prices determined by the JPC, which were applied equally to all producers".**

Please address, in particular, how the "additional pricing element" reflected by the SDF levy could reflect "profit" if the main steel producers would not have been permitted to raise their prices to the level reflected by that pricing element if that element had not been mandated?

<u>Response</u>:

84. The United States responds to Questions 38, 39, and 40 together, below.

Question 40: <u>To both parties</u>: Did the GOI or any interested parties express concerns about the SDF levy during the Section 129 reinvestigation? If not, was the USDOC required to address this matter? Why/why not?

<u>Response</u>:

85. The United States responds to Questions 38, 39, and 40 together.

86. As an initial matter, and as the United States explained in its previous submissions, India's claim under Article 14(b) falls outside the scope of this compliance proceeding because there was no finding of inconsistency and no DSB recommendation relating to Article 14(b).[101] Specifically, the Appellate Body reversed the panel's finding "in paragraph 7.313 of the panel report, rejecting India's claim as it relates to the USDOC's determination that loans provided

[101] United States' First Written Submission, paras. 323-327; United States' Second Written Submission paras. 177-180.

under the SDF conferred a benefit within the meaning of Article 1.1(b) and 14(b) of the SCM Agreement."[102] The Appellate Body then determined that it could not complete the legal analysis because it did not have a basis upon which to assess whether the prime lending rates on which the USDOC relied constituted a "comparable commercial loan" within the meaning of Article 14(b) of the SCM Agreement.[103]

87. Because there was no finding of inconsistency under Article 14(b) concerning the USDOC's examination of the benefit conferred by the SDF program, there was no recommendation by the DSB, and nothing for the USDOC to implement. India's claim thus does not fall within the scope of this compliance proceeding, and the Panel's evaluation should end there. Furthermore, in response to Question 40, no parties raised the exclusion of the SDF program as an issue before the USDOC during the Section 129 proceeding.

88. For completeness, the United States also responds to the Panel's questions concerning the substance of the SDF program.

89. The GOI did not require the main integrated steel producers to participate in the SDF.[104] Regardless, all of the integrated steel producers, *i.e.*, Steel Authority of India Ltd. (SAIL), Tata (formerly known as Tata Iron and Steel Company (TISCO)), India Iron and Steel Company Ltd. (IISCO), and Rashtriya Ispat Nigam Limited (RINL), were members of the SDF.[105]

90. As the United States previously explained, once the steel producers were members, members were required to add the SDF component to their prices.[106] In the GOI's supplemental questionnaire response, the GOI explained that it authorized for steel producers who were members of the SDF to "add an element to the ex-works prices determined" and that the additional element "was applied equally to all the main integrated steel producers."[107] Thus, "[t]he SDF component added to the ex-works prices was included in the *controlled* prices, which applied to the products produced by the main steel plants as members of the JPC."[108] Therefore, as members of the JPC, the steel producers could only sell products at the prices set by the JPC and were required to add an SDF component.[109] The JPC determined the amounts to be levied, sequestered the resulting funds, and then the SDF Managing Committee directed the redistribution of those funds to steel producing entities and steel-related projects in accordance with the GOI's goals for the steel sector.[110]

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[102] United States' First Written Submission, para. 325 (citing *US – Carbon Steel (India) (AB)*, para. 4.349).
[103] United States' First Written Submission, para. 325 (citing *US – Carbon Steel (India) (AB)*, para. 4.353).
[104] GOI Investigation Supplemental Questionnaire Response, p. 3 (Exhibit USA-14).
[105] GOI Investigation Supplemental Questionnaire Response, p. 1 (Exhibit USA-14).
[106] United States' First Written Submission, para. 329; United States' Second Written Submission, paras. 186-192.
[107] United States' Second Written Submission, para. 190 (citing GOI Investigation Supplemental Questionnaire Response, pp. 1-2 (Exhibit USA-14)).
[108] GOI Investigation Supplemental Questionnaire Response, p. 3 (Exhibit USA-14).
[109] GOI Investigation Supplemental Questionnaire Response, pp. 2-3 (Exhibit USA-14).
[110] GOI Investigation Supplemental Questionnaire Response, p. 2 and Exhibits 20-22 (Exhibit USA-14).

91. Furthermore, because the steel producers who were members of the SDF had this additional element to their price increase, and these "additional funds were contributed to the [SDF],"[111] the USDOC determined that the funds were authorized for use solely as a source of funds for the SDF.[112] Therefore, the funds were not voluntarily contributed by the producers, or otherwise considered the producers' own funds or "profits," as India suggests.[113]

92. Therefore, in addition to India's claim falling outside the terms of reference in this dispute, India has failed to demonstrate that an objective and unbiased investigating authority could not have determined that the funds in the SDF were from consumers, and not the producers, and thus, did not constitute a "cost" that the USDOC needed to consider in calculating benefit.

Question 41: <u>To both parties</u>: India argues (para. 206, second written submission) that:

> **The aforementioned observations were made by the USDOC in the context of deciding whether the SDF loans can constitute a financial contribution. The USDOC never considered the issue whether steel producers' own contribution to the fund could be considered as costs for the purpose of determination of benefit under Article 14(b).**

If an investigating authority makes a finding regarding the existence or non-existence of a term or condition applying to a loan when determining a "financial contribution", is it required to repeat that analysis for the purposes of determining "benefit"? Why/why not? Is there anything in the SCM Agreement that prescribes the headings or sections under which an investigating authority's determination must assess certain matters?

<u>Response</u>:

93. There is no requirement in the SCM Agreement that an investigating authority's determination of a financial contribution must be repeated for the purposes of determining benefit. Indeed, as the Panel's question suggests, nothing in the SCM Agreement prescribes the specific headings or sections under which an investigating authority must set out its assessment of certain matters. Where the path of an investigating authority's determination is reasonably discernable, an adjudicator should meet with that reasoning rather than avoid it on the basis of form.[114]

94. The benefit analysis is a comparison of the financial contribution at issue to market benchmarks to determine the amount, if any, of a benefit. Thus, once the financial contribution

[111] United States' Second Written Submission, para. 190 (citing GOI Investigation Supplemental Questionnaire Response, p. 1 (Exhibit USA-14)).
[112] United States' Second Written Submission, paras. 190-191.
[113] India's Second Written Submission, para. 173.
[114] *See, e.g., EC – Tube or Pipe Fittings (AB)*, paras. 160-161.

is identified, an investigating authority is not required to repeat the same discussion regarding the financial contribution in the context of setting out its calculation of benefit.

IV. SPECIFICITY

Question 43: <u>To both parties</u>: Do the parties accept the considerations of the panel in *US – Countervailing Measures (China) (Article 21.5 – China)* extracted below (paras. 7.269 and 7.273, fns omitted, emphasis added)? If not, please explain why not.

> **We consider that the requirements of Article 2.1(c) are to be understood in connection with the nature and purpose of the specificity analysis at issue. In particular, we recall that *"taking account" of the length of time during which a subsidy programme has been in operation is part of an assessment of whether a limited number of actual users of the programme can be explained by the short time the programme has been in operation.***
>
> **…**
>
> ***Based on the foregoing, we do not consider that Article 2.1(c) imposes in all cases a requirement to establish the total duration of the programme. Rather, to comply with the requirement of the last sentence of Article 2.1(c), it would be sufficient to show that the programme has been in operation for a duration that does not itself account for "use of a subsidy programme by a limited number of certain enterprises".***

<u>Response</u>:

95. The compliance panel's analysis in the cited paragraphs of the panel report in *US – Countervailing Measures (China)* reflects an appropriate interpretation of Article 2.1(c) in some respects, but not others as we explain below.

96. First, we note that the paragraphs in between the two paragraphs cited in the Panel's question correctly recognize, as the United States explained in its first written submission, that Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise."[115] The plain text of Article 2.1(c) indicates that it is to be understood within the nature and purpose of the specificity analysis at issue.[116] The context and fact-driven nature of Article 2.1(c) means that particular factors will carry more weight than the others depending on the factual circumstances.[117]

97. Yet the panel's suggestions as to how the factors in Article 2.1(c) interrelate rely on generalizations that may not reflect the factual circumstances relevant to a particular *de facto*

[115] United States' First Written Submission, paras. 205, 226 (quoting *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.272).
[116] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.269.
[117] United States' First Written Submission, para. 226.

specificity analysis. The panel, in doing so, also reads elements into Article 2.1(c) that stray beyond the text of the covered agreement.

98. As we explained in our first written submission,[118] Article 2.1(c) provides that, "notwithstanding any appearance of non-specificity" resulting from application of subparagraphs (a) and (b), a subsidy may nevertheless be "in fact" specific. In conducting its analysis under Article 2.1(c), an investigating authority "may" consider "other factors" – *i.e.*, the four factors set out in the second sentence of Article 2.1(c): use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. An authority need not examine all four factors when conducting its analysis.[119] The third sentence of Article 2.1(c) sets out two additional considerations to be taken into account when conducting a *de facto* specificity analysis: the "extent of diversification of economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation."[120]

99. Further, as we explained in our second written submission,[121] Article 2.1(c) states that "*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." The term "shall" indicates that it is mandatory for investigating authorities to deal or reckon with those factors.[122] But the third sentence of Article 2.1(c) does not impose a purely formalistic requirement. An authority takes a factor into account when it deals or reckons with it. Significantly, where these two factors are not relevant to the authority's determination, it need not include express discussion of each factor.[123] And numerous panels have upheld determinations by investigating authorities where these factors were taken into account *implicitly*.[124]

100. This is consistent with the panel's observation in *US – Countervailing Measures (China)* that Article 2.1(c) does not require the establishment of the total duration of the subsidy program at issue.[125] However, to the extent that this compliance panel was suggesting that an express

[118] *See* United States' First Written Submission, para. 204.
[119] *US – Softwood Lumber IV (Panel)*, para. 7.123; *see also id.*, para. 7.124.
[120] *See* United States' First Written Submission, para. 204.
[121] United States' Second Written Submission, paras. 121-122.
[122] United States' Second Written Submission, para. 121 (citing *US – Countervailing Measures (China) (Panel)*, para. 7.251).
[123] United States' Second Written Submission, para. 121.
[124] United States' Second Written Submission, para. 122 (citing *US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips*, para. 7.229). *See also US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.253 (internal citations omitted); *US – Washing Machines (Panel*), para. 7.251 (quoting *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.253).
[125] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.273.

showing regarding the duration of the program is required in all circumstances, that would not be consistent with the third sentence of Article 2.1(c) for the reasons explained above.

