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)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

March 8, 2019

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS AS TO 19 USC 1677(7)(G)(i)(III)

1. India asserts that the United States has failed to implement the DSB's recommendations with respect to the Appellate Body's "as such" finding in relation to 19 USC §1677(7)(G)(i)(III). India erroneously argues that the United States needed to either remove or amend the statute to come into compliance

2. The Appellate Body's "as such" finding as to Section 1677(7)(G)(i)(III) was beyond the scope of its authority under DSU Article 17.6 as it was not an issue covered in the panel report and was not an issue before the Appellate Body on appeal. As such, this finding does not constitute a valid basis for a DSB recommendation. Accordingly, this compliance Panel has no obligation to consider whether the United States has implemented such a finding that falls outside the scope of the DSU.

3. Section 1677(7)(G)(i)(III) has never been used because of the discretionary element in the statute that was not discussed in the Appellate Body's findings. Under the statute, the administering authority charged with initiation, the USDOC, has discretion as to the timing of a self-initiated investigation. This discretion is not constrained. If the USDOC does not self-initiate an investigation on the same day a petition is filed by an industry, the statute will never be triggered.

4. There is no practice to discontinue as to Section 1677(7)(G)(i)(III). The United States may exercise its discretion to avoid creating the situation identified as WTO-inconsistent. Where a Member may apply a measure in a WTO-consistent manner, there is no basis to find that the Member has through that measure *already* breached its WTO obligations because of the potential for a *future* WTO-inconsistent application. Instead, it would only be if the Member chooses to act in a WTO-inconsistent manner in a particular circumstance that WTO-inconsistent action would be taken and in which a WTO breach would arise. And significantly, the USDOC has confirmed its commitment to exercise its discretion concerning when to self-initiate an investigation in such a way as not to create the situation of concern to the Appellate Body.

II. THE COMMISSION'S INJURY DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

5. India contends that the United States acted inconsistently with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement and Article VI of the GATT 1994.

6. India is precluded from making several of the claims. First, as to India's claims of inconsistency under SCM Agreement Article 15.4, the underlying facts and findings relevant to that claim did not change from the United States International Trade Commission's ("Commission") original 2001 determination to its Section 129 determination. Likewise, certain other arguments that India makes in its Article 21.5 submission are based wholly on methodologies and factual findings that originated in the original USITC determination: India's

challenge to the data and methodology used by the Commission for the purposes of its price effects analysis; India's challenges to the Commission's exercise of its discretion not to rely on the results of the COMPAS model; and India's claim under Articles 15.1 and 15.5 that the Commission failed to consider factory closures in its non-attribution analysis.

7. Moreover, India's claims are based on a selective and incomplete reading of the Commission determination. India disregards the Commission's detailed analysis of the conditions of competition relevant to the hot-rolled steel market, and the Commission's analysis that underselling by subsidized imports resulted in a significant impact on domestic prices. Further, India overlooks the Commission's explanation of why subject imports had a significant impact on the domestic industry, notwithstanding some positive trends, and its examination of factors other than subject imports that injured the domestic industry to ensure that such other factors were not attributed to subsidized imports.

8. In each instance, India does not attempt to examine the conclusions reached by the Commission, but rather ignores the Commission's analysis and, instead, focuses on other evidence. When judged against the Commission's actual analysis, India's claims do not withstand scrutiny, and fail to establish that the Commission's determination is inconsistent with any of the cited provisions.

9. The Commission's underselling analysis provided "explanatory force" for the impact of subject import pricing on domestic prices and constituted an objective examination consistent with Articles 15.1 and 15.2 of the SCM Agreement. India has also failed to establish that the Commission's analysis of the impact of subject imports was inconsistent with Articles 15.1 and 15.4 of the SCM Agreement. Moreover, the Commission's examination of other known factors causing injury was consistent with Articles 15.1 and 15.5 of the SCM Agreement.

III. INDIA'S CLAIM UNDER ARTICLE 1.1(A)(1) LACKS MERIT

10. India contests the USDOC's Section 129 Determinations concerning public body. However, India's arguments lack merit because the USDOC's explanations of its findings based on the record evidence are reasoned and adequate, such that an objective and unbiased investigating authority could have found the NMDC to be a public body.

11. In the Section 129 Determinations, the USDOC reexamined the record evidence in the underlying proceedings and conducted additional analysis. The USDOC evaluated the core features of the NMDC and its relationship with the GOI within the country's legal order. The USDOC explained that the GOI owned 98.38 percent of the NMDC. Beyond this majority ownership, the USDOC found that the record demonstrated that the NMDC was governed by the GOI's Ministry of Steel. The USDOC also explained that the NMDC was treated as a state-owned, public-sector company by the GOI, and the record evidence demonstrated that the GOI was significantly involved in NMDC's day-to-day operations.

