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)

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

March 1, 2019

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Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
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 (China) (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 – 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 – 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 – Upland Cotton (Article 21.5 – Brazil) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008

TABLE OF ABBREVIATIONS

Abbreviation	**Definition**
CVD	Countervailing Duty
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Essar	Essar Steel India Limited
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GOI	Government of India
JSW	JSW Steel Limited
MMTC	Minerals & Metals Trading Corporation
NMDC	National Minerals Development Corporation
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SDF	Steel Development Fund
Tata	Tata Steel Limited
URAA	Uruguay Round Agreements Act
USDOC	U. S. Department of Commerce
WTO	World Trade Organization

I. INTRODUCTION

1. In this document, the United States comments on India's responses to the Panel's written questions. To a large extent, India's responses repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. arguments on these issues, the comments below contain additional points on India's arguments. The absence of a U.S. comment on an aspect of India's response to any particular question should not be understood as agreement with that response.

II. 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>Comments</u>:

2. The United States refers the Panel to the U.S. response to both subparts of this question.

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

a. To India: How does India conceive that "classifications as governmental" could be proven as a matter of evidence – for instance, does this require an explicit domestic legal/constitutional or administrative categorization as "governmental"?

b. To India: How should an investigating authority approach instances where a Member's legal system does not provide for explicit designations of certain functions as "governmental"?

c. To India: How would an investigating authority obtain evidence from other noninvestigated WTO Members as to classifications of their governmental functions?

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

Comments:

3. The United States comments on India's responses to subparts a through d of this question together.

4. As the United States explained in its response to Questions 2(d) and 3, 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.[1] Therefore, India's argument that the USDOC was required to demonstrate that mining was a governmental function both in India and in other WTO Members to establish that the NMDC is a public body is erroneous.

5. In the underlying proceedings, the USDOC solicited information concerning the NMDC. In the Section 129 proceeding, after considering the information that was on the record in the underlying proceedings, the USDOC determined 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.[2] Given these facts, and other evidence before the USDOC, this finding was

[1] *See also* Canada's Response to Panel Questions, para. 7 ("Canada disagrees with India's argument that the activities of an entity must be 'ordinarily classified as governmental in the legal order' of the country for it to be considered a public body."); Japan's Response to Panel Questions, para. 9 ("As Japan elaborated in its oral statement before the Panel, Japan disagrees with India's argument cited in this question.").

[2] 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).

sufficient to support a determination that the NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Question 3: To both parties: 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?

Comments:

6. The United States refers the Panel to the U.S. response to Questions 2(d) and 3.

Question 4: To both parties: 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 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?

Comments:

7. As the United States explained in its response to this question, the existence of private, commercial entities that are also engaged in mining in India does not "cast doubt" on a finding that the function could be characterized as "governmental" for purposes of a public body determination, as India contends.[3] Several third parties made similar statements in their responses to the Panel's questions.[4] Indeed, 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

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[3] India's Response to Panel Question 4.

[4] EU's Response to Panel Questions, para. 51 ("The European Union believes that the performance of the same function by private, commercial entities in competition with a governmental entity does not remove the possibility that such a function can be characterized as 'governmental.'"); Japan's Response to Panel Questions, para. 23 ("Japan does not consider that the fact that private entities are performing the same function in competition with a governmental entity is relevant to the public body inquiry under Article 1.1(a)(1) of the SCM Agreement."); Canada's Response to Panel Questions, para. 11 ("[T]he performance of the same function by private entities does not remove the possibility that such a function can be characterized as 'governmental.'").

public body, any action or conduct by that entity is "governmental" (or "public") for purposes of Article 1.1(a)(1).

8. Furthermore, India's contention that, in such a case, an investigating authority "*must prove* the function which is also performed by the private entities is [a] governmental function within the legal order of the respondent Member and that there is a[n] express delegation of this function to such private entities,"[5] is not supported by the text of Article 1.1(a)(1); nor does it reflect the Appellate Body's approach. As the United States has previously explained, 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.[6]

Question 5: <u>To India</u>: India submits that the USDOC failed to accord "due significance" to the existing record evidence regarding the implications of Miniratna status (para. 87, India's second written submission). Can India elaborate upon the "significance" that the USDOC should have accorded to this evidence, and in particular: (i) what inferences and conclusions should have been drawn from this evidence; (ii) how such inferences and conclusions would relate to other aspects of record evidence relied upon by the USDOC; and (iii) how such inferences and conclusions would be relevant to a "public body" determination?

<u>Comments</u>:

9. In its response to this question, India relies on the DPE Guidelines that were submitted as exhibits with its rejected case brief to argue that the NMDC "possess[es] significant amount of autonomy from the Government."[7] As the United States previously explained, the DPE Guidelines (Exhibit IND-68) have no bearing on the Panel's review of the USDOC's Section 129 Determinations because they were not on the record before the USDOC.[8] Furthermore, as the United States explained in its response to Questions 15 and 16, the content of the rejected case brief (Exhibit IND-56) was also not information on the record for consideration by the USDOC.[9]

10. Notably, India fails to bring forth evidence *on the record* that supports its assertion that the NMDC had a purported "enhanced autonomy" from the GOI. This is because, as the USDOC's Section 129 Determinations demonstrate, the record evidence supports the finding that the GOI exercised meaningful control over the NMDC.[10] Therefore, India has failed to demonstrate that the USDOC's conclusion that the NMDC is a public body is a determination that an objective and unbiased investigating authority could not have reached based on the whole of the record.

[5] India's Response to Panel Question 4 (emphasis added).
[6] United States' Second Written Submission, paras. 102-105.
[7] India's Response to Panel Question 5.
[8] United States' First Written Submission, para. 191.
[9] United States' Response to Panel Questions, paras. 41, 45.
[10] United States' First Written Submission, paras. 168-176.

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 India: Can India please confirm whether this reflects an accurate summation of its case on the USDOC's treatment of Miniratna status.

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?

Comments:

11. The United States refers the Panel to the U.S. response to this question.

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

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"?

Comments:

12. The United States refers the Panel to the U.S. response to Questions 7 and 8.

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"?

Comments:

13. The United States refers the Panel to the U.S. response to Questions 7 and 8.

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?

Comments:

14. The United States refers the Panel to the U.S. response to this question.

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):

> **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]…**

<u>Comments</u>:

15. As the United States explained in its response to this question, the DPE Guidelines have no bearing on the Panel's review of the USDOC's Section 129 Determinations because they were not on the USDOC's record.[11] Therefore, India's reliance on this information in its response should be disregarded. Even aside from this, as the Panel's question recognizes, the DPE Guidelines do not support India's arguments; rather, such evidence demonstrating a delegation of authority supports the USDOC's determination that the NMDC was a public body.

Question 11: <u>To India</u>: During the Section 129 reinvestigation, the GOI argued in its case brief that "[Miniratna] is governmental policy that ensures that companies like NMDC operate as independent corporate entities, on commercial principles" (Exhibit IND-57, p. 19 (p. 25 of exhibit)). India submits at para. 90 of its second written submission that "India 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". Is the Panel correct in understanding India to argue that the conferral of Miniratna status is evidence that the NMDC operates autonomously on commercial principles, and therefore cannot be a "public body"? If yes, how does Miniratna status achieve this?

<u>Comments</u>:

16. Because India refers the Panel to its response to Question 5, please see the U.S. comment to India's response to Question 5.

Question 12: <u>To India</u>: Can India please reconcile its argument that "NMDC is one of the many commercial entities which are merely permitted to *operate* or *engage* in mining" (emphasis original, para. 90, India's second written submission) with the following excerpt of the Hoda Report (Exhibit USA-8, p. 16 (p. 31 of exhibit) (emphasis added)):

[11] United States' Response to Panel Questions, paras. 24, 41 (explaining that the content of the rejected case brief (Exhibit IND-56) was not information on the record). *See also* United States' First Written Submission, para. 191 (explaining that the DPE Guidelines were not on the record).

> **. . . Ideally there should be arm's length between the regulator and any State entity that mines. It is necessary that if State organisations mine, they should be required to do so with the same obligations and rights as all other miners. … The existing Indian mineral policy and laws provide for State organisations to undertake mining and *give a clear preferential treatment to PSUs undertaking prospecting and mining, even in respect of areas prospected by private sector investors.***

Comments:

17. The record evidence referenced by the Panel in this question was among the evidence considered by the USDOC in reaching its determination that the NMDC was a public body.