101. The compliance panel's analysis in *US – Countervailing Measures (China)* further suggests that "'taking account' of the length of time during which a subsidy programme has been in operation *is part of an assessment* of whether a limited number of actual users of the programme can be explained by the short time the programme has been in operation."[126] The United States does not agree with the compliance panel's suggestion that such an analysis necessarily forms "part of an assessment" of the limited number of users under Article 2.1(c). As we have noted, the determination of *de facto* specificity under Article 2.1(c) will depend on the context and particular factual circumstances. The compliance panel's observation reflects one way that an investigating authority could take into account the length of time factor. But the question of the "length of time" a subsidy program has been in operation is not the same as an analysis of the "use of a subsidy program by a limited number of certain enterprises." They are distinct factors in Article 2.1(c). While the two factors may certainly interrelate under particular factual scenarios, to suggest that they bear a relationship that would apply in all factual circumstances is not consistent with Article 2.1(c).

102. Indeed, as the United States explained in its first written submission, the USDOC in this investigation requested that the GOI provide the number of recipients in the sale of high grade iron ore program for a four-year period, in order to take account of whether there are only a limited number of users of the subsidy program and whether it has only been in operation for a limited period of time, consistent with Article 2.1(c).[127] In doing so, the USDOC recognized that, if a subsidy program is recently introduced, there is no expectation that the subsidy will spread throughout the economy instantaneously.[128] Article 2.1(c) does not require more.

Question 44: <u>To both parties</u>: In relation to the reliance of the USDOC on the existence of the question put to the GOI USDOC's *Standard Questions Appendix* as to the number of recipients of the subsidy programme over a four-year period (see Final Determination, Exhibit IND-60, p. 33; see also United States' first written submission, para. 221):

> **a. can the parties please explain whether the GOI responded to this question in the relevant reviews, including by reference to pinpoint citations in exhibits?**
>
> **b. Assuming that the GOI did not respond to this request for information, did the USDOC: (i) follow-up with the GOI to again request it to provide this information; and/or (ii) have recourse to "facts available" in the absence of this information? If yes, please identify where this is demonstrated in the record. If no, please explain what significance the Panel should place this request for information, including by**

[126] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.269 (emphasis added).
[127] United States' First Written Submission, para. 221 (citing USDOC Section 129 Final Determination, pp. 32-33 (Exhibit IND-60)).
[128] United States' First Written Submission, para. 221 (citing USDOC Section 129 Final Determination, p. 33 (Exhibit IND-60)).

reference to whether the USDOC considered it sufficiently significant to either follow-up or have resource to "facts available".

Response:

103. As the United States discussed in its first written submission, the USDOC in its Section 129 proceedings issued its initial questionnaire to the participants, including the GOI.[129] The *Standard Questions Appendix* to that questionnaire asked the GOI to provide the date the subsidy was established in the first question presented.[130] It further requested that the GOI "provide the number of program recipients for a four-year period (the year in which the respondent company was approved for assistance under the program as well as each of the preceding three years)."[131]

104. In response to this request, the GOI stated that the *Standard Questionnaire Appendix* had no relevance, because NMDC did not supply iron ore to respondents at LTAR. While obtaining answers to this question would have further informed the length of time the sale of high grade iron ore program has been in operation, however, the GOI's failure to provide those answers does not undermine that the USDOC *took account of* the length of time that program had been in operation.

105. As we explained in response to Question 43 above, as well as in our second written submission,[132] Article 2.1(c) provides that "*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." The term "shall" indicates that it is mandatory for investigating authorities to deal or reckon with those factors.[133] But the third sentence of Article 2.1(c) does not impose a purely formalistic requirement. An authority takes a factor into account when it deals or reckons with it. Where these two factors are not relevant to the authority's determination, it need not include express discussion of each factor.[134]

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[129] United States' First Written Submission, para. 221.
[130] *See* USDOC Section 129 Final Determination, p. 32 (Exhibit IND-60). *See also* Letter to Embassy of India, "Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: New Subsidy Allegation Questionnaire ("2004 AR GOI New Subsidies Allegation Questionnaire")," July 19, 2005, p. 6 (Exhibit USA-4); Letter to Embassy of India, "Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Issuance of Initial Questionnaire to the Government of India and Indian Firms Subject to Review ("2006 AR GOI Initial Questionnaire")," February 2, 2007, p. 38 (excerpted) (Exhibit USA-5); Letter to Embassy of India, "Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Issuance of Initial Questionnaire to the Government of India and Indian Companies Subject to Review ("2007 AR GOI Initial Questionnaire")" February 28, 2008, p. 57 (excerpted) (Exhibit USA-6); Memo to File Concerning "Issuance of Initial Questionnaire in the Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India ("2008 AR GOI Initial Questionnaire)," dated February 6, 2009 (excerpted), p. 54 (excerpted) (Exhibit USA-7).
[131] USDOC Section 129 Final Determination, pp. 32-33 (Exhibit IND-60).
[132] United States' Second Written Submission, paras. 121-122.
[133] United States' Second Written Submission, para. 121 (citing *US – Countervailing Measures (China) (Panel)*, para. 7.251).
[134] United States' Second Written Submission, para. 121.

And numerous panels have upheld determinations by investigating authorities where these factors were taken into account *implicitly*.[135]

106. Here, despite the GOI's failure to provide the requested information, the USDOC did not simply rest on the questions it had asked, but instead relied on the facts on the record. The USDOC explicitly noted the record evidence that NMDC sold high grade iron ore in the 2004 administrative review to Essar; in the 2006 administrative review to Essar, Ispat, and JSW; and in the 2007 administrative review to Essar.[136] The USDOC further recognized that, as NMDC's own website indicated, "NMDC was established as a fully owned Government of India Corporation in 1958."[137] The fact that NMDC has been in operation for sixty years is further support for the USDOC's conclusion: that for the sale of high grade iron ore for LTAR by NMDC, the subsidy program was not in operation "for a limited period of time only." This record evidence, taken together, shows how the *USDOC took into account* the length of time the program has been in operation.

Question 45: <u>To both parties</u>: The text of Article 2.1(c) refers, in relevant part, to the "use of a subsidy programme by a limited number of certain enterprises". In its Second written submission, the United States refers to (para. 138): "*record evidence* relied on by the USDOC *demonstrates* that the *use* of the *iron ore from leases is limited to steel companies*" (emphasis original). Does the term "use" in Article 2.1(c) refer to the direct use by the actual recipients of a subsidy under the subsidy programme, or can it extend to downstream beneficiaries, such as steel makers who are sold iron ore by standalone miners that were granted mining leases under the subsidy programme in the present case?

<u>Response</u>:

107. During the Section 129 proceedings, the USDOC determined that "India had mining programs for iron ore"; "all mineral rights are owned by the state governments"; and "the GOI granted leases to mine iron ore and coal, receiving a royalty per unit extracted."[138] The subsidy program at issue in this question is the receipt of mining rights of iron ore *through leases* issued

[135] United States' Second Written Submission, para. 122 (citing *US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229). *See also US – Countervailing Measures (China) (Panel)* (internal citations omitted), para. 7.253; *US – Washing Machines (Panel*), para. 7.251 (quoting *US – Countervailing Measures (China) (Panel) (Art. 21.5*, para. 7.253)).
[136] United States' First Written Submission, para. 222 (citing USDOC Section 129 Final Determination, p. 33 (Exhibit IND-60); 2004 AR Final I&D Memo, p. 4 (Exhibit IND-15) (Exhibit IND-60); 2006 AR Final I&D Memo, p. 16 (Exhibit IND-38) (Exhibit IND-60); 2007 AR Final I&D Memo, p. 16 (Exhibit IND-46) (Exhibit IND-60)).
[137] United States' First Written Submission, para. 223 (citing USDOC Section 129 Final Determination, p.33 (Exhibit IND-60); 2004 New Subsidies Allegation, Exhibit 6, p. 2 (Exhibit USA-1) (Exhibit IND-60).
[138] *See* USDOC Section 129 Other Issues Preliminary Determination, pp.7-8 (Exhibit IND-55) (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India* (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38)).
[138] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).

by the Government of India. Under the particular facts of this dispute, the entities that "use" the mining rights of iron ore program are those entities that hold the leases. The lessors use or employ the mining leases under the mining rights of iron ore program.