12. The USDOC then evaluated "whether the functions or conduct [of the NMDC] are of a kind that are ordinarily classified as governmental in the legal order of [India]". The USDOC

concluded 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." The USDOC then established that the NMDC exploited public resources on behalf of the GOI, and is thus vested with governmental authority.

13. The USDOC also evaluated "the extent to which the GOI in fact 'exercised' meaningful control over the NMDC and over its conduct." The USDOC considered the GOI's majority ownership of the NMDC and the fact that the NMDC was governed by the Ministry of Steel, as well as the fact that the NMDC was a strategic company which was monitored and reviewed by the government. The USDOC explained that the GOI controlled the NMDC through the NMDC's board of directors. The USDOC also considered the fact that the "NMDC is under administrative control of the Ministry of Steel," as well as record evidence establishing that the GOI was also heavily involved in the NMDC's day-to-day operations. Furthermore, the USDOC considered the fact that the GOI, through its "canalization" policy, exercised control over the supply and demand of high grade iron ore that the NMDC sold in the Indian and global market.

14. India argues that positive evidence does not support the determination that the GOI exercised meaningful control over the NMDC. India complains that the actual price negotiations are carried out by a "Committee of Directors," and not the general Board of Directors. However, as the USDOC explained, the report from the on-site verification of the GOI during the 2004 administrative review reflected that NMDC's directors – not its staff members – were responsible for the negotiation of price and quantity with customers. Record evidence also indicated that the NMDC's chairman, who is selected by the GOI, must approve such negotiations before the contract is submitted to the Board for ratification. Thus, irrespective of whether it was the Committee of Directors or Board of Directors negotiating the contract, the record is clear that the contract had to be approved by the Chairman and submitted to the Board of Directors for ratification. Furthermore, contrary to India's argument, the NMDC's Board of Directors did not serve in an independent capacity.

15. India also argues, without citing to any support, that the export restriction on iron ore was a general measure applicable to all iron ore exports and not just the NMDC. However, the record evidence demonstrates otherwise. The USDOC considered the record evidence establishing that the Bailadila mines were the only mines with export restrictions because they contained high grade iron ore, and that the NMDC was the sole company that mined in Bailadila. Furthermore, the USDOC explained that the GOI designated the MMTC, a GOI-owned and controlled company, as the sole exporter of NMDC's high grade iron ore. The Ministry of Commerce further monitored the export of high grade iron ore through the MMTC to ensure that the NMDC's Bailadila mines did not exceed the caps. India's argument also fails because the USDOC did not need to demonstrate that the export restriction was only limited to the NMDC. Rather, the USDOC observed that the GOI's restriction on the export of high grade iron ore was another means of the GOI's control over the NMDC.

16. India then complains that the USDOC failed to sufficiently investigate the NMDC's "*miniratna*" status. In bringing its Article 1.1(a)(1) claim, India relies on a quote from *US – Antidumping and Countervailing Duties (China)* that investigating authorities have a duty to seek

out relevant information. Although the Appellate Body made this general observation in the context of an Article 1.1(a)(1) claim, the Appellate Body cited to *US – Corrosion Resistant Steel Sunset Review* and *US – Wheat Gluten* as support. *US – Corrosion Resistant Steel Sunset Review* involved Article 11.3 of the AD Agreement and an investigating authority's role in a sunset review to include both investigatory and adjudicatory aspects, and *US – Wheat Gluten* involved an investigating authority's duty under Article 3.1 of the *Agreement on Safeguards*. Thus, the text of Article 1.1(a)(1) does not itself impose an obligation on an investigating authority to seek out additional information or clarification – rather, a Member may be found not to have satisfied Article 1.1(a)(1) if its findings on financial contribution (including public body) are not reasoned and adequate, in light of the record.

17. India also erroneously brings forward and relies on evidence that was not on the record before the USDOC, specifically its citation to the DPE Guidelines, Chapter IX. This evidence has no bearing on the Panel's review of USDOC's Section 129 Determinations because it was not on the USDOC's record. Therefore, India has failed to demonstrate that the USDOC's public body determination in the Section 129 proceeding is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

IV. INDIA'S CLAIMS UNDER ARTICLES 2.1(C) AND 2.4

18. India's claims that the USDOC's findings of *de facto* specificity are inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement lack merit. The USDOC explicitly took into account the diversification of economic activities in India and the length of time the challenged programs have been in operation. The United States has implemented the DSB recommendations and rulings.

19. In the context of the sale of high grade iron ore, India rests its claims on a purported failure by the USDOC to identify this subsidy program. Because this claim was not raised in the original proceedings and consequently was not subject to findings in the underlying proceedings, it is outside the scope of this compliance proceeding. Furthermore, the evidence shows that the USDOC in fact identified the sale of high grade iron ore as a program.