18. Contrary to India's arguments in response to this question, as the United States explained in its response to Question 4, the existence of other commercial entities engaging in mining does not undermine a public body determination because an investigating authority's examination must focus on the core features of the entity, and the relationship between the entity and the government.[12]

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

[12] *US – Carbon Steel (India) (AB)*, para. 4.29. As noted 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 – 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.

mean ownership and an ability to appoint Board members, as opposed to "meaningful control".

<u>Comments</u>:

19. India again erroneously relies on the U.S. responses to panel questions in the original panel proceeding concerning the meaning of "administrative control" to argue that this evidence does not support USDOC's public body finding.[13] As the Unites States previously explained, this is incorrect.[14] 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.[15] India fails to demonstrate that the USDOC's reliance on this evidence in the Section 129 Determination did not support its determination that the NMDC is a public body, and its arguments in this respect must therefore be rejected.

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>Comments</u>:

20. In its response, India contends that the "NMDC conducts its entire operations and business, and not just pricing, on commercial principles."[16] However, as the United States detailed in its response to this question, nothing in Article 1.1(a)(1) supports an interpretation that the existence of such commercial behavior would preclude an entity from being deemed a "government or any public body" within the meaning of that provision. And indeed, it is not the case that a government, or an entity controlled by a government, cannot act in a commercial manner. As the panel in *Korea – Commercial Vessels* likewise recognized: "it is not clear to us that an entity will cease to act in an official capacity simply because it intervenes in the market on commercial principles if that intervention is ultimately governed by that entity's obligation to pursue a public policy objective."[17] Therefore, for the reasons discussed in the U.S. response to

[13] India's Second Written Submission, para. 85.
[14] United States' Second Written Submission, para. 97.
[15] United States' First Written Submission, paras. 168, 174.
[16] India's Response to Panel Question 14.
[17] *Korea – Commercial Vessels (Panel)*, para. 7.48.

this question, commercial behavior, whether found in an entity's operations, business, or pricing, is not relevant to a determination of whether an entity is a public body.

21. Furthermore, the information on the record concerning the NMDC's operations and business does not support India's contention that the NMDC is autonomous from the GOI because it acted in a commercial manner. Rather, as the United States has previously discussed at length, the USDOC determined that the GOI exercised meaningful control over the NMDC based on record evidence demonstrating that: (1) the GOI had majority ownership of the NMDC;[18] (2) the NMDC was governed by the Ministry of Steel;[19] (3) the NMDC was a strategic company which was monitored and reviewed by the government;[20] (4) the GOI's control over the NMDC through the board of directors, including appointment and selection of directors by the government;[21] (5) the GOI's involvement in the NMDC's day-to-day operations, including negotiations over the price and quantity with customers;[22] and (6) the GOI's export restrictions and control over the supply and demand of high grade iron ore sold by the NMDC.[23] Therefore, after considering the evidence concerning "the totality of operations and business"[24] of the NMDC, an objective and unbiased investigating authority could have found that the information demonstrated that the NMDC was a public body.

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

> **c. <u>To India</u>: At paragraph 230 of India's second written submission, India argues that "i[t] is not the case that India submitted any new information afresh". Was this information already on the investigating record, or was it new information that was submitted afresh?**

<u>Comments</u>:

22. Because India refers the Panel to its response to Question 16, the United States likewise refers the Panel to its comments to India's response to Question 16.

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?

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[18] United States' First Written Submission, para. 173.
[19] United States' First Written Submission, paras. 173-174.
[20] United States' First Written Submission, para. 173.
[21] United States' First Written Submission, para. 173.
[22] United States' First Written Submission, para. 174.
[23] United States' First Written Submission, para. 175.
[24] India's Response to Panel Question 14.

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>Comments</u>:

23. India argues that because the GOI provided the NMDC's general website address in its questionnaire response, wherein the NMDC Annual Report could be found, the NMDC Annual Report itself was on the record of the proceeding. India further argues that the information that the link referred to was "static content . . . (which do not undergo a change with the passage of time)."[25] However, India does not provide support for this position. Furthermore, contrary to India's assertion, the provision of a general website address in a response does not place all the content available through a website on the record of a proceeding.

24. As for Clause 49 of the Listing Agreement (Annexure 2 of Exhibit IND-56, and also submitted as Exhibit IND-69), and the DPE Guidelines (Annexure 3 of Exhibit IND-56, and also submitted as Exhibit IND-68), as the United States previously explained, such information was not on the record before the USDOC and therefore has no bearing on the Panel's review.[26]

Question 17: <u>To India</u>: India argues that: "the fact that the Chairman of NMDC occupied another position in another governmental committee that recommended such an export restriction, does not necessarily imply that the Board of Directors of NMDC had made any decisions on the same. No such positive evidence exists on record" (para. 101, India's second written submission). Can India please comment on how its argument in this regard relates to the following record evidence:

> **Dang Report, p. 1: "COMPOSITION OF EXPERT GROUP: The expert group was chaired by Shri R.K Dang, Former Secretary, Ministry of Mines and its members included <u>representatives</u> of departments/ministries, state governments, industry <u>representatives</u> and <u>representatives</u> from industry associations and experts in the area of environment and mining" (underling added).**
>
> **Dang Report, p. 5: "1.3.2 <u>Composition:</u>**

[25] India's Response to Panel Question 16.
[26] *See* United States' Second Written Submission, paras. 100, 109 (explaining that the information was not on the record of the proceeding); United States' Response to Panel Questions, para. 41 (explaining that the content of the rejected case brief (Exhibit IND-56) was also not information on the record).

> **1. Shri R.K. Dang, IRTS (Retd.), Ex-Secretary, Ministry of Mines – Chairman**
>
> **…**
>
> **6. CMD, National Mineral Development Corporation Limited -- Member (underlining original; emphasis added).**

Dang Report, p. 103: "On the other hand mining companies such as NMDC, Federation of Indian Mineral Industry (FIMI) and Steel Makers such as Steel Authority of India Limited (SAIL), Essar Steel Ltd. oppose the demand for value addition within the state by the State Government on the following grounds" (underlining added).

Dang Report, p. 105: "Somewhere in between are organizations like SAIL, NMDC, Government of Orissa whose reactions vary from non-encouragement of iron-ore export, revision of ceiling limit for export of iron ore from 64% content to 63%; to insistence on continuance of international trade in iron ore but not at the cost of domestic industry; allowing export of iron ore fines and low grade mineral subject to receiving substantially higher export mines" (underlining added).

Dang Report, p. 179: "POSITION PAPER ON NATIONAL GUIDELINES ON IRON ORE MINING 12. NMDC" (upper-case original).

Dang Report, p. 185: "Shri B. Ramesh Kumar Chairman, NMDC in his presentation stated as under: …" (underlining added; emphasis added) Dang Report, p. 194:

VIEWS OF STAKEHOLDERS ON VARIOUS ISSUES RELATING TO MINING OF IRON ORE, CHROME ORE AND MANGANESE ORE AS INDICATED IN THE QUESTIONNAIRE CIRCULATED AMONG THE MEMBERS OF THE COMMITEE

QUESTION No. 1: A view has been expressed that mining of these minerals should be treated as an independent economic activity like agriculture or industry, unrelated to end-use of the products. A somewhat contrary view is that mining of these minerals should be regarded as an essential primary activity relating to downstream manufacturing and value addition e.g. irons ore pellets, sinter, pig iron, steel, alloys. Please give your views with reasons

(I) National Mineral Development Corporation (NMDC) Ltd:

Mining of minerals should be treated as an independent industrial activity without linking it to end use product. Mined out product should be freely marketed commodity to user agencies such as sponge iron producers, pellet producers and steel producers.

Comments:

25. In its response, India argues that the fact that the NMDC Chairman sat on a governmental committee and recommended export restrictions does not imply that the NMDC's Board of Directors "made any decisions on the same and no such positive evidence exists on the record."[27] Further, India argues that there is no connection between the GOI's enactment of those export restrictions, and the USDOC's determination that the NMDC is a public body.[28]

26. India's arguments are unpersuasive. The record evidence referenced by the Panel's question shows that positive evidence existed on the record concerning the NMDC's support of export restrictions. Furthermore, as previously explained, the USDOC observed that the GOI's restriction on the export of high grade iron ore was one 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).[29] The USDOC considered the fact that the GOI-selected NMDC chairman, as part of the Expert Group on Preferential Grants of Mining Leases, recommended that except for long term contracts, the export of iron ore should not be allowed.[30] The NMDC chairman also had to approve all pricing negotiations with customers before the contracts were submitted to the Board of Directors for ratification.[31] All of this was among the evidence considered by the USDOC in reaching its determination that the GOI-appointed NMDC directors were "not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf."[32] Accordingly, India has failed to demonstrate that the conclusion reached by the USDOC was one that an unbiased and objective investigating authority could not have reached based on the evidence before it.