108. Accordingly, the USDOC found that "the GOI's provision of mining rights was specific . . . because the provision of the rights was limited to two industries, specifically steel producers and mining companies."[139] This reflects the USDOC's finding of *de facto* specificity for the mining rights of iron ore program. As the USDOC explained, "[t]he evidence on record indicates that the leases for iron ore mines granted by the GOI are limited in number and that the GOI grants those leases to only two industries, *i.e.*, steel makers and mining companies, and thus the GOI's provision of mining rights for iron ore is *de facto* specific."[140] The record evidence supports these determinations, as the USDOC explained in its determinations.[141] For example, the USDOC found during the 2006 administrative review that, according to documents issued by the GOI and its Ministry of Steel, mining rights are limited to a handful of steel and mining companies, including Tata.[142]

109. The USDOC additionally observed *subsequent to this finding* that given iron ore's inherent characteristics, the mineral is inherently *limited* to steel companies as an input for producing steel.[143] This observation is supported by the record evidence cited in the USDOC's determination. But the USDOC had already found the mining rights of iron ore program was *de facto* specific because, as the record evidence indicated, it was limited to two industries: steel producers and mining companies.

110. Significantly, the USDOC in conducting this *de facto* specificity analysis made no findings that the "use" of the mining rights of iron ore program extended to downstream beneficiaries. For this reason, the United States does not believe that this Panel needs to, or should, address the interpretive issue presented in this question of whether the term "use" in Article 2.1(c) extends to downstream beneficiaries.

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[139] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).
[140] USDOC Section 129 Final Determination, pp. 24-25 (Exhibit IND-60).
[141] *See* USDOC Section 129 Other Issues Preliminary Determination, p. 8 n.34 (Exhibit IND-55) (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 FR 40295 (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38)).
[142] *See Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32) (citing The Report of the ''Export Group'' on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore, as issued by the Ministry of Steel at page 50, which was included as Exhibit 3 of petitioner's May 23, 2007, submission); *see also Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 FR 40295 (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38).
[143] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).

111. The Panel's question asks about the scope of the term "use" in Article 2.1(c). The term "use" must be placed within the broader context and purpose of the *de facto* specificity inquiry. The relevant inquiry under Article 2.1(c) is focused on *de facto* limitation, taking into consideration the type of subsidy in question. In this circumstance, the essential specificity question is whether use of the subsidy program is generally available or *de facto* limited to certain enterprises. As the Appellate Body in *US – Carbon Steel (India)* recognized, in light of its plain meaning, "the word 'use' [under Article 2.1(c)] refers to the action *of using or employing something*" – in this context, using a "subsidy programme."[144] The Appellate Body further recognized that "the term 'use' reveals the type of evidence that is examined in the inquiry mandated by the first factor under Article 2.1(c)[,]" which focuses on "a quantitative assessment of the entities that *actually use* a subsidy program and, in particular, on whether such *use* is shared by a 'limited number of certain enterprises.'"[145] This inquiry does not change in the context of downstream beneficiaries; the question is still whether downstream beneficiaries were actual users of the subsidy program. The *de facto* specificity inquiry is a fact-driven, context-dependent exercise, and as the panel in *US – Countervailing Measures (China)* recognized, Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise."[146]

112. As explained above, the USDOC's *de facto* specificity finding here was based on a limited number of industries. The USDOC explained in its Section 129 determination that the "GOI provided iron ore mine leases to certain steel and mining entities"; that "the leases for iron ore mines granted by the GOI are limited in number"; and "the GOI grants those leases to only two industries, *i.e.*, steel makers and mining companies and thus the GOI's provision of mining rights for iron ore is *de facto* specific."[147] Under the particular facts of this dispute, the entities that actually "use" the mining rights of iron ore program are limited to those entities that hold the leases.

Question 46: <u>To both parties</u>: Can the parties please confirm that the following sets of terminology used variously by the parties in their submissions and the USDOC in its explanations are synonyms, and if not, how terms within these sets of terminology differ. Can the parties please also explain what they understand these sets of terminology to refer to, by reference to the USDOC's explanations and/or applicable record evidence.

a. "steel makers"; "steel companies"; "the steel industry"; "steel producers"

b. "standalone mining companies"; "mining companies"; "mining entities"; "independent miners"; "miners"

[144] *US – Carbon Steel (India) (AB)*, para. 4.374 (emphasis added) (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3484).
[145] *US – Carbon Steel (India) (AB)*, para. 4.374.
[146] *US – Countervailing Measures (China) (Panel)*, para. 7.272.
[147] USDOC Section 129 Final Determination, pp. 24-25 (Exhibit IND-60).

c. "the provision of mining rights for iron ore"; "the mining rights of iron ore program"; "the GOI provided iron ore mine leases to…"; "leases for iron ore mines granted by the GOI"; "through its provision of leases, the GOI provides a good"

Response:

113. With respect to the terms in subpart (a) of the Panel's question, they are synonymous and used interchangeably in the USDOC's determinations and the United States' submissions. The same is true with respect to the terms used in subpart (b). The terms referenced in subparts (a) and (b) together refer to the two industries to which the program at issue, the mining rights of iron ore program, was limited. As the United States noted in response to Question 45, the USDOC found that "the GOI's provision of mining rights was specific . . . because the provision of the rights was limited to two industries, specifically steel producers and mining companies."[148] The USDOC similarly explained that the "evidence on record indicates that the leases for iron ore mines granted by the GOI are limited in number and that the GOI grants those leases to only two industries, *i.e.*, steel makers and mining companies."[149]

114. With respect to subpart (c) of the Panel's question, the referenced phrases refer to the same program at issue in these proceedings: the mining rights of iron ore program. The USDOC, in its discussion of Comment 6 titled "Mining Rights of Iron Ore,"[150] noted that "the GOI provided iron ore mine leases to certain steel and mining entities."[151] On the same page, the USDOC also describes the same program as comprising the "provision of mining rights"; "mining leases granted by the GOI"; and "leases for iron ore mines."[152]

Question 47: To both parties: In its Section 129 Final Determination, the USDOC confirmed its finding that (p. 25): "as discussed in the Other Issues Preliminary Determination, evidence on record shows that iron ore's inherent characteristics makes the use of iron ore limited to steel companies as an input for producing steel." Does this rationale also apply to the use of the leases to mine iron ore by "standalone mining companies"? If so, please explain how/why by reference to the USDOC's explanations and relevant record evidence. If not, please identify where and how the USDOC provides a rationale for the limited nature of the program at issue vis-à-vis "standalone mining companies", as distinct from steel makers.

Response:

115. During the Section 129 proceedings, the USDOC determined that "India had mining programs for iron ore"; "all mineral rights are owned by the state governments"; and "the GOI

[148] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).
[149] USDOC Section 129 Final Determination, pp. 24-25 (Exhibit IND-60).
[150] USDOC Section 129 Final Determination, p. 21 (Exhibit IND-60).
[151] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).
[152] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).

granted leases to mine iron ore and coal, receiving a royalty per unit extracted."[153] As we explained in response to Question 45, the subsidy program at issue in both questions is the receipt of mining rights of iron ore *through leases* issued by the Government of India. Under the particular facts of this dispute, the entities that "use" the mining rights of iron ore program are those entities that hold the leases. The lessors use or employ the mining leases under the mining rights of iron ore program.

116. Accordingly, as we further noted in response to Question 45, the USDOC found in the underlying proceeding that "the GOI's provision of mining rights was specific . . . because the provision of the rights was limited to two industries, specifically steel producers and mining companies."[154] This reflects the USDOC's finding of *de facto* specificity for the mining rights of iron ore program. As the USDOC explained, "[t]he evidence on record indicates that the leases for iron ore mines granted by the GOI are limited in number and that the GOI grants those leases to only two industries, *i.e.*, steel makers and mining companies and thus the GOI's provision of mining rights for iron ore is *de facto* specific."[155] The record evidence supports these determinations, as the USDOC explained in its determinations.[156] For example, the USDOC found during the 2006 administrative review that, according to documents issued by the GOI and its Ministry of Steel, mining rights are limited to a handful of steel and mining companies, including Tata.[157]

117. After making this finding, the USDOC additionally observed *subsequent to this finding* that given iron ore's inherent characteristics, the mineral is inherently limited to steel companies as an input for producing steel.[158] This observation is supported by the record evidence cited in the USDOC's determination. But the USDOC had already found that the mining rights of iron ore program was *de facto* specific because it was limited to two industries: steel producers and

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[153] USDOC Section 129 Other Issues Preliminary Determination, pp.7-8 (Exhibit IND-55) (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India* (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38)).
[154] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).
[155] USDOC Section 129 Final Determination, pp. 24-25 (Exhibit IND-60).
[156] *See* USDOC Section 129 Other Issues Preliminary Determination, p. 8 n.34 (Exhibit IND-55) (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 FR 40295 (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38)).
[157] *See Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Countervailing Duty Administrative Review* 73 FR. 1579, 1591-1592 (January 9, 2008) (Exhibit IND-32) (citing The Report of the ''Export Group'' on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore, as issued by the Ministry of Steel at page 50, which was included as Exhibit 3 of petitioner's May 23, 2007, submission); *see also Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 73 FR 40295 (July 14, 2008) (Exhibit IND-39) and accompanying Issues and Decision Memorandum, Sections I.A.8 and 9 (July 7, 2018) (Exhibit IND-38)).
[158] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).

mining companies.[159] The USDOC's additional observations regarding the inherent characteristics of iron ore and use by the steel industry did not alter this finding.

Question 48: <u>To both parties</u>: In its Section 129 Preliminary Determination, the USDOC found as follows (pp. 8): "In 2003 and 2004, India produced 122.84 million tons of iron ore, of which 44.97 million tons was used by domestic steel companies to produce 34.25 million tons of crude steel, while the remaining 77.87 million tons was exported or stored as surplus iron ore" (underlining added). The United States makes reference in its first written submission to (para. 258): "thereby adding value to India's large domestic iron ore deposits, rather than simply mining and exporting iron ore" (underlining added). Does the data referred to by the USDOC, and the rationale referred to by the United States, suggest that a significant amount of iron ore being mined under leases granted by the GOI was being extracted and then exported? If so, could this suggest that exporting iron ore reflected one way in which "standalone miners" used the iron ore that they obtained through mining leases?