20. India now claims that the United States has not identified that the sale of high grade iron ore by NMDC constitutes a subsidy program. India could have challenged this issue in the original proceeding, but opted not to do so. Members generally may not make claims in compliance proceedings that they could have pursued during the original proceedings, but opted not to. India's claim is clearly outside the scope of this Article 21.5 compliance proceeding.

21. Additionally, India suggests that because the GOI's provision of mining rights of iron ore is generally available, the program cannot be found to be *de facto* specific to certain enterprises within the meaning of Article 2 of the SCM Agreement. India's argument as to the mining rights of iron ore is unconvincing; it consists almost entirely of cherry-picked statements from the USDOC's Section 129 Determination. India's criticisms of the USDOC's determination are unfounded and misrepresent both the USDOC's analysis and the record evidence.

V. INDIA'S CHALLENGE UNDER THE CHAPEAU OF ARTICLE 14 AND ARTICLE 14(D) IS WITHOUT MERIT

A. The USDOC's Decision To Not Use An In-Country Benchmark Is Consistent With The Chapeau Of Article 14 And Article 14(d) Of The SCM Agreement

22. India claims that the USDOC failed to adequately support its conclusion that the association chart and price quote were not suitable as an in-country benchmark. However, the USDOC was unable to rely on the association chart for benchmarking purposes because a close examination of the chart revealed the prices as "provisional," and not actual transaction prices. The USDOC also explained that the association chart does not identify the basic terms of sale, such as the entities selling or buying the iron ore. Regarding the price quote, the USDOC found that it was unclear whether the price was an actual transaction price or a price quote; and the price quote was propriety and contains data so limited that if it were used as a benchmark, the numbers could be reverse calculated by others, resulting in an improper disclosure.

23. India challenges the price quote and argues that the USDOC was not bound to accept claims of confidentiality without seeking further clarification or explanation pursuant to Article 12.4.2. India did not claim that the USDOC's failure to consider Tata's price quote was inconsistent with Article 12.4 of the SCM Agreement in its panel request. Accordingly, the Panel cannot consider such a claim by India now.

24. India argues that Article 14(d) of the SCM Agreement does not require the use of actual transaction prices. However, the lack of actual transaction prices in the association chart and price quote was not the sole reason for the USDOC's decision. Furthermore, to the extent that India argues that Article 14 *requires* the use of data — such as offers for sale — not based on actual sales transactions, India's legal position is baseless. In its submission, India highlights paragraph 4.176 of the Appellate Body's report. The context of the cited paragraph pertains to the Appellate Body's discussion of whether the USDOC's regulations exclude consideration of government prices other than those from competitively run government auctions, and did not relate to whether the USDOC would consider transactions other than actual transactions in Tier 1 of its hierarchy. Moreover, the key point is that an investigating authority acts consistently with its obligations under Article 14 when it examines all evidence on the record, and makes a reasoned decision on an appropriate benchmark.

B. India Has No Basis For Its Claim Concerning The NMDC's Export Prices

25. India also challenges the USDOC's decision to not use the NMDC export prices as an out-of-country, alternative benchmark. The USDOC found that it was unable to use the NMDC export prices because it was a price from the same government-related entity at issue, consistent with the Appellate Body's findings that were explicitly related to the USDOC needing to analyze prices from government-related entities other than the entity providing the financial contribution at issue. Consistent with that finding, the USDOC in the Section 129 Determinations then explained that the only "government-related prices" on the record of the proceedings were those set by the NMDC, and thus, there were no other government-related prices for it to evaluate.

26. The USDOC also provided further analysis explaining that the NMDC export prices were not suitable as a world market benchmark source. Specifically, the USDOC explained that the NMDC export prices did not represent a market derived price since they were distorted by the fact that the GOI controlled the price, through: (1) controlling government ownership of both NMDC and the exporter MMTC; (2) the domination of the two entities by India appointed officials; (3) the corporate directors' key role in setting export prices; (4) the GOI's export restrictions on iron ore by placing caps on the quantities exported; and, (5) the close monitoring of both entities by the Ministry of Steel as "strategic companies."

27. Accordingly, the USDOC fully analyzed the association chart, the price quote and the NMDC export prices for use as benchmarks for government sales of iron ore for LTAR, and ultimately determined that these three sources were not appropriate benchmarking sources, consistent with both the chapeau of Article 14 and Article 14(d) of the SCM Agreement.

VI. THE PANEL SHOULD REJECT INDIA'S CHALLENGE UNDER ARTICLE 14(B) OF THE SCM AGREEMENT CONCERNING THE SDF PROGRAM

28. India argues that the USDOC acted inconsistently with Article 14(b) of the SCM Agreement because the USDOC failed to address the issue of the SDF program in its Section 129 Determinations. However, there was no finding of inconsistency concerning the benefit conferred by the SDF program in the 2006 administrative review, and therefore, there was no recommendation by the DSB. India's claim relating to Article 14(b) therefore does not fall within the scope of this compliance proceeding.