[27] India's Response to Panel Question 17.
[28] India's Response to Panel Question 17.
[29] United States' First Written Submission, para. 184.
[30] United States' First Written Submission, para. 184.
[31] United States' First Written Submission, para. 181.
[32] USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60).

Question 18: To both parties: 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))?

Comments:

27. The United States refers the Panel to the U.S. response to this question.

Question 19: To both parties: 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 United States also please identify the "GOI policy considerations" that were being referred to?

Comments:

28. As the United States explained in its response to this question, the information within the Dang Report and the Hoda Report to which the question refers provides further support to the USDOC's determination that the NMDC's export restrictions policy was one of the means in which the GOI exercised meaningful control over the NMDC. In its response, India contends that neither the Hoda Report nor Dang Report have statutory force.[33] However, the respective status of these pieces of evidence in Indian domestic law is not the issue before the Panel. Rather, the Hoda Report, a report from the High Level Committee of the Government of India

[33] India's Response to Panel Question 19.

Planning Commission,[34] and the Dang Report, a report from the GOI-constituted Expert Group on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore,[35] contained information that was relevant to the issue of whether the NMDC was a public body. Thus, India has failed to demonstrate that after considering the totality of the record evidence, which included the contents of the Hoda Report and Dang Report, an objective and unbiased investigating authority could not have determined the NMDC to be a public body.

Question 20: To both parties: 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?

> 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.*

Comments:

29. The United States refers the Panel to the U.S. response to this question.

Question 21: To India: India argues, in reference to the NMDC's Annual Reports and its compliance with the Listing Agreement, that "[t]he fact that Government may approve their nomination is irrelevant to whether NMDC is public body or not" (India's second written submission, para. 94). Can India explain how this argument relates to the passages on page 55 of Exhibit IND-56 which state that: that (i) "[t]he terms, conditions and tenure of appointment of Directors both Executive and Non-Executive Directors including Chairmancum-Managing Director are decided by Government of India"; (ii) "[t]he Remuneration/Compensation is also fixed by Government of India"; and (iii) "[t]he vacancy position … was already referred to the Ministry of Steel, which is the

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[34] Letter to Secretary Gutierrez, "Fifth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India," (May 23, 2007) ("Tata 2006 New Subsidy Allegation"), Exhibit 10 (*National Mineral Policy, Report of the High Level Committee* (*"Hoda Report"*), p. 2 (Exhibit USA-8).

[35] Letter to Secretary Gutierrez, "Fifth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India," (May 23, 2007) (JSW 2006 New Subsidy Allegation) at Exhibit 31: *The Report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore* ("*Dang Report"*), p. 1 (Exhibit USA-2).

Administrative Ministry of the Company and the matter is under active consideration of Government of India."

<u>Comments</u>:

30. In its response, India references Clause 49 of the Listing Agreement (Exhibit IND-69, and also Annexure 1 of Exhibit IND-56) to argue that the NMDC had to "ensure good corporate governance" and as a result, "at least half of the Board should comprise of independent directors."[36] However, as demonstrated by the evidence to which the Panel refers in its question, such evidence does not support India's position;[37] rather, consistent with the USDOC's determination, the GOI appointed the majority of the NMDC's board of directors, who were actively involved in the day-to-day operations of the NMDC on the GOI's behalf.[38]

31. As the United States previously explained, Clause 49 of the Listing Agreement was not on the record before the USDOC for consideration, and therefore has no bearing on the Panel's review.[39] Even aside from this, India does not explain why the alleged fact that the NMDC "ensur[ed] good corporate governance" would necessarily outweigh the substantial record evidence demonstrating the GOI's meaningful control over the NMDC. Indeed, as the USDOC found, in addition to the fact that the GOI appointed the majority of the board members, and that Ministry of Steel officials actually held two positions on the board,[40] the record evidence further demonstrated that the board members were "not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf."[41]

32. India also fails to explain why the GOI's power to appoint directors would be "irrelevant" to the USDOC's determination that the NMDC was meaningfully controlled by the GOI. Instead, India selectively quotes the Appellate Body's findings to argue that because the GOI's power to appoint directors was considered "formal indicia," this evidence must therefore be categorically dismissed altogether.[42] This is incorrect. The Appellate Body stated, "[t]hose indicia, insofar as they were discussed by the USDOC in its determinations, are certainly relevant to the question at issue. Yet, *without further evidence and analysis*, they do not provide a sufficient basis for a finding that the NMDC is a public body."[43] In the Section 129 Determinations, the USDOC's discussion of the GOI's power to appoint directors and the composition of the board of the directors was *among the evidence* that the USDOC considered in reaching its determination that the totality of the record evidence demonstrated that the GOI

[36] India's Response to Panel Question 21.
[37] *See also* India's Rejected Case Brief, p. 55 (Exhibit IND-56) ("[T]he Company could not satisfy to comply the provisions under Clause 49 of the Listing Agreement.").
[38] United States' First Written Submission, paras. 173-174.
[39] United States' Second Written Submission, paras. 100, 109; United States' Response to Panel Questions, paras. 41, 45.
[40] United States' First Written Submission, para. 173.
[41] USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60).
[42] India's Response to Question 21.
[43] *US – Carbon Steel (India) (AB)*, para. 4.43 (emphasis added).

exercised meaningful control over the NMDC such that the NMDC was a public body. Accordingly, contrary to India's contention, the fact that the GOI approved directors' nominations is "certainly relevant to the question at issue."[44]

III. BENEFIT – ARTICLE 14(D)

Question 22: To India: Do the matters referred to in paragraphs 119-121 of India's first written submission pertain only to the association price chart, or do they also pertain to Tata's price quote? If they also pertain to Tata's price quote, please explain where in India's first written submission this is supported by sufficient argumentation and evidence.

Comments:

33. India's response that paragraphs 119 to 121 of India's first written submission pertain only to the association price chart is consistent with the United States' reading of India's First Written Submission.

Question 24: To India: Despite the matters and evidence India refers to in para. 119 of India's first written submission, does India accept that the designation "P" for "Provisional" in respect of the 2006-07 prices demonstrates that those prices are provisional and do not reflect "actual", or completed, sales transactions? In your response, please also comment on the United States' observation in footnote 454 of the United States' first written submission that: "Furthermore, in the bottom right hand corner of the chart, the letters 'NQ' are defined as 'Not Quoted', implying that the figures listed are quotes, and not actual prices."

Comments:

34. India argues that the "Not Quoted" at the bottom right hand corner of the association chart does not imply that the figures listed are quotes, and that the United States has provided an *ex post* explanation.[45] However, as previously discussed, the USDOC examined the association chart based on an objective assessment of the positive evidence on the record.[46] This included both the consideration of the "(P)" as "provisional" marking, as well as the fact that the chart explained that "NQ" stood for "not quoted." As a result, the USDOC explained that a close examination of the association chart revealed that the prices were provisional, and not actual transactions.[47]

35. Indeed, in light of India's response to this question, the United States highlights that it is now *undisputed* between the parties that the 2006-07 column in the association chart "does not

[44] *US – Carbon Steel (India) (AB)*, para. 4.43.
[45] India's Response to Panel Question 24.
[46] United States' First Written Submission, para. 276.
[47] United States' First Written Submission, para. 276.

reflect actual, or completed, sales transactions."[48] Therefore, India has failed to demonstrate that the USDOC reached a determination that an objective and unbiased investigating authority could not have reached – that is, that the chart contained provisional prices.[49]

Question 25: To India: In the GOI's case brief (Exhibit IND-57, p. 32 (p. 38 of exhibit)), the GOI stated that "the prices indicated in this association chart are based on actual transaction prices" (underlining added). During the substantive meeting with the parties, in response to question 12(b) of the Panel, India stated that the 2005-06 prices:

> **"are actual transaction prices, but certainly, we would say that they cannot be disaggregated because the single price chart only shows, for the entire year, what must be an average price from various mines with various terms of sale what are the various prices that have been indicated" …**
>
> **… "it must be average of actual prices because it is not one particular customer to whom from one mine it is sold. It is an aggregation of the various prices sold from a particular mine to various customers, but it is an average actual price."**

Could India please confirm that the prices are not individual transaction prices but are averages for the relevant period described.