<u>Response</u>:

118. Article 2.1(c) refers to use of the *subsidy program* by a limited number of certain enterprises. This does not refer to "use" of the product at issue. As the Appellate Body in *US – Carbon Steel (India)* recognized, in light of its plain meaning, "the word 'use' [under Article 2.1(c)] refers to the action *of using or employing something*" – in this context, using a "subsidy programme."[160] Article 2.1(c) does not require a finding that the *product at issue* was "used" by a limited number of enterprises.

119. As discussed in response to Questions 45 and 47, the subsidy program at issue here is the receipt of mining rights of iron ore *through leases* issued by the Government of India. Therefore, the entities that "use" the mining rights of iron ore program are those entities that receive and hold the leases. To the extent this Panel's question suggests that "use" under Article 2.1(c) would extend beyond the users of the *subsidy program* to include also those users of the iron ore itself, such an interpretation would not appear to be supported by the text.

Question 50: <u>To the United States</u>: At paragraph 250 of the United States' first written submission, the United States argues that India's claim concerning the diversification and length of time factors under Article 2.1(c) as to the mining rights of iron ore and mining of coal programmes is outside the scope of these Article 21.5 proceedings. The United States did not refer to this claim when listing its compliance objections in paragraph 6 of its Opening Statement. Can the United States please confirm whether it persists with its objection in this regard?

[159] Moreover, as the United States noted in response to Question 46, the USDOC's references to mining companies would include "standalone mining companies."
[160] *US – Carbon Steel (India) (AB)*, para. 4.374 (emphasis added) (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3484).

Response:

120. Yes, as explained in paragraph 250 of its first written submission, India's claim concerning the diversification and length of time factors under Article 2.1(c) as to the mining rights of iron ore and mining of coal programs is outside the scope of these compliance proceedings.

V. ARTICLE 12.8 OF THE SCM AGREEMENT

Question 52: To both parties: Aside from the reference to the export restrictions on high-grade iron ore in the 2004 Administrative Review Verification Report, is there any reference in any of the determinations in the 2004, 2006, 2007 and 2008 reviews being addressed in the Section 129 redetermination that demonstrates that the export restrictions were "under consideration" as an "essential fact" by the USDOC pursuant to Article 12.8? Additionally, please comment on the relevance, if any, of the NMDC's export price being *accepted* as a benchmark price in the 2004 administrative review to whether the aforementioned reference in the 2004 Administrative Review Verification Report was sufficient to show that this was an "essential fact" that was "under consideration" by the USDOC in the context of the Section 129 redetermination.

Response:

121. As the United States previously explained, an authority's obligation under Article 12.8 is limited to disclosing the essential facts – not its reasoning or conclusions.[161] The panel in *China – GOES* affirmed this distinction when it found that "the disclosure obligation does not apply to the *reasoning* of the investigating authorities, but rather to the 'essential facts' underlying the reasoning."[162] Therefore, whether the USDOC's determinations, that is, documents setting out the USDOC's reasoning and conclusions with respect to certain facts, discussed the export restrictions on high-grade iron ore is not relevant to the issue of whether the fact was disclosed, consistent with Article 12.8.

122. The same reasoning also applies to the USDOC's acceptance of the NMDC export prices as a benchmark in the 2004 administrative review. The USDOC's *determination* to use the NMDC export prices is not relevant to the issue of whether the USDOC properly *disclosed* the export restrictions policy.

123. Nonetheless, the 2004 administrative review verification report, a document that has been recognized as a vehicle for disclosing essential facts,[163] was not the only instance in which the export restrictions policy was discussed because the purpose of verification was to verify

[161] United States' First Written Submission, para. 385.
[162] United States' First Written Submission, para. 385 (citing *China – GOES (Panel)*, para. 7.407 (emphasis in original); *see also US – Oil Country Tubular Goods Sunset Reviews (Article 21.5-Argentina) (Panel)*, para. 7.148 ("The text of Article 6.9 [of the Anti-Dumping Agreement] clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities.")).
[163] *Argentina – Ceramic Tiles*, para. 6.125.

existing information on the record. The USDOC also asked specific questions concerning the export restrictions in questionnaires issued to the GOI in the 2004 and 2006 administrative reviews, further demonstrating the disclosure of this policy as an essential fact under consideration in the underlying reviews.[164]

Question 53: <u>To both parties</u>: In instances where there were no findings of violations of any of the provisions of Article 12 in the original proceedings but where there were findings of violations on substantive obligations in the SCM Agreement in the original proceedings, are there circumstances where Article 12 continues to apply to the steps taken by an investigating authority to remedy the violations on substantive obligations? If so, please explain the legal basis, including by reference to the considerations in Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras 6.73, 6.74 and 6.79.

<u>Response</u>:

124. Relevant to this dispute, the obligations under Articles 12.1 and 12.8 of the SCM Agreement apply in the context of a Section 129 proceeding, but only require additional action on the part of the USDOC where there is a new proceeding or where new facts are introduced on a record. Article 12.1 provides that interested Members and interested parties shall be given "ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." Article 12.8 states that before a final determination is made, Members and interested parties shall be informed of the essential facts under consideration and that "[s]uch disclosure should take place in sufficient time for the parties to defend their interests." Therefore, as is clear from the context, the purpose of these provisions is to allow parties to present evidence in a new proceeding (Article 12.1) and to ensure parties are informed of the essential facts under consideration when there are new facts (Article 12.8).

125. Where a proceeding is limited to conducting a re-examination of issues that were previously found to be WTO-inconsistent, and *new* evidence is not placed on the record, the obligations under Articles 12.1 and 12.8 will not require action additional to that taken in the context of the underlying proceedings. In the dispute at hand, the GOI previously had the opportunity to present relevant evidence and the USDOC disclosed the essential facts under consideration in the underlying proceedings.[165] The USDOC's re-examination of public body and benchmarks did not trigger *an additional* obligation under Articles 12.1 and 12.8.

126. Indeed, as the panel found in *Korea – Certain Paper (Article 21.5 – Indonesia)*, when "a procedural obligation set forth under [Article 12][166] has been fulfilled in the original investigation, we shall refrain from ruling that it had to be re-observed in the implementation

[164] 2004 AR GOI Supplemental Questionnaire Response, pp. 7-8 (Exhibit IND-13); 2006 AR GOI Initial Questionnaire Response, pp. 9-10 (Exhibit IND-18).
[165] United States' First Written Submission, paras. 371, 388, 394.
[166] The dispute concerns Article 6 of the AD Agreement, which provides for similar procedural obligations as Article 12 of the SCM Agreement.

proceeding unless the steps taken by the [investigating authority] made it necessary."[167] Here, the USDOC did not take steps that triggered an obligation to take additional action under Articles 12.1 and 12.8. The Section 129 proceeding did not involve a new factual investigation regarding public body or benchmarks such that the issues were subject to Article 12.1 obligations.[168] Similarly, because there were no new facts on the record, the essential facts under consideration had already been previously disclosed in the underlying proceedings.[169] The panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* likewise noted that Article 6.9 of the AD Agreement, which is identical to Article 12.8 of the SCM Agreement, "provides for a *one-time disclosure requirement* that has to contain the 'essential facts' that are under consideration."[170]

127. Therefore, the obligations of Articles 12.1 and 12.8 did not require the USDOC to take additional action in the context of the Section 129 proceeding on public body and benchmarks. India's claims thus fail.

VI. "AS SUCH" CLAIM

Question 54: To the United States: At para. 56 of its first written submission, the United States argues that "[t]he measure taken to comply by the United States is … its commitment to exercise its discretion concerning when to self-initiate an investigation so as to not create the situation of concern to the Appellate Body regarding Section 1677(7)(G)(i)(III)". At para. 28 of its second written submission, the United States argues that "there is no measure that the United States must take to comply with the DSB recommendation". Can the United States explain if there is a contradiction between the two statements? If the response is in the negative, can the United States elaborate on the relationship between the two statements?

Response:

128. There is no contradiction between the two statements. The "commitment to exercise discretion" was reflected in the letter exchange between the USDOC and the Office of the United States Trade Representative ("USTR"), as well as the statements made by the United States at subsequent DSB meetings. Through the letter exchange, the United States confirmed its commitment to exercise its discretion concerning when to self-initiate an investigation in a manner so as not to lead to results that are inconsistent with U.S. WTO obligations. The fact that the United States confirmed its intention not to take such action, both through this letter exchange and its statements at the DSB, reinforces that the USDOC has the authority to decide when and whether to self-initiate an investigation – and accordingly, when and whether Section 1677(7)(G)(i)(III) ("Subpart III") will ever be triggered.

[167] *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.74; *see also id.*, para. 6.79.
[168] United States' First Written Submission, para. 371.
[169] United States' First Written Submission, paras. 388, 394.
[170] *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.91.

129. However, the United States was not *required* to take this action to come into compliance with its obligations under the SCM Agreement. Because Subpart III does not require the United States to take WTO-inconsistent action,[171] the United States did not need to take an *additional* measure in order to implement the DSB recommendation. Subpart III was already WTO-consistent and did not need to be changed.