29. For completeness, the United States also demonstrates that India's Article 14(b) arguments fail on the merits because as discussed by the USDOC in its 2006 final determination, the SDF fund did not contain the steel producers' own funds, and was therefore not a cost for the USDOC to account for in calculating the benefits conferred. Accordingly, the Panel should reject India's claims.

VII. THE PANEL SHOULD REJECT INDIA'S CLAIMS CONCERNING THE NEW SUBSIDY PROGRAMS UNDER ARTICLES 21.1 AND 21.2

30. India is precluded from raising arguments against the new subsidy programs from the 2004, 2006, 2007, and 2008 administrative reviews because a Member cannot raise claims in an Article 21.5 proceeding against an unchanged aspect of a measure that was previously found to be WTO-consistent in the original proceedings. As a result of a finding that there was no WTO-inconsistency, the USDOC did not, and did not need to, revise its determinations concerning the new subsidy allegations in the administrative reviews.

31. India is also precluded from raising new arguments under Article 21 because it previously had an opportunity to do so, but opted not to. In the original proceedings, although India appealed the original panel's finding concerning Article 21, India did not ask for the Appellate Body to find that the USDOC breached Article 21 by failing to examine properly each of the new subsidy allegations at issue. Therefore, India cannot now argue in this compliance

proceeding that the USDOC failed to establish a sufficiently close link or nexus and failed to consider certain factors when it could have raised those arguments in the original proceeding.

32. India also challenges two "new" subsidy programs in the Section 129 Determinations - mining rights of iron ore and mining of coal for LTAR. However, India's claims concerning the "new" subsidy programs in the Section 129 Determinations must fail because the USDOC did not examine new subsidy programs in its Section 129 Determinations. And, even were the compliance Panel to examine the merits, India has failed to establish that the Section 129 Determinations were inconsistent with Articles 21.1 and 21.2 of the SCM Agreement.

VIII. INDIA'S CLAIMS UNDER ARTICLE 12.1 HAVE NO MERIT

33. Contrary to India's assertions, the USDOC acted consistently with Article 12.1 of the SCM Agreement. In particular, the record shows that the USDOC provided notice of the information required and all parties were given ample opportunity during the underlying administrative proceedings to submit factual information related to Tata's proprietary price quote and the *miniratna* status of the NMDC. Further, the Section 129 proceeding did not involve some sort of new factual investigation regarding these issues that might have been subject to Article 12.1 obligations. India's arguments are thus without merit.

34. Furthermore, neither the Appellate Body nor the original panel found in the underlying proceedings that the USDOC should further seek information concerning the price quotes or the NMDC's *miniratna* status. Specifically, regarding the proprietary price quote submitted by Tata, the original panel faulted the USDOC for failing to provide a *contemporaneous* rationale in the USDOC's underlying determinations. With respect to the NMDC's *miniratna* status, the Appellate Body's finding was based upon the USDOC's failure to address the information on the record before it. Thus, contrary to India's claims, nothing in Article 12.1 of the SCM Agreement obligated the USDOC to reopen the administrative records to solicit new factual information.

IX. INDIA'S CLAIMS UNDER ARTICLE 12.8 LACK MERIT

35. Contrary to India's claims, the USDOC fully complied with its obligations under Article 12.8 to disclose the essential facts under consideration with respect to the issue of whether NMDC export prices were a suitable out-of-country benchmark for iron ore. The USDOC disclosed the fact that the GOI placed export restrictions on iron ore in its 2004 administrative review verification report, wherein it detailed the GOI's divulgence of its "canalization restrictions" on the exportation of high grade iron ore. In the Section 129 Final Determination, the USDOC then relied on this verification report as one of the bases for its determination to not use the NMDC export prices as a world-market benchmark. Thus, the USDOC was considering facts already disclosed, and which the GOI and other interested parties had ample opportunity to address in the context of 2004 administrative review.

36. India's arguments also mischaracterize the USDOC's obligations. An authority's obligation under Article 12.8 is limited to disclosing the essential facts – not its reasoning or conclusions.

37. India claims that the USDOC acted inconsistently with Article 12.8 by not disclosing information as to the "diversification of the industrial sector in India [and the] length of time for which the provision of iron ore by NMDC program was operational because the USDOC did not disclose these facts in the preliminary determination." This argument is meritless because the information that the USDOC considered in analyzing the diversification and length of time factors under the third sentence of Article 2.1(c) was on the records of the respective underlying administrative proceedings. India had ample opportunity to respond to such disclosure of information. Likewise, India's suggestion that