Comments:

36. In its response, India continues to assert that the prices in the association chart are averages for the relevant period.[50] However, India provides no citation or record evidence in support of its assertion.[51] As the United States detailed in its response to Question 26, the association chart was not accompanied by any explanation or evidence that demonstrated what the listed prices represented. Rather, what is clear from the chart is that the 2006-07 column did not contain actual transactions, a fact that India now acknowledges.[52] 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 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).

[48] India's Response to Panel Question 24.
[49] United States' First Written Submission, para. 276.
[50] India's Response to Panel Question 25.
[51] India's Response to Panel Question 25.
[52] India's Response to Panel Question 24.

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?

Comments:

37. The United States refers the Panel to its response to both subparts a and b of this question, in which the United States explained that India's assertion that the 2005-06 column of the association chart contained "market determined prices" and cover at least the first quarter of 2006 is wholly unsupported by the record.

Question 27: To both parties: 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.

Comments:

38. India contends that the non-contemporaneous domestic prices in the 2004-05 column were required to be preferred over the Tex Report world market prices for a benchmarking source.[53] Although in-country prices are considered the "starting point" of a benchmark analysis,[54] where an investigating authority concludes that in-country prices cannot be relied on in determining a benchmark, an alternative benchmark instead should be used.[55] As the USDOC explained, the association chart did not contain actual transactions, and was devoid of any information on the basic terms of sale.[56] Indeed, the association chart is *not* clear that the 2004-05 column represents actual transactions.[57] The chart does not state that the prices are transactional, but rather, contains a "(P)" marking defined as "provisional" and a "NQ" marking defined as "not quoted."[58]

39. Furthermore, the 2004-05 prices were also not contemporaneous with the 2006 period of review. In fact, the Tex Report chart shows a 19 percent increase in the price of iron ore for 2006.[59] Therefore, an objective and unbiased investigating authority, upon reviewing such

[53] India's Response to Panel Question 27.
[54] *US – Carbon Steel (India) (AB)*, para. 4.154.
[55] *US – Carbon Steel (India) (AB)*, para. 4.158.
[56] United States' First Written Submission, para. 276.
[57] United States' Second Written Submission, para. 142; United States' Response to Panel Questions, para. 57.
[58] United States' First Written Submission, para. 276; United States' Second Written Submission, para. 142.
[59] 2006 AR Essar Supplemental Questionnaire Response, dated Nov. 14, 2007, at Exhibit 1 (Exhibit IND-30).

evidence, could have determined that the association chart was not an appropriate benchmarking source.

Question 28: To both parties: 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 selling 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 "selling 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.

Comments:

40. In its response, India continues to make assertions devoid of any record support. India claims that under the header "market" in the association chart, the phrases represent specific selling entities and specific locations.[60] India also argues that because the chart is from the Mine Owners/Goa Mineral Ore Exporters' Association it is clear that the prices are reported by entities mining and selling the iron ore.[61]

41. However, as the United States previously explained, India's assertion that the entities listed in the association chart are *selling* entities is wholly unsupported by the record.[62] Furthermore, contrary to India's assertion, although the chart states that it is from the Mine Owners/Goa Mineral Ore Exporters' Association, there is no indication of *who* compiled the chart.[63] Indeed, the one-page association chart was submitted by both the GOI and Tata in the underlying proceeding without any additional documentation or explanation by either party.[64]

42. Therefore, because the nature of the data contained in the association chart was unclear – and because, as explained previously,[65] the chart did not contain actual market determined transactions – India has not shown that an objective and unbiased investigating authority could not have reached a determination that the association chart could not be relied upon for benchmarking purposes, as the USDOC determined in the Section 129 Final Determination.[66]

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-

[60] India's Response to Panel Question 28.
[61] India's Response to Panel Question 28.
[62] United States' Second Written Submission, para. 144; United States' Response to Panel Questions, paras. 63-65.
[63] United States' Second Written Submission, para. 144.
[64] United States' Second Written Submission, para. 144.
[65] United States' First Written Submission, paras. 276-278; United States' Second Written Submission, para. 144.
[66] United States' Response to Panel Questions, para. 65.

36)? Please explain how/why, including by reference to record evidence as appropriate.

Comments:

43. India argues that the NMDC was not one of the transacting entities in the association chart.[67] However, as the United States explained in its response, the association chart does not demonstrate one way or another the answer to whether the NMDC was one of the transacting entities in the chart.[68] India asserts that the price chart identifies the locations and/or the mining entities,[69] but, as previously explained, the chart is not clear whether this information pertains to the selling or buying entities.[70] Thus, contrary to India's argument, there is no record evidence indicating whose iron ore prices are reflected in the association chart. Accordingly, while it may be possible that the NMDC was one of the transacting entities, the chart is not clear in this regard.

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.

Comments:

44. The United States refers the Panel to the U.S. response to this question.[71]

Question 32: To both parties: 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.**

[67] India's Response to Panel Question 30.
[68] United States' Response to Panel Questions, paras. 63-65.
[69] India's Response to Panel Question 30.
[70] United States' Second Written Submission, para. 144; United States' Response to Panel Questions, paras. 63-65.
[71] United States' Response to Panel Questions, paras. 63-65.

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

…

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?**

<u>Comments to subparts a-e, and g</u>:

45. The United States comments on India's response to subparts a through e, and subpart g together. India's assertions that "no further questions were raised" by the USDOC,[72] and that the supplemental questionnaire "was the only occasion where the USDOC sought information from the GOI"[73] are demonstrably false. As the United States explained in its response to these questions, the supplemental questionnaire (Exhibit IND-35) was the *third time* the USDOC sought information from the GOI concerning the 2006 prices for iron ore for benchmarking purposes in the underlying review.[74] India argues that the GOI did not know the "intent" of the USDOC regarding this information,[75] but as is clear from the context of each of these

[72] India's Response to Panel Question 32(a).
[73] India's Response to Panel Question 32(b).
[74] United States' Response to Panel Questions, paras. 67-68, 70.
[75] India's Response to Panel Question 32(a).

questionnaires, the USDOC sought this information for the purposes of receiving benchmark data for iron ore, and the GOI, in turn, provided the requested information each time.

46. Furthermore, to the extent that India is now arguing that the USDOC should have sought further clarification concerning the association chart in the Section 129 proceeding,[76] India's argument has no merit. The USDOC was not required to provide additional opportunities to submit additional information during the Section 129 proceeding. In the underlying administrative reviews, the USDOC provided the interested parties several opportunities to submit the relevant information. As the United States has explained, the original panel faulted the USDOC for failing to explain its treatment of this evidence in the USDOC's underlying determinations.[77] The USDOC remedied this deficiency in its Section 129 Determination.

47. The United States also notes that the requirement to provide interested parties with ample opportunity to present all relevant evidence is an obligation found under Article 12.1 of the SCM Agreement. However, as discussed below in the U.S. comment to Question 51, a claim under Article 12.1 concerning the association chart is outside the Panel's terms of reference. Therefore, India has no basis now to argue that the USDOC was required to seek further clarification concerning the association chart in the Section 129 proceeding.

Question 33: <u>To both parties</u>: 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?

<u>Comments</u>:

48. The United States refers the Panel to the U.S. response to this question.[78]

Question 34: <u>To both parties</u>: 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?

<u>Comments</u>:

49. The United States refers the Panel to the U.S. response to this question.[79]

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[76] India's Response to Panel Questions 32(e), (g).
[77] United States' First Written Submission, para. 377 ("[T]here is no reference to the domestic price data at issue in the USDOC preliminary or final determinations, or in any other contemporaneous document . . . . India's *prima facie* case was not rebutted by any contemporaneous rationale or justification in the USDOC's determinations." *US – Carbon Steel (India) (AB)*, para. 4.273 (citing *US – Carbon Steel (India) (Panel)*, paras. 7.154, 7.158)).
[78] United States' Response to Panel Questions, para. 78.
[79] United States' Response to Panel Questions, para. 79.