130. Nonetheless, the United States *did take action* through the USDOC's decision to express its commitment concerning self-initiation. Just as a Member could make a decision to engage in action that amounts to an unwritten measure, so too can a Member make a decision not to engage in certain action. In this case, the letter exchange reflects the USDOC's commitment (or decision) to exercise its discretion in a WTO-consistent manner.

131. This is clear upon an examination of the contents of the letters. On June 23, 2016, the Office of the United States Trade Representative sent a letter to the USDOC noting the Appellate Body's "as such" finding; stating its understanding that "under sections 702(a) and 732(a) [of the Tariff Act of 1930, the USDOC] has discretion with respect to the timing of any investigation"; and stating its understanding that the USDOC "has the authority to exercise this discretion in a manner that will lead to results that are not inconsistent with the international obligations of the United States, as reflected in the *Agreement on Subsidies and Countervailing Measures and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* of the WTO."[172] The letter then asked, "[i]n order to confirm compliance with the WTO recommendations in this dispute," that the USDOC "confirm its commitment to exercise its discretion in a manner consistent with the international obligations of the United States."[173] Five days later, the USDOC sent a response on June 28, 2016, stating that "[t]his letter serves to confirm [the USDOC's] commitment in administering the antidumping and countervailing duty laws of the United States, to exercise its discretion with respect to the timing of investigations initiated under sections 702(a) or 732(a) of the Tariff Act of 1930, as amended, in a manner that will not lead to results that are inconsistent with the international obligations of the United States, as reflected in the Agreement on Subsidies and Countervailing Measures . . . of the World Trade Organization."[174]

132. That the USDOC's commitment is meaningful is demonstrated by the fact that the USDOC has never triggered Subpart III, in this investigation or *any* investigation. This is because nothing in the U.S. statute requires the USDOC to *self*-initiate a countervailing duty investigation on the same day a petitioner files an anti-dumping petition, or vice versa.

[171] The conditions of Subpart III will only be triggered if the USDOC *exercises its discretion* to *self*-initiate a countervailing duty investigation on the same day a petitioner files an anti-dumping petition, or vice versa.
[172] Letter from Office of the United States Trade Representative to the United States Department of Commerce, dated June 23, 2016 (Exhibit USA-36).
[173] Letter from Office of the United States Trade Representative to the United States Department of Commerce, dated June 23, 2016 (Exhibit USA-36).
[174] Letter from the United States Department of Commerce to the Office of the United States Trade Representative, dated June 28, 2016 (Exhibit USA-37).

133. As a result, there is no contradiction between not *needing* to take action but taking action anyway. We further stress that because the United States may apply the measure in a WTO-consistent manner, as explained in the U.S. written submissions, there is no basis to find that the measure is "as such" WTO-inconsistent.[175]

134. Moreover, the United States was not required to express such a commitment through letters in order to comply with the DSB recommendation as to Subpart III because no DSB recommendation could follow from an alleged "finding" by the Appellate Body that overstepped its role under the DSU. As we explained in our written submissions, the Appellate Body's finding is inconsistent with Article 17.6 of the DSU because the meaning and WTO-consistency of Subpart III was not an issue of law or legal interpretation addressed in the original panel's report; nor could it be, when no party raised a claim as to Subpart III in the original proceedings, and the original panel did not address such a claim in its report.[176] Indeed, at no point in this proceeding has India identified any specific reference to Subpart III in a claim before the original panel or the Appellate Body. All India has indicated are instances where it cited to the statutory language of Section 1677(7)(G) as a whole – without argumentation specifically focused on Subpart III.[177]

135. Just as a panel may not make the case for a party, the Appellate Body has no authority under the DSU to make out such a case. Because the Appellate Body did not have any evidence or argumentation as to the meaning of Subpart III – and particularly the U.S. laws cited in within that provision, Sections 1671a(b) or 1673a(b), which refer to investigations initiated by the investigating authority – the Appellate Body failed to understand that Subpart III can be triggered only where the USDOC exercises its discretion to self-initiate an investigation on a particular day.

136. Therefore, this Panel need not follow the reasoning of the Appellate Body with respect to the interpretation of Subpart III. Rather, this Panel's task under Article 11 of the DSU is to make an objective assessment of the matter before it, including by making those factual findings necessary to evaluate whether Subpart III requires the United States to take any action inconsistent with the SCM Agreement. As we have explained, when properly interpreted, Subpart III is not WTO inconsistent, and therefore no further action is required to bring the U.S. into compliance with its obligations.

Question 55: <u>To the United States</u>: Other than statements made in the context of DSB meetings and the exchange of letters between the office of the USTR and the USDOC (citing Exhibits USA-37, USA-38), is there additional documental evidence proving the existence

[175] *See* United States' First Written Submission, paras. 26, 28, 33, 44-55, 57; United States' Second Written Submission, paras. 18, 28-30, 33-34.
[176] *See* United States' First Written Submission, paras. 26-31, 36-40; United States' Second Written Submission, paras. 18, 20-30.
[177] Further, as we explained in our second written submission, India's request for establishment of a panel in the original proceedings specifically asserted claims as to Subparts I and II of Section 1677(7)(G)(i), but notably absent is any claim specific to Subpart III. *See* United States' First Written Submission, para. 23.

of the USDOC's "commitment" to not self-initiate countervailing duty investigations in a manner that is inconsistent with the United States' obligations under the WTO?

Response:

137. As the United States explained in its response to Question 54, the exchange of letters was not required to bring the United States into compliance with its obligations under the SCM Agreement. As previous Appellate Body and panel reports have found, a measure will only be found to be WTO-inconsistent "as such" where it *necessarily leads to* WTO-inconsistent action.[178] Because the United States may apply the measure in a WTO-consistent manner, there is no basis to find that the measure is "as such" WTO-inconsistent.[179] Therefore, the United States need not take any action to implement the DSB recommendation.

138. Nonetheless, as also explained in response to Question 54, the United States did take actions to confirm its commitment to act in a WTO-consistent manner through an exchange of letters between the Office of the U.S. Trade Representative and the Department of Commerce, and through communications to the DSB. Having already expressed its commitment in these ways, the United States has not repeated its statements through yet other documents. The United States would further note that India has not brought forward any evidence that would either contradict the interpretation of Subpart III set out by the United States, or show that the USDOC has acted *inconsistently* with the commitment expressed in its letter. Therefore, no additional evidence is required to show that the United States need not take further action to implement the DSB recommendation in this dispute.

Question 56: To the United States: What is the value under US law of the USDOC's "commitment" to not self-initiate countervailing duty investigations on certain dates?

Response:

139. The USDOC's commitment expresses its decision, as the investigating authority responsible for administering U.S. laws relating to investigations of dumping and subsidization, to exercise its discretion under those laws in a particular way. Unless and until a U.S. court finds

[178] *See, e.g., US – Carbon Steel (AB)*, para. 162 (recognizing complainant has burden to show that a measure challenged as "as such" inconsistent mandates WTO-inconsistent action, or that the measure materially restricted the investigating authority discretion to make WTO-consistent determinations).

[179] *See, e.g., US – Section 211 Appropriations Act (AB)*, para. 259 (recognizing that while municipal laws mandating action inconsistent with the covered agreement are appropriate for an "as such" challenge, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.") (citing *US – 1916 Act (AB)*, para. 88 n.177; *Chile Alcoholic Beverages (AB)*, para. 74).

otherwise, the practice and interpretation of the investigating authority of U.S. law, including the extent of its discretion, *is* U.S. law.

140. Panels have made similar observations when considering what is permitted under U.S. law. The panel in *US – Countervailing and Anti-Dumping Measures (China)* correctly observed that "in the absence of a United States court decision that would govern the practice of USDOC, it is USDOC's own practice or interpretation that governs under United States law."[180] In considering whether a USDOC practice regarding rates of duty was permitted under United States CVD law, that panel concluded: "the evidence before us suggests that this practice was presumptively lawful under United States law, as USDOC's interpretation of United States CVD law governed in the absence of a binding judicial determination indicating otherwise."[181] That panel additionally recognized that, "[a]s the United States explained, *under United States law*, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.'"[182]

141. In the present dispute, the exchange of letters reflects USDOC's interpretation of its authority under U.S. law. The United States' commitment to exercise its discretion not to self-initiate in a particular way has not been subject to challenge in domestic judicial proceedings. And as noted, the USDOC has never exercised its discretion to self-initiate in any investigation such that the conditions of Subpart III would be triggered. Therefore, the exchange of letters supports an interpretation that Subpart III is not inconsistent with U.S. obligations under the SCM Agreement because the statute does not require WTO-inconsistent action.

Question 57: <u>To the United States</u>: What would be the consequences under US law if the USDOC were to self-initiate a countervailing investigation on the same day as an anti-dumping petition is filed (or vice versa)? Would the self-initiation be inconsistent with any law or regulation under US law? How would the investigation be affected?

<u>Response</u>:

142. Self-initiation of a countervailing duty investigation on the same day as an anti-dumping petition is filed (or vice versa) is contemplated by Subpart III. However, as we have explained, this situation has never arisen in any investigation in the history of the application of the statute.

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[180] *US – Countervailing and Anti-Dumping Measures (panel)*, para. 7.171; *see also id.* at para. 7.171 n. 270 ("Specifically, the United States observed that 'under recognized principles of U.S. law, Commerce's interpretation of the U.S. CVD law is presumed to be the governing interpretation of the U.S. Tariff Act until and unless a court finds that Commerce's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding decision.'") (citations omitted).

[181] *US – Countervailing and Anti-Dumping Measures (panel)*, para. 7.185.

[182] *US – Countervailing and Anti-Dumping Measures (panel)*, para. 7.163 (emphasis added) (citing *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)).

The United States is not in a position to speculate as to whether some assertion could be made that this provision is somehow inconsistent with another provision of U.S. law.

Question 58: To the United States: With reference to para. 9 of India's opening statement at the substantive meeting with the Panel, can the USDOC ensure that a petitioner does not file an anti-dumping complaint on the same day as the USDOC self-initiates a countervailing duty investigation (or vice versa)? Should the hypothetical scenario described in India's opening statement materialise, what options are available to the USDOC to fulfil its "commitment"? Assuming this hypothetical scenario occurs, would the USITC be mandated to cross-cumulate the effects of subsidized and dumped, non-subsidized imports in its injury assessment?

Response:

143. In raising this argument, India seeks to suggest that a petitioner could effectively control whether Subpart III is triggered, rather than the USDOC, by preparing a countervailing duty petition, for example, and then waiting for the USDOC to self-initiate an anti-dumping investigation on the same product so that it could file its petition the same day. However, India fails to support this argument with any evidence or argumentation as to how this might be possible under U.S. law.

144. When the relevant U.S. laws are examined, it becomes apparent that the hypothetical raised by India has no practical significance – and certainly does not undermine the USDOC's commitment to exercise its discretion on when to self-initiate in such a manner as to not lead to results that are inconsistent with U.S. WTO obligations. First, as a practical matter, that the USDOC might self-initiate an investigation on a particular product would not itself be public information. [In fact, the USDOC is prohibited by statute from publicizing such information.[183]] Therefore, the feasibility of a petitioner being able to anticipate both the timing and subject of a self-initiated investigation is highly speculative. Second, even if a petitioner were able to prepare and file a petition so as to trigger Subpart III of the statute, Section 704(k) of the Tariff Act of 1930, as amended (19 U.S.C. § 1671c(k)), states that "[t]he administering authority may terminate any investigation initiated by the administering authority under section 702(a) [section 1671a(a) of this title] after providing notice of such termination to all parties to the investigation." In other words, the USDOC retains full discretion under U.S. law to terminate a self-initiated countervailing duty investigation, for example, and in particular would have the discretion to do so where an antidumping duty petition is filed on the same day (or vice versa). Still other U.S. laws would allow the USDOC to prevent a petition from being filed "on the same day" as a self-initiated investigation. For example, the relevant USITC regulation mandates that any petition filed after 12:00 noon eastern U.S. time "shall be deemed filed on the next business day."[184] Since the USDOC can control the timing of any self-

[183] *See* 19 U.S.C § 1671a(b)(4)(C) (Exhibit IND-1).
[184] *See* 19 C.F.R. § 207.10(a) (Exhibit USA-43).

initiation, it could ensure that any corresponding petition could not be filed on the same day for purposes of Subpart III simply by self-initiating its investigation later in the day.

145. All of the above only further underscores that the timing of a self-initiated investigation is squarely within the discretion of the USDOC, such that the statute does not require the United States to engage in WTO-inconsistent action. As explained in previous U.S. submissions, a municipal law cannot be found to be "as such" merely because it permits WTO-inconsistent action. Rather, only where a measure necessarily leads to WTO-inconsistent conduct can a finding of "as such" inconsistency be made.[185] Where, as here, a Member has discretion to act in a WTO-consistent manner, the measure in question does not necessarily lead to WTO-inconsistent action and thus is not inconsistent "as such" with the Member's WTO obligations.

Question 59: <u>To the United States</u>: What are the implications of the USDOC's understanding of the operation of the "commitment" to not self-initiate investigations on certain dates for the USITC's implementation of Section 1677(7)(G)(i)(III) in injury determinations?

<u>Response</u>:

146. As the United States explained in its answer to question 58, Subpart III is triggered only when the USDOC self-initiates a countervailing duty investigation *on the same day* that an antidumping duty petition is filed, or vice versa. Thus, as a prerequisite to the application of Subpart III, both of these activities must be deemed by the USITC to have occurred *on the same day*. Under the U.S. statutory scheme, only the USDOC, and not the USITC, has the authority to self-initiate.[186] As explained above, while the USITC does not control the timing of self-initiation or of the filing of a petition, its regulations dictate the effective filing date for a petition.[187] And the USITC would not be required to take any action under Subpart III where a petition is not filed on the same day as the self-initiation of an investigation by the USDOC. Thus, again, because the USDOC maintains discretion as to whether Subpart III is triggered, any obligations of the USITC under the statute also would be triggered only by the USDOC's exercise of discretion.

Question 60: <u>To both parties</u>: Could the parties please comment on the relevance of the timing of the exchange of letters between the Office of the USTR and the USDOC (Exhibits USA-37; USA-38) in relation to the reasonable period of time to comply with the

[185] *See, e.g., US – Carbon Steel (AB)*, para. 162 (recognizing complainant has burden to show that a measure challenged as "as such" inconsistent mandates WTO-inconsistent action, or that the measure materially restricted the investigating authority discretion to make WTO-consistent determinations); *US – Section 211 Appropriations Act (AB)*, para. 259 (recognizing that while municipal laws mandating action inconsistent with the covered agreement are appropriate for an "as such" challenge, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.") (citing *US – 1916 Act (AB)*, para 88 n.177; *Chile Alcoholic Beverages (AB)*, para. 74).
[186] 19 U.S.C. §§ 1671a(a) and 1673a(a) (Exhibit IND-1).
[187] 19 C.F.R. § 207.10(a) (Exhibit USA-43).

DSB recommendation in this case?

Response:

147. First, as we have explained in response to Questions 54 and 55, the United States does not rely solely on the exchange of letters to show that Subpart III is not inconsistent with WTO rules. The exchange of letters and other U.S. statements serve to *confirm* that the United States has been, and continues to be, in compliance with the obligations underlying the DSB's recommendations and rulings concerning Subpart III. And because Subpart III does not – and did not – require the United States to take WTO-inconsistent action, there was no measure that the United States had to undertake in order to come into compliance in this dispute. For these reasons, the timing of the letters is not relevant.

148. In any event, it is clear through the letters that the USDOC took a decision to express its commitment to exercise its discretion in a particular way *prior to* India bringing its compliance challenge. Specifically, it was India's request to the DSB to refer the compliance matter to this compliance panel that resulted in the Panel's terms of reference being set. Accordingly, pursuant to DSU Article 21.5 and 7.1, the Panel must examine the legal situation as of the date the DSB referred the matter to the panel for examination.

149. Contrary to India's assertions in its submissions, nowhere does the DSU provide that a compliance Panel may only examine whether a Member is in compliance with its WTO obligations as of the date of expiry of the RPT. Article 21.5 of the DSU provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." There is nothing in the text of Article 21.5 that limits the "disagreement" between the parties to the point in time at the end of the RPT.

150. Further, there are good reasons a compliance proceeding may not be initiated at the end of the RPT. As we explained in our second written submission, if a complaining Member deems the other Member in a dispute to have not implemented DSB recommendations and rulings, it can raise its concerns bilaterally. It could raise them at DSB meetings. If still not satisfied, it could request consultations or the establishment of a compliance panel. The Member in weighing what measures it should take to implement DSB recommendations must consider the potential that the complaining Member will request a compliance panel, and take what implementation actions it believes appropriate prior to that request.[188]

151. It would run contrary to the very aim of the dispute settlement system to secure a positive solution to the dispute (under Article 3.7 of the DSU) if a complaining Member felt compelled to stop engaging with the other party and to initiate compliance proceedings upon the expiry of the RPT, or if the responding party Member felt that there was no benefit to continuing its efforts to come into compliance after the expiry of the RPT. In fact, Article 21.5

[188] *See* United States' Second Written Submission, para. 32.

of the DSU assigns no particular consequence to the end of the RPT for purposes of analyzing the disagreement between the parties in a compliance proceeding.

Question 61: <u>To the United States</u>: The United States made the following remarks at the hearing in response to Question 27 of the questions put at the hearing in relation to Section 1677(7)(G)(i)(III):

> **this wasn't before the underlying panel or Appellate Body, and nor now has India submitted any evidence as to how the discretion held by the Department of Commerce works. Quite simply there aren't facts in this dispute or in the underlying proceedings that would allow this panel to determine how in fact this subpart III is triggered**

If there is no evidence or argumentation on the record as to what Section 1677(7)(G)(i)(III) means, how can Exhibits USA-36 and USA-37 demonstrate that the discretion in Section 1677(7)(G)(i)(III) has been curtailed?

<u>Response</u>:

152. The United States made this statement in response to assertions made by India concerning the *meaning* of Subpart III and the U.S. laws referred to therein. The quoted statement focuses on a critical point emphasized in our written submissions: India never, at any point before the original panel or the Appellate Body, raised a claim under Subpart III. India did not present any evidence and argumentation concerning Subpart III, including the underlying statutes referred to in that provision, Sections 1671a(a) and 1673a(a), which address investigations initiated by the investigating authority. The original panel report reflected the argumentation presented by the parties, and likewise did not engage in *any* substantive discussion of the intent and meaning behind Subpart III.[189] Rather, the original panel's analysis was limited to a general assertion that "Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports."[190] And neither the United States nor India made any arguments on appeal pertaining to Subpart III.[191]

153. Despite all this, the Appellate Body – of its own accord – proceeded to interpret the meaning of Subpart III as requiring the USITC to cross-cumulate *if* a petition is filed by an industry in an anti-dumping investigation on *the same day* that a countervailing duty investigation is self-initiated by the USDOC, or vice versa.[192] On this basis, the Appellate Body

[189] *See* United States' Second Written Submission, para. 25.
[190] *US – Carbon Steel (India) (Panel)*, para. 7.340.
[191] *See* United States' Second Written Submission, para. 25 (citing India's Appellant Submission and Appellee Submission).
[192] *US – Carbon Steel (India) (AB)*, para. 4.629.

found "Section 1677(7)(G)(i)(III) of the US statute to be inconsistent 'as such' with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement."[193]

154. Not having had a chance to defend a claim against Subpart III before the panel or Appellate Body in the underlying proceedings, the United States explained the operation of Subpart III at meetings of the DSB, and confirmed the USDOC's commitment to (continue to) exercise its discretion as to the timing of any self-initiated investigation in a WTO-consistent manner. The United States has repeated those explanations before this compliance Panel.