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 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".**

Comments:

50. The United States comments on India's response to Questions 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".

Comments:

51. The United States comments on India's response to Questions 35 and 36 together.

52. As an initial matter, India appears to argue that the Tex Report cannot be a reliable benchmarking source that contains market-determined prices because it does not contain domestic prices.[80] This is false. Although in-country prices are considered the "starting point" of a benchmark analysis,[81] where an investigating authority concludes that in-country prices cannot be relied on in determining a benchmark, an alternative benchmark instead should be used.[82] As previously explained, in the Section 129 proceeding, the USDOC determined that there were no appropriate in-country benchmarking sources, and therefore turned to examine the out-of-country benchmark sources.[83] Contrary to India's assertion, the fact that the Tex Report does not contain Indian domestic prices does not mean that the source is not reliable or that it does not contain market-determined prices.

53. Furthermore, as the United States explained in its response to these questions, in the Section 129 Final Determination, the USDOC referenced its underlying reviews, where it had previously determined that the record evidence demonstrated that the Tex Report prices were "*concluded* negotiations," "*concluded* talks," and "*negotiated* iron ore prices," as recognized by Question 36.[84] Indeed, the GOI submitted two years of complete Tex Reports on the record, which 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.[85] 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 *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

[80] India's Response to Panel Question 35(a) ("GOI understands that the Panel is inquiring about 'reliable' and 'market-determined' in the context of Article 14(d). Thus, the price cannot be 'reliable' and 'market-determined' for the purpose of benchmark determination under Article 14(d), which prefers the use of domestic benchmark over out of country benchmark.").
[81] *US – Carbon Steel (India) (AB)*, para. 4.154.
[82] *US – Carbon Steel (India) (AB)*, para. 4.158.
[83] United States' First Written Submission, para. 266.
[84] United States' Response to Panel Questions, para. 80.
[85] United States' Response to Panel Questions, para. 80.

original investigation, and thus we see no reason why a different methodology requires explanation" (at para. 7.858).

Comments:

54. India argues that the USDOC was required to provide adequate explanation based on positive evidence on the record to reject the NMDC export prices as a benchmark. As previously explained, the USDOC's determination to reject the NMDC export prices was based on the record evidence, which demonstrated that the prices were not market determined. Specifically, the USDOC determined that the NMDC export prices were not market determined based on: (1) the 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."[86]

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

[86] United States' First Written Submission, paras. 304-309, 315-319.

<u>Comments</u>:

55. The United States refers the Panel to the U.S. response to this question.[87]

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>Comments</u>:

56. As the United States previously explained, the "additional pricing element" was not voluntary for the SDF members, nor did it constitute producers' profits, as India suggests.[88] Notably, India fails to rely on any record evidence to support its assertions in response to this question.[89] And indeed, as the United States has detailed in its submissions, the record evidence demonstrates that, to the contrary, the SDF fund was composed of consumers' contributions.[90]

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>Comments</u>:

57. The United States refers the Panel to its response to this question, in which the United States explained that because there was no finding of inconsistency under Article 14(b)

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[87] United States' Response to Panel Questions, paras. 89-92.
[88] United States' First Written Submission, para. 329; United States' Second Written Submission, paras. 185-192; United States' Response to Panel Questions, paras. 89-92.
[89] India's Response to Panel Question 39.
[90] United States' First Written Submission, para. 329; United States' Second Written Submission, paras. 185-192.

concerning the USDOC's examination of the benefit conferred by the SDF program, there was no recommendation by the DSB, and thus, nothing for the USDOC to implement.[91]

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>Comments</u>:

58. As previously explained, because the USDOC determined that the SDF fund was comprised of funds collected from consumers, and not the steel producers, there was no "cost" for the USDOC to consider in its benefit analysis.[92] Furthermore, the United States recalls that there was nothing on the record for the USDOC to analyze.[93] Specifically, there was no record evidence concerning the amount, if any, of the costs associated with obtaining a SDF loan.[94] In its response, India continues to fail to identify any costs on the record associated with obtaining loans under the SDF program that the USDOC failed to take account.

59. Accordingly, India has not shown that an objective and unbiased investigating authority could not have reached the USDOC's conclusion that because the levies remitted to the SDF fund were not the producers' own funds, the funds themselves, or any interest that could have been otherwise earned, were not a "cost" that the USDOC needed to consider in its calculation of benefit under Article 14(b) of the SCM Agreement.[95]

V. SPECIFICITY

Question 42: <u>To India</u>: Is there any aspect of India's claim under Article 2.1(c) in relation to the identification of the "subsidy programme" that is unconnected from the "length of time" factor?

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[91] United States' Response to Panel Questions, paras. 86-87.
[92] United States' First Written Submission, para. 331.
[93] Unite States' Second Written Submission, para. 193.
[94] United States' Second Written Submission, para. 193.
[95] United States' First Written Submission, para. 331.

<u>Comments</u>:

60. India had asserted in its first written submission that "the USDOC was under a mandate to identify the 'subsidy programme' and the length of time during which that subsidy programme has been in operation. It is only when the two identifications are properly made can the USDOC evaluate whether a subsidy programme has been 'use[d] . . . by a limited number of certain enterprises.'"[96] In responding "no" to this question, India has made clear that it has abandoned the claim that the USDOC was required to, and failed to, identify the relevant subsidy program for the sale of high grade iron ore by NMDC *independent* of the "length of time" factor.[97] As the United States has explained previously, this claim was not identified in India's panel request, and would not in any event be permitted in the context of this compliance proceeding because it challenges an unchanged aspect of the measure at issue.[98]

61. We also recall that a complainant cannot challenge whether an investigating authority has failed to identify a subsidy program connected to, or within the context of, considering whether that authority took into account the length of time the program has been in operation – for all of the reasons we explained in our written submissions.[99]

62. The terms of subparagraph (c) of Article 2.1 describe a process in which "use of a subsidy programme" is assessed in conducting the broader *de facto* inquiry and, as a part of that process, an investigating authority should take account of the length of time in considering the "other factors" referred to in the first and second sentences. The existence of a program is not a question that is to be resolved within the confines of the third sentence of Article 2.1(c). Rather, the third sentence of Article 2.1(c) serves to *inform* the broader inquiry found in the second sentence, *i.e.*, whether "use of a subsidy program by a limited number of certain enterprises" indicates specificity or not.[100]

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.***

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[96] India's First Written Submission, para. 87.
[97] *See* India's Response to Panel Question 42.
[98] *See* United States' First Written Submission, paras. 211-217; United States' First Written Submission, para. 117.
[99] *See* United States' First Written Submission, paras. 229-238.
[100] United States' First Written Submission, para. 236.

> …
>
> ***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>Comments</u>:

63. The United States refers the Panel to the U.S. response to this question.

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

<u>Comments</u>:

64. The United States refers the Panel to the U.S. response to this question.

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>Comments</u>:

65. India states that "use" of the mining rights of iron ore program is limited to the mining and steel industries. Similarly, as the United States explained in response to this question, the subsidy program at issue in this question is the receipt of mining rights of iron ore *through leases* issued by the Government of India.[101] 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, and would be limited to steel and mining companies.[102] 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. Therefore, the Panel need not address the interpretive issue presented in this question of whether the term "use" in Article 2.1(c) extends to downstream beneficiaries.

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"**

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"**

<u>Comments</u>:

66. Given India's response, it appears the parties agree that the terms identified in the Panel's question are synonymous.[103] The United States refers the Panel to the U.S. response to this question.

Question 47: <u>To both parties</u>: 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

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[101] *See* United States' Response to Panel Questions, para. 107.
[102] *See* United States' Response to Panel Questions, para. 108.
[103] *See* United States' Response to Panel Questions, paras. 113-114.

rationale for the limited nature of the program at issue vis-à-vis "standalone mining companies", as distinct from steel makers.