155. The Panel's question highlights the fundamental problem with the Appellate Body's finding, however. India never raised a claim against Subpart III before the panel or the Appellate Body in the underlying proceedings, and therefore there was no evidence or argumentation upon which to base a finding. The Appellate Body therefore acted beyond the scope of its authority under Article 17.6 of the DSU, by not limiting its findings to "issues of law covered in the panel report and legal interpretations developed by the panel."[194] Because the Appellate Body lacked the authority to reach it, this finding cannot constitute a valid basis for a DSB recommendation. Therefore, not only has India failed to provide any evidence upon which the Panel could base a finding that Subpart III is WTO-inconsistent, there is no legal authority for the Panel to make such a finding in the context of this compliance proceeding.

156. But it is for India to show that the United States has failed to bring its measures into compliance with its WTO obligations. It has not done so. India claims only that the United States failed to remove or modify Subpart III of the U.S. statute.[195] India has not successfully rebutted the U.S. arguments regarding the lack of a legal basis for the Appellate Body's findings or the meaning of Subpart III under U.S. law.

157. The Panel's question suggests that if there is no evidence on the record as to the meaning of Subpart III, then the letter exchange between the USTR and the USDOC could not demonstrate that discretion under Subpart III has been curtailed. The United States' assertion during the hearing that there was no evidence or argumentation presented before the original panel or Appellate Body as to Subpart III does not mean that there is no evidence or argumentation *at all* before this compliance panel as to how the discretion operates under Subpart III. In fact, the United States explained extensively, in both of its submissions before this compliance Panel, that the USDOC has discretion to decide whether to self-initiate an antidumping duty investigation on the same day a countervailing duty petition is filed by an industry, or vice versa, and thereby trigger the conditions of Subpart III. But that does not excuse the fact that the Appellate Body misinterpreted the meaning of Subpart III because it failed to account at all for the discretion under that statute. Nor does it replace the absence of any argumentation between the parties in the original proceedings as to Subpart III (or the

[193] *US – Carbon Steel (India) (AB)*, para. 4.629.
[194] United States' Second Written Submission, para. 26.
[195] *See* India's First Written Submission, paras. 15-16.

provisions discussed therein, Sections 1671a(a) and 1673a(a)), because Subpart III was clearly not an issue in dispute during the underlying proceedings.

158. It is unclear what the Panel means by suggesting that the United States must "demonstrate" that discretion has been "curtailed" under Subpart III. As the United States explained in response to Question 55 and in its written submissions, the letter exchange reflects the USDOC's *commitment* to exercise its discretion concerning when to self-initiate an investigation in a manner so as not to lead to results that are inconsistent with U.S. WTO obligations. The fact that the United States confirmed its intention not to take such action, both through this letter exchange and its statements at the DSB, only reinforces that the USDOC has the authority to decide when and whether to self-initiate an investigation – and accordingly, when and whether Subpart III will ever be triggered. The letter exchange reflects the USDOC's commitment (or decision) to exercise its discretion in a WTO-consistent fashion. India not only failed to provide any evidence and argumentation as to the meaning of Subpart III in the underlying proceedings, but also did not provide any evidence and argumentation in these compliance proceedings to rebut the arguments presented by the United States as to how the discretion operates in Subpart III.

159. Finally, the United States must emphasize once again that the letter exchange, while meaningful, was *not* required for the United States to come into compliance with its obligations under the SCM Agreement. Because Subpart III does not require the United States to take WTO-inconsistent action, the United States did not need to take an *additional* measure in order to implement the DSB recommendation.

Question 62: <u>To the United States</u>: Is it the United States' position that essentially Section 1677(7)(G)(i)(III) is meaningless, despite continuing to subsist as a law?

<u>Response</u>:

160. The United States has argued that the USDOC has *discretion* with respect to whether and when to self-initiate an investigation such that the conditions of Subpart III would be triggered. This discretion is critical to understanding Subpart III, and was reinforced through the exchange of letters in which the USDOC confirmed its commitment to exercise this discretion in a WTO-consistent manner. Because the USDOC has discretion on whether and when to self-initiate, Subpart III does not require or necessarily lead to WTO-inconsistent action.[196] Therefore, India cannot show that Subpart III is "as such" inconsistent with U.S. WTO obligations.

[196] *See, e.g.*, *US – Carbon Steel (AB)*, para. 162 (recognizing complainant has burden to show that a measure challenged as "as such" inconsistent mandates WTO-inconsistent action, or that the measure materially restricted the investigating authority discretion to make WTO-consistent determinations); *US – Section 211 Appropriations Act (AB)*, para. 259 (recognizing that while municipal laws mandating action inconsistent with the covered agreement are appropriate for an "as such" challenge, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the *WTO Agreement* in good faith.") (citing *US – 1916 Act (AB)*, para 88 n.177; *Chile Alcoholic Beverages (AB)*, para. 74).

VII. "AS APPLIED" INJURY CLAIMS

Question 63: To the United States: Did the USITC make any considerations concerning the magnitude of price undercutting in the Section 129 injury determination?

Response:

161. While Article 15.2 of the SCM Agreement requires a comparison between the price of subject imports and that of the domestic like product, neither that Article nor any other provision of the SCM Agreement imposes a particular methodology for such a price comparison.[197] Instead, the Appellate Body has found that an investigating authority retains a certain amount of discretion in conducting an examination pursuant to Article 15.2, so long as an investigating authority undertakes an "objective examination" that takes into consideration "price comparability."[198]

162. Consideration of the particular margin(s) of underselling, as opposed to the existence of underselling, may not be probative in every investigation. For instance, when products are close substitutes and are more "commodity-like," any difference in price – no matter how small – may influence purchasing decisions. Thus, while the magnitude of price undercutting may be probative to a price effects analysis in some investigations, an investigating authority has discretion to determine its relevance in each investigation in light of the underlying conditions of competition.

163. In this matter, the USITC implicitly considered the relevance of the degree of underselling in the underlying investigation in light of the conditions of competition pertinent to the U.S. hot-rolled steel market, which indicated that the magnitude of underselling margins was less pertinent than the existence of underselling. Specifically, the USITC explained that because subsidized imports and the domestic like product were highly interchangeable within product type (*e.g.*, of similar alloys or ASTM standard), and that purchasing decisions were made based largely on price, that "even a relatively moderate amount" of underselling could result in price depressing or suppressing effects.[199] Accordingly, the USITC found that the frequency of underselling by subsidized imports (59.7 percent of quarterly comparisons), combined with the correlation between increases in subsidized import volumes and inventories and restrained price increases followed by sharp price declines for the domestic like product, established the significance of price underselling based on an objective examination and positive evidence.[200]

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[197] *See* United States' First Written Submission, para. 1093 (citing *China – X-Ray Equipment*, para. 7.41).
[198] *China – GOES (AB)*, para. 200; *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 113.
[199] USITC Section 129 Determination, pp. 19-20, 23 (Exhibit IND-58).
[200] USITC Section 129 Determination, pp. 24-25 (Exhibit IND-58).

164. To the extent India continues to impose its preference that the USITC should instead have relied on the hypothetical estimates created from the COMPAS model,[201] the Unites States has explained in prior submissions why India's argument in unavailing.[202]

Question 64: <u>To the United States</u>: Is ascertaining the significance of price undercutting by frequency of undercutting through quarterly comparisons the standard methodology used by the USITC in injury assessments?

<u>Response</u>:

165. As the United States explained at the hearing and in its written submissions, the USITC's methodology for price comparisons is outside the terms of reference for this compliance panel.[203] This methodology remains unchanged from the original 2001 determination, and India did not raise a challenge to this methodology in prior proceedings.[204]

166. While the approach used by the USITC in other proceedings is not at issue in this dispute, for purposes of responding to the Panel's question, the United States notes that the collection and use of quarterly price comparison data in this investigation was not aberrant. The USITC standardly seeks quarterly pricing data from questionnaire respondents in its investigations.[205] The USITC then typically relies on quarterly pricing data in examining the price effects of subject imports, as it did in this investigation.[206]

Question 65: <u>To the United States</u>: Could the United States clarify how the USITC determined that undercutting occurred in a particular quarter? Would a single instance of undercutting in a quarter be sufficient to conclude that price undercutting occurred in that specific quarter? Please respond by reference to relevant record evidence if available.