<u>Comments</u>:

67. The United States refers the Panel to the U.S. response to this question.[104]

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>Comments</u>:

68. India reiterates the assertion presented in its written submissions concerning Exhibit 12 of the Verification Report for Tata, arguing it indicates that the provision of *leases* for the mining rights of iron ore by the GOI was broadly available, and accordingly that the USDOC's *de facto* specificity finding as to that program is without factual support.[105] The United States in its first written submission explained why this argument is erroneous.[106] As the USDOC correctly found in its Section 129 Determination, Exhibit 12 of the Tata Verification Report discusses the "total concession of iron ore granted by GOI" in 2006,[107] and does not indicate the total number of *leases* granted by GOI. Rather, it only addresses the amount of iron ore production, noting the hectares covered by the production of individual companies.[108] Accordingly, the USDOC observed that "the production numbers only demonstrate the relative level of production of iron ore by steel companies versus the production of iron ore by standalone mining companies, which is based on both the efficiency of iron ore production and the total number of iron ore mining leases held by steel companies and mining companies[,]" and that those "numbers do not

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[104] India refers to the meaning of legislation, the MMDR Act, as relevant to whether the USDOC's *de facto* specificity findings are consistent with Article 2.1(c). As the United States explained in its first written submission, while such arguments "could have some relevance to a *de jure* specificity analysis, the USDOC failed to make findings in that respect." United States' First Written Submission, para. 255.

[105] *See* India's Response to Panel Question 48. *See also* India's First Written Submission, para. 96; India's Second Written Submission, para. 118.

[106] *See* United States' First Written Submission, paras. 261-262.

[107] India's First Written Submission, para. 96.

[108] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).

indicate the proportion of leases held by steel and mining companies."[109] For these reasons, India is incorrect in once again asserting that this exhibit indicates large numbers of leases for the mining of iron ore were granted to "various entities."[110]

69. The United States further refers the Panel to the U.S. response to Questions 45, 47, and 48.

VI. ARTICLE 12.1 OF THE SCM AGREEMENT

Question 51: To India: In paragraph 195 of India's first written submission, India identifies two discrete matters where it claims the USDOC erred because it cited "insufficiency of evidence as a reason to reject various arguments raised by India and for its refusal to comply with the recommendations and rulings of the DSB". Can India confirm that it makes such claims – either under Article 12.1 or under the substantive disciplines at issue i.e. Articles 1.1(a)(1) and 14(d) – only with respect to the two discrete matters listed in paragraph 195(a) and 195(b) of its first written submission? If not, can India identify where in its first written submission there is sufficient argumentation and evidence to ground such claims on other matters?

Comments:

70. India's claim under Article 12.1 is limited to the two discrete matters listed in paragraph 195(a) and 195(b) of its first written submission – that is, the claim is limited to Tata's price quote and the NMDC's miniratna status. Therefore, to the extent India now attempts to raise a claim under Article 12.1 with respect to the association chart, that attempt must be rejected as falling outside the Panel's terms of reference.[111] Additionally, as the United States discussed in its comments to India's response to Question 32 above, the United States did not have an obligation to seek clarification concerning the association chart in order to implement the DSB recommendation concerning Article 14(d) of the SCM Agreement.

VII. 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

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[109] USDOC Section 129 Final Determination, p. 24 (Exhibit IND-60).
[110] India's Response to Panel Question 48.
[111] *See* India's Response to Panel Questions 32(e), (g).

USDOC in the context of the Section 129 redetermination.

Comments:

71. The United States refers the Panel to its response to this question.

Question 53: To both parties: 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.

Comments:

72. As the United States explained in its response to this question, 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 apply, but will not require action additional to that taken in the context of the underlying proceedings.

73. In its response, India raises Article 12.4 as an example to argue that the obligations under Article 12 must apply in a Section 129 proceeding, otherwise the USDOC could not have treated Tata's price quote as proprietary in the Section 129 proceeding.[112] Consistent with the United States' position set out above, the obligations of Article 12.4 concerning confidentiality continue to apply in a Section 129 proceeding. However, as explained above, additional action is not required where there is no new evidence placed on the record. Thus, in the Section 129 proceeding, for instance, the interested parties did not need to ask the USDOC again for confidential treatment of certain documents; rather, the documents' confidential treatment continued.

VIII. "AS SUCH" CLAIM

Question 60: To both parties: 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 DSB recommendation in this case?

Comments:

74. The United States refers the Panel to the U.S. response to Questions 54, 55, 60, and 61.

[112] India's Response to Panel Question 53.

Question 10: <u>To The Third Parties</u>: Under what circumstances, if any, can a compliance panel established under Article 21.5 of the DSU revisit "as such" findings of violation from the original proceedings that have been adopted by the DSB? Please respond by reference to the United States' second written submission, para. 27:

> **Contrary to India's assertion, this finding by the Appellate Body not only can be questioned, it must be questioned. Because the Appellate Body lacked the authority to reach it, this finding cannot constitute a valid basis for a DSB recommendation. Therefore, this compliance Panel has no basis to consider whether the United States has implemented such a finding that falls outside the scope of the DSU.**

<u>Comments</u>:

75. Canada, the European Union, and Japan assert that a compliance panel cannot revisit "as such" findings that have been adopted by the DSB.[113] Japan suggests that "[w]hether it is necessary to allow a respondent Member to revisit the original findings adopted by the DSB as exceptions to this principle may require the consideration of whether and to what extent another remedial path is available to the respondent Member."[114] Canada claims that a "panel has no authority, absent cogent reasons for doing so, to question the underlying findings that were made by a panel or the Appellate Body once they have been adopted by the DSB."[115]

76. As the United States explained in its submissions, the rights and obligations of WTO Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements.[116] There is nothing in the DSU that provides that Appellate Body reports are binding on panels – there is no *stare decisis* in WTO dispute settlement. Indeed, Article 3.9 of the DSU makes it clear that an Appellate Body report is not an authoritative interpretation of the covered agreements.[117] To the contrary, in Article IX:2 of the WTO Agreement, Members reserved for *themselves*, acting in the Ministerial Conference or General Council, "the exclusive authority to adopt interpretations" of the WTO agreements. And in specifying the basis for "clarifying" the covered agreements, Article 3.2 of the DSU refers only to the customary rules of interpretation of public international law.[118]

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[113] Canada's Response to Panel Questions, para. 20; European Union's Response to Panel Questions, para. 60; Japan's Response to Panel Questions, para. 34.
[114] Japan's Response to Panel Questions, para. 35.
[115] Canada's Response to Panel Questions, para. 20.
[116] *See* United States' Second Written Submission, paras. 250-251. Under Article 3.2 of the DSU, "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements."
[117] See also Article 17.14 of the DSU, which makes it clear that an Appellate Body report is unconditionally accepted only by the parties to the dispute, not by the Members as whole.
[118] *See* United States' Second Written Submission, paras. 250-251.

77. Canada appears to refer to the Appellate Body's statements that a panel must follow a prior Appellate Body interpretation absent undefined "cogent reasons" for departing from that interpretation.[119] Nowhere does the DSU consider that a panel should consider whether a party has identified "cogent reasons" for reaching a different finding or conclusion than the Appellate Body. This "cogent reasons" approach, which essentially treats prior reports as precedent, or binding on future panels, is not grounded in the text of the DSU. This is truer still where, as here, the findings at issue concern questions of fact that, under DSU Articles 7.1, 11, 12.7, 13, 15.1, and 17.6, are issues *exclusively* to be resolved by a panel.[120] In fact, it is inconsistent with the task assigned to panels under the DSU and, ironically, finds no legitimate support in prior reports of the Appellate Body.

78. Like an original panel, under Article 11 of the DSU a compliance panel should make its own objective assessment of the matter referred to it by the DSB. An objective assessment requires that the panel properly weigh the evidence and make factual findings based on the totality of the evidence and within its bounds as trier of fact in this dispute. An objective assessment also requires that a panel interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member's commitments.[121] As Articles 6 and 7 of the DSU make clear, the "matter" referred to a panel consists of the measures at issue and the legal claims. Therefore, any legal findings by the compliance Panel must be those resulting from the Panel's objective assessment of the measures and claims.[122]

79. Were a panel to decide to simply apply the reasoning in a prior Appellate Body report and decline to fulfill its function under Articles 7.1, 11, and 3.2 to make findings on the

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[119] Canada's Response to Panel Questions, para. 20. The United States notes that Canada has not cited to any panel or Appellate Body reports in making this assertion.

[120] DSU Art. 7.1 (panel's terms of reference to "examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB" by the complaining party in its panel request), Art. 11 ("a panel should make an objective assessment of the matter before it, including an objective *assessment of the facts* of the case…"), Art. 12.7 ("the report of a panel shall set out the *findings of fact*, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes"), Art. 13.1 (panel may "seek *information* and technical advice from any individual or body"), Art. 15.1 ("panel shall issue the descriptive (*factual* and argument) sections of its draft report to the parties to the dispute"), Art. 17.6 ("An appeal shall be *limited to issues of law* covered in the panel report and *legal interpretations* developed by the panel.") (italics added).

[121] DSU Art. 11 ("Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . .").

[122] Article 3.2 of the DSU further informs the function of a panel established by the DSB to assist it. Article 3.2 explains that "Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". Thus, it is the rights and obligations under those agreements that are fundamental. And for purposes of understanding the "existing provisions" of the covered agreements – that is, their text – the DSU directs WTO adjudicators to apply "customary rules of interpretation of public international law," reflected in Articles 31 and 32 of the Vienna Convention.

applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation, the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

80. In this dispute, the United States has explained in its first and second written submissions that this Panel should conduct its own objective assessment of the matter before it.[123] India never raised a claim as to 19 U.S.C. § 1677(7)(G)(i)(III) ("Subpart III") in the original proceedings, and the original panel accordingly made no findings as to the intent and meaning of that provision. The Appellate Body – of its own accord – proceeded to interpret the text of Subpart III and to find that the law was inconsistent with Article 15.3 of the SCM Agreement. In doing so, the Appellate Body 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," and its finding thus cannot constitute a valid basis for a DSB recommendation.[124] Even setting aside the issue of whether the Appellate Body acted within its authority under Article 17.6, the Panel must conduct its own objective assessment of the matter. As we have explained, a proper interpretation of Subpart III shows that Subpart III does *not* require the United States to take WTO-inconsistent action.[125] Rather, the USDOC has discretion with respect to the timing of any self-initiation, and may exercise that the discretion such that the circumstance covered under Subpart III of the statute will never occur.[126] The Department of Commerce has taken action to confirm this interpretation through an exchange of letters.[127]

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[123] *See* United States' First Written Submission, paras. 26-57; United States' Second Written Submission, paras. 19-34.

[124] The third parties suggest that a panel cannot disagree with an "as such" finding made by the Appellate Body. *See* Canada's Response to Panel Questions, para. 20; European Union's Response to Panel Questions, para. 60; Japan's Response to Panel Questions, para. 34. If these Members maintain that any "finding" in an adopted report necessarily results in a DSB recommendation, that would lead to absurd results not consistent with the DSU. Under such reasoning, a DSB recommendation could result even if a panel or the Appellate Body made a "finding" on a measure not identified in the panel request, or made a "finding" under a claim or WTO agreement not covered by a panel request. We do not think that any WTO Member would defend such an outcome. The same problem arises where a party does not advance any evidence or arguments in relation to a measure, as was the case in this dispute. As we explained previously, it is not within the authority of an adjudicator, whether a panel or the Appellate Body, to make out a claim on its own. *See* United States' Second Written Submission, para. 21. Accordingly, this compliance Panel only needs to confirm that India failed to advance any evidence or arguments as to Subpart III in the original proceedings. If it did not, the Appellate Body's "as such" finding as to Subpart III cannot constitute a valid basis for a DSB recommendation.

[125] *See* United States' Second Written Submission, paras. 28-30; United States' First Written Submission, paras. 33, 50-51.

[126] United States' First Written Submission, paras. 46-49. We further note that India has never disputed that Subpart III affords the USDOC the discretion to determine *when, if at all*, to self-initiate an investigation.

[127] U.S. First Written Submission, paras. 52-53; Letter from Office of the United States Trade Representative to the United States Department of Commerce, dated June 23, 2016 (Exhibit USA-36); Letter from the United States Department of Commerce to the Office of the United States Trade Representative, dated June 28, 2016 (Exhibit USA-37).

81. For these reasons, the Panel must find that, contrary to the Appellate Body's conclusions in the original proceeding, India has failed to demonstrate that Subpart III of the U.S. statute is inconsistent with Article 15.3 of the SCM Agreement. The United States further refers the Panel to the U.S. response to Questions 54 through 60.

IX. "AS APPLIED" INJURY CLAIMS

Question 68: To India: Can India explain how the USITC's alleged "failure to note" the causes for the closure of several plants rendered the non-attribution analysis inconsistent with Article 15.5 of the SCM Agreement?

Comments:

82. The United States refers the Panel to paragraphs 146 and 147 of the U.S. first written submission, and paragraphs 75, 76, and 77 of the U.S. second written submission.

Question 69: To India: India argues that the USITC failed to examine the injury caused by the decline in US domestic demand during the period of investigation. Could India elaborate on its position, providing specific comments on the following excerpt from the USITC's Section 129 Determination?

> **We have considered factors other than subject CVD imports to ensure that we are not attributing any injury from other such factors to subject imports. We recognize that the domestic industry's condition was affected by a decline in apparent U.S. consumption in the latter part of 2000,[131] but also find that domestic shipments and production contracted at a time when overall apparent consumption was still strong and while rapidly increasing subject imports gained sales from the domestic industry largely through underselling. Specifically, the decline in demand for hot-rolled steel did not occur until the end of 2000, yet the substantial drop in the domestic industry's commercial shipments began in the beginning of 2000 as low-priced subject CVD import volumes reached peak period levels.[132][128]**
>
> [131] **The industrial production index peaked in the third quarter of 2000 and declined thereafter. USITC Pub. 3446 at II-7.**
>
> [132] **USITC Pub. 3446 at Table III-5 and calculated from V-10-V-11. Based on quarterly data, the domestic industry's commercial shipments were 6.0 million short tons in first**

[128] USITC's Section 129 Determination, (Exhibit IND-58), p. 31 (p. 37 of exhibit).

> **quarter 2000, 5.6 million short tons in second quarter 2000, 4.9 million short tons in third quarter 2000, and 4.7 million short tons in fourth quarter 2000. *Id.* at Table III-5. Moreover, commercial shipments, which compete directly with subject CVD imports, declined by 19.2 percent from first quarter 2000 to third quarter 2000, whereas internal consumption declined only by 5.3 percent for the same period. *Id*.**

Comments:

83. The United States refers the Panel to paragraph 143 of the United States' first written submission, and paragraphs 71 and 72 of the United States' second written submission.

X. "NEW SUBSIDIES" CLAIMS

Question 70: To India: In the first written submission, India claims that the USDOC Section 129 Determination covers two subsidies distinct from the subsidies examined and countervailed pursuant to the *2006 administrative review*. India's second written submission, however, adds that the alleged two new subsidies in the Section 129 Determination do not have a sufficiently close link with the subsidies examined in the *original investigation*. Can India clarify whether its claim concerns the absence of a link between the alleged new subsidies and those investigated in the original determination, or if its claim is that there is no link between the alleged new subsidies and those investigated and countervailed pursuant to the 2006 administrative review?

Comments:

84. India's response that its claim concerns the link between the alleged new subsidies and those investigated in the original determination is consistent with the United States' reading of India's First Written Submission.

Question 71: To India: India argues in its first written submission that "the Appellate Body, in absence of sufficient facts, did not provide a comprehensive framework for examination of sufficiently close link or nexus between the new subsidies and the subsidies that resulted in the imposition of the original countervailing duty". How does India reconcile this statement with the content of the following paragraph from the Appellate Body Report in *US – Carbon Steel (India)*?

> **India does not challenge the Panel's finding that an investigating authority may examine new subsidy allegations in the conduct of an administrative review pursuant to Article 21 of the SCM Agreement. Furthermore, India does not challenge the precise considerations that the USDOC took into account in deciding to examine each of the new subsidy allegations at issue. Rather, India's position on appeal is that, where any**

Article 21 review is conducted and involves the examination of new subsidy allegations, such examination must comply with the requirements set out in Articles 11, 13, and 22 of the SCM Agreement. Bearing in mind the nature and scope of India's appeal, we summarize below the Panel's findings that are the subject of India's appeal before turning to our analysis of India's claims.

Comments:

85. As the Panel's question recognizes, in the original proceedings, India had the opportunity to appeal the original panel's finding concerning the conduct of new subsidy allegations in administrative reviews under Articles 21.1 and 21.2, but it opted not to do so.[129] Therefore, the panel's finding that India had failed to demonstrate any inconsistency with Articles 21.1 and 21.2 stood, and there was no recommendation to the United States with respect to these claims. India is thus precluded from raising new claims against the new subsidy programs in the 2004, 2006, 2007, and 2008 administrative reviews because these aspects of the USDOC's determinations are unchanged since the original panel proceedings and were not found to be WTO-inconsistent in the original proceedings.[130]

XI. ARTICLE 19.3 OF THE SCM AGREEMENT

Question 73: To India: Was the USDOC under an obligation to consider the previously negotiated rates in its Section 129 reinvestigation? If India's answer is in the positive, what would be the basis in the SCM Agreement for such an obligation? Would it be Article 19.3? Article 23? Other provisions?