<u>Response</u>:

167. For each pricing product, the USITC tabulated the quantities and values of sales to the first unrelated customer to calculate a single quarterly price for: (1) U.S. importers of

[201] See India's Opening Statement, para. 15 (wrongly insisting that "subsidized imports taken together had an impact of 0.3% to 0.4% on the prices of US producers.").
[202] United States' First Written Submission, paras. 121-126; United States' Second Written Submission, paras. 59-61.
[203] *See* United States' First Written Submission, para. 92; United States' Second Written Submission, para. 44; United States' Oral Statement at Panel Hearing, para. 7.
[204] *See id.*
[205] We again note that investigating authorities retain discretion as to the price comparison methodology employed in each investigation. *China – X-Ray Equipment*, para. 7.41.
[206] In addition, in this investigation, the USITC observed that purchasers' reported average unit value data corroborated the finding of underselling shown by the quarterly price comparison data. *See* USITC Section 129 Determination, p. 24, n.105 (Exhibit IND-58).

merchandise from each subject country and (2) domestic producers.[207] Where the subject imports' average quarterly price was lower than that of the domestic product, imports from that subject country were characterized as having undersold in that quarter. Where subject imports' average quarterly price was higher, imports from that subject country were characterized as having oversold. The USITC's conclusions on price comparisons relied on pricing tables in the USITC's staff report, which outlined the quarterly volume, value, and average unit price for each pricing product from the domestic industry and each subject country.[208]

168. The USITC sought to identify high-volume, representative products in collecting pricing data, with the intent that each quarterly price would thus involve multiple transactions, not a single transaction.[209] While the precise volumes of products in each quarter of pricing comparisons are business confidential information, we note that the reported pricing data represent millions of short tons of hot-rolled steel.[210]

Question 66: <u>To the United States</u>: What was the period of investigation used to determine injury in the investigation leading to the imposition of anti-dumping duties on imports from Brazil, Japan, and the Russian Federation?

<u>Response</u>:

169. For the antidumping investigations of imports from Brazil, Japan, and Russia, the USITC's period of investigation encompassed the full calendar years of 1996, 1997, and 1998, which resulted in one year overlap (1998) with the underlying investigation of subsidized imports.

Question 67: <u>To the United States</u>: Did the USITC in its Section 129 Determination assess the nature and the extent of the injurious effects of dumped imports from China, Kazakhstan, the Netherlands, Romania, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), and Ukraine separately from all other non-

[207] *See* 2001 USITC Determination at V-12 & V-13 (describing pricing products and price comparison methodology) (Exhibit IND-5). This price is akin to an average unit value for the pricing product for each quarter.
[208] *See* USITC Section 129 Determination, pp. 23-25 (Exhibit IND-58); 2001 USITC Determination, Tables V-4, V-5, and V-6 (Exhibit IND-5).
[209] As the United States noted in its first written submission, the USITC also sought input from parties as to the pricing products, and no respondents objected to the selected pricing products. United States' First Written Submission, para. 107; *see also* Section 129 Proceedings, USITC Comments from Corus Steel (April 27, 2001) (Exhibit USA-28); USITC Section 129 Proceedings, Comments from Saldanha Steel (April 26, 2001) (Exhibit USA-29); USITC Section 129 Proceedings, Comments from Zaporozhstal Steel (April 25, 2001) (Exhibit USA-30).
[210] The selected pricing products included extensive volumes of U.S. commercial shipments, encompassing 24.2 percent of the domestic like product's shipments, 26.7 percent of shipments of subsidized imports from Argentina, 20.9 percent of shipments of subsidized imports from India, 26.3 percent of shipments of subsidized imports from Indonesia, 10.9 percent of shipments of subsidized imports from South Africa, and 12.1 percent of shipments of subsidized imports from Thailand. 2001 USITC Determination at V-13 (Exhibit IND-5). The data for total commercial U.S. shipments for U.S. producers and subject importers show that these percentages represent substantial volumes of such shipments. *See* 2001 USITC Determination at IV-13, Table IV-6. (Exhibit IND-5).

subsidized imports? If the answer is in the positive, could the United States refer to relevant evidence?

Response:

170. The United States recalls that Article 15 identifies three categories of products relevant to a determination of injury: the domestic product or like product,[211] subsidized imports of the product in question,[212] and non-subsidized imports of the product in question.[213] Although Article 15.5 specifies that an investigating authority examine the volumes and prices of *non-subsidized imports of the product in question* to ensure that injury from such products are not attributed to subsidized imports, that provision does not identify further subsets of non-subsidized imports that necessitate examination.[214] Indeed, this approach is only logical: an analysis of the broader category of non-subsidized imports would necessarily encompass any injury of a subset of these products, making a separate analysis of a subset unnecessary. Therefore, to the extent that India has suggested that the USITC was required to segregate each of the various groups of non-subject imports for purposes of a non-attribution analysis under Article 15 of the SCM Agreement,[215] nothing in the covered agreement supports that proposition.

171. In accordance with Article 15.5 of the SCM Agreement and the examples laid out in that Article, the USITC examined the volumes and prices of "non-subsidized imports of the product in question," inclusive of imports from China, Kazakhstan, the Netherlands, Romania, Taiwan, and Ukraine.[216] The USITC examined these imports and found that their volume and market share sharply declined during the period of investigation.[217] The USITC further utilized pricing data from its concurrent antidumping investigations of hot-rolled steel to examine the prices of non-subsidized imports from China, Kazakhstan, the Netherlands, Romania, Taiwan, and Ukraine, and these data indicated that non-subsidized (and dumped) imports were higher priced than subsidized imports in more than half of 453 quarterly comparisons.[218]

VIII. ARTICLE 19.3 OF THE SCM AGREEMENT

Question 72: To the United States: We refer to the documents labelled by India as "JSW Amended Final Results" and "Tata Amended Final Results". Both documents report that

[211] *See, e.g.*, SCM Agreement Articles 15.1, 15.2, 15.3, 15.5, 15.6.
[212] *See, e.g.*, SCM Agreement Articles 15.1, 15.2, 15.3, 15.4, 15.5, and 15.6.
[213] *See, e.g.*, SCM Agreement Article 15.5.
[214] SCM Agreement Article 15.5.
[215] India's First Written Submission, para. 61(a).
[216] Although not required by Article 15.5 of the SCM Agreement, the USITC did undertake a further analysis of dumped imports from Brazil, Japan, and Russia. The USITC explained, however, this was because trade remedies had been imposed on these imports in mid-1999 during the underlying period of investigation, thereby altering the conditions under which these imports competed in the U.S. market. USITC Section 129 Determination, pp. 28-29 (Exhibit IND-58).
[217] USITC Section 129 Determination, pp. 31-32 (Exhibit IND-58).
[218] USITC Section 129 Determination, p. 32 & n.135 (Exhibit IND-58).

JSW and Tata filed lawsuits challenging certain aspects of the final results concerning them. In both cases, the documents refer that the USDOC entered into settlement agreements with the companies concerned. In its first written submission, the United States argues that "[t]hese rates, as memorialized in the USDOC's Amended Final Determinations, were the result of negotiated settlements – and were not based upon specific margin or facts available margin calculation". Can the United States elaborate further on the bases for these settlements and provide evidence accordingly?

Response:

172. As explained in the U.S. submissions, the Amended Final Results are not relevant to the Panel's evaluation of U.S. compliance in this dispute.[219] The Amended Final Results came into effect before India requested a panel in the original dispute, and despite the fact that they contained the deposit rates then applicable to JSW and Tata, India chose not to challenge them before the original panel. Instead, India chose to challenge the specific findings and calculations made with respect to JSW and Tata in the underlying CVD determinations. The United States has complied with the findings of the panel and Appellate Body in the underlying proceedings, and this compliance Panel has been asked by India to examine whether it has done so successfully. The Amended Final Results are not a measure taken to comply; nor has India alleged that they are a measure taken to comply. Therefore, examination of the basis for these, now expired, rates is not within the scope of these proceedings. Were the Panel to consider the basis for these settlement rates to be a relevant inquiry in the context of India's claims, it would be for India to submit the evidence and argumentation necessary to substantiate those claims under Article 19.3. It has not done so.

173. The settlement rates for both JSW and Tata were determined through negotiations between the United States and those two parties. As we explained in our first written submission, JSW and Tata challenged the facts available rates in U.S. domestic litigation before the United States Court of International Trade. That litigation was settled in 2010 and 2011, and pursuant to that settlement JSW agreed to a 76.88 percent liquidation and cash deposit rate and Tata agreed to a 102.74 percent liquidation and cash deposit rate.[220] As a result of these negotiated settlements, JSW's 2006 entries were liquidated at the 78.66 percent assessment rate, and Tata's 2008 entries were liquidated at the 102.74 assessment rate.

174. The specifics of settlement negotiations for judicial proceedings between the United States and interested parties – including those before the United States Court of International Trade – are typically confidential and not disclosed publicly. As explained in our submissions,

[219] *See* United States' First Written Submission, paras. 398-401, 437-441; United States' Second Written Submission, paras. 239, 263.

[220] United States' First Written Submission, para. 407 (citing *Certain Hot-Rolled Carbon Steel Flat Products From India: Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision*, 75 Fed. Reg. 80,455-56 (Dec. 22, 2010) ("JSW Settlement") (Exhibit USA-20). *See also Certain Hot-Rolled Carbon Steel Flat Products From India: Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision*, 76 Fed. Reg. 77,775, 77,776 (Dec. 14, 2011) ("Tata Settlement") (Exhibit USA-21)).

these settlement rates are based on mutual agreement between the parties, which would reflect each party's consideration of the risks and benefits of continuing the domestic litigation.[221] The resulting settlement rates do not represent conclusions regarding any specific findings made in the course of an investigation or administrative review, as those would be set out in a USDOC determination.[222] As such, there are no additional record documents related to the settlement agreements.

[221] United States' First Written Submission, para. 440; United States' Second Written Submission, paras. 260-61.
[222] *See* 19 U.S.C. § 1671d(d) (requiring notice for final determination). *See also* 19 U.S.C. § 1671b(f) (requiring notice for preliminary determination) (Exhibit IND-1).