Comments:

86. Contrary to India's assertion, the USDOC was not under any obligation pursuant to Article 19.3 to take into account the Amended Final Results. In fact, as explained below, it would be contrary to the DSU for a panel to take into account the Amended Final Results in evaluating the U.S. compliance in this dispute.

87. As the United States has explained, the duties negotiated between the USDOC, JSW, and Tata (the "Amended Final Results") came into effect on December 22, 2010, and – despite the fact that they contained the deposit rates then applicable to JSW and Tata – India did not challenge them before the original panel. Instead, India chose to challenge the specific findings and calculations made by the USDOC with respect to JSW and Tata in the underlying CVD determinations. Those rates resulted from administrative proceedings before the USDOC, where JSW and Tata fully participated and advocated their respective positions on what the CVD rates

[129] United States' First Written Submission, paras. 343-344; United States' Second Written Submission, paras. 201-202.
[130] United States' First Written Submission, para. 335 (citing *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210).

should be for individual subsidy program. The USDOC determined CVD rates following an analysis of individual subsidy programs, and a calculation of specific margins for those programs. India chose to challenge before the original panel *those specific rates from the underlying proceedings, rather than the Amended Final Results*. India was successful in its WTO challenge, and the United States therefore issued new findings and calculations with respect to these companies, resulting in new cash deposit rates – rates that were much lower than those India had challenged in the underlying proceedings.

88. There is no question that India could have challenged the Amended Final Results in the original panel proceedings, but chose not to. Therefore, India is not permitted to challenge this measure now in the context of proceedings under Article 21.5 of the DSU.[131]

89. Moreover, nowhere does the text of Article 19.3 provide, as India asserts, that an investigating authority must compare the rates determined to implement DSB recommendations in a particular dispute with rates determined through domestic litigation – and certainly not rates determined through domestic settlements.[132]

90. As the United States explained extensively in its first and second written submissions,[133] Article 19.3 does not provide an independent basis apart from the substantive provisions of the SCM Agreement to challenge how CVD rates are calculated. Thus, Article 19.3 does not permit independent judgment of whether a CVD rate constitutes an "appropriate amount," but instead speaks to the application of CVDs on a non-discriminatory basis, in the amount that is appropriate to the source of the subsidized imports.

91. For these reasons and those provided in our written submissions, the United States also disagrees with Canada's suggestion in its response to third party questions that the term "appropriate amounts" in Article 19.3 required the USDOC to "consider the previous domestic settlement agreement in its section 129 determination" and conduct some kind of comparison between the settled CVD rates and the subsequent rates resulting from the Section 129 proceedings.[134] Canada arrives at this conclusion after asserting that, under Article 19.3, "investigating authorities are required to determine whether countervailing duties are imposed in appropriate amounts in relation to parallel domestic judicial, arbitral or administrative review proceedings."[135] Canada additionally raises a hypothetical involving domestic judicial review following an administrative proceeding and a subsequent WTO dispute brought for a separate

[131] *See* United States' Response to Panel Questions, para. 172.
[132] *See* European Union's Response to Panel Questions, para. 71 (no "affirmative obligation" exists under Article 19.3, let alone under Articles 23 and 30, for an investigating authority to consider duty amounts agreed to in settlements in administrative review proceedings). *See also* United States' Second Written Submission, para. 261 (explaining why India's arguments under Articles 23 and 30 of the SCM Agreement are meritless).
[133] *See* United States' First Written Submission, paras. 398-441; United States' Second Written Submission, paras. 239-264.
[134] Canada's Response to Panel Questions, para. 28. *See also* United States' First Written Submission, paras. 398-401, 437-441; United States' Second Written Submission, paras. 239, 263.
[135] Canada's Response to Panel Questions, para. 22.

claim, and claims that the hypothetical illustrates why the United States' interpretation of Article 19.3 is incorrect.[136]

92. The hypothetical presented by Canada is not the situation before this Panel. Moreover, Canada's hypothetical and its interpretation of Article 19.3 are not consistent with the text of that Article. Canada appears to suggest that a WTO panel must determine whether the amounts applied by an investigating authority are consistent with the findings of judicial or arbitral bodies in the relevant WTO Member. It is not the role of a WTO panel to examine the consistency of a Member's measure with its own domestic law.[137] Moreover, on Canada's approach, a Member could evade its WTO obligations because a municipal court came to a conclusion not consistent with those obligations. Similarly, if a municipal court came to a finding that provides for a better outcome than that which could be obtained at the WTO, a panel must essentially then alter the Member's WTO obligation to be consistent with its domestic law, even where other Members would have no such obligation. Such an outcome is not consistent with the text of Article 19.3 of the SCM Agreement, nor with the function of WTO dispute settlement.

93. To support its interpretation of Article 19.3, Canada notes "[t]he Appellate Body has emphasized that the obligation to impose subsidies in appropriate amounts is related to the requirement to calculate a subsidy as precisely as possible under Article VI:3 of the GATT 1994."[138] But this is precisely what the USDOC did in calculating the CVD rates in its Section 129 proceedings. Canada's suggestion that the USDOC, in order to calculate the CVD rates as precisely as possible, needed to modify those rates in light of the settlement rates would actually undermine this obligation, and would prevent the panel from assessing their accuracy under the obligations of the SCM Agreement.

94. Like India, Canada also fails to explain how Articles 23 and 30 of the SCM Agreement support its interpretation of Article 19.3 – an interpretation the United States already has rebutted in its prior submissions.[139] In this respect, the United States also agrees with the European Union that Article 23 "merely provides, in rather general terms, that Members shall provide for judicial review and does not even mention settlements;" and that Article 30, as a "general provision on dispute settlement," does not "create[] an obligation to take into account settled rates."[140]

95. Finally, Canada's argument that the USDOC "should have explained its reasons for refusing to consider the previous domestic settlement agreement in its section 129 determination," even aside from not being grounded in the text of any provision or claim before the Panel, ignores the fact that the USDOC did explain its reasoning.[141] Specifically, the USDOC explained in its Section 129 Determination in response to JSW Steel's arguments that

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[136] Canada's Response to Panel Questions, para. 25.
[137] *US – Countervailing and Anti-dumping Measures (China)*, para. 7.164.
[138] Canada's Response to Panel Questions, para. 23.
[139] Canada's Response to Panel Questions, para. 23. *See also* United States' Second Written Submission, paras. 261-262.
[140] EU's Response to Panel Questions, para. 71.
[141] Canada's Response to Panel Questions, para. 28.

"JSW has offered no basis in law for its proposed use of the *JSW Amended Final Results* for purposes of JSW's cash deposit requirements for future entries. To the contrary, the final results of the Department's section 129(b) proceeding for the 2006 review period reflect an accurate recalculation of JSW's countervailing duty rate that was necessary to render the Department's actions not inconsistent with the finding of a WTO panel."[142]

Question 74: To India: Could India please comment on the United States' statement that "the specific entries subject to the settled rates in the USDOC's Amended Final Determination were liquidated, and consequently the imports of steel subject to the relevant administrative proceedings received the full benefits of the settled rates"?

Comments:

96. India's response mistakenly suggests that the United States has not previously specified that the steel imports liquidated at settled rates will *not* be subject to revised countervailing duty rates determined pursuant to the section 129 proceedings.[143] As the USDOC stated in the Section 129 implementation notice, "Pursuant to section 129(c) of the URAA, the new determination shall apply with respect to unliquidated entries of the subject merchandise that are entered or withdrawn from warehouse, for consumption, on or after the date on which USTR directs the Department to implement the new determination."[144] Therefore, all of the entries subject to the settled rates received the benefit of those rates and were not affected by the Section 129 Determination.

[142] USDOC Section 129 Final Determination, p. 9 (Exhibit IND-60).
[143] India's Response to Panel Question 74.
[144] *Certain Hot-Rolled Carbon Steel Flat Products From India: Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act*, 81 Fed. Reg. 27,412, 27,413 (Dep't of Commerce May 6, 2016) (Exhibit IND-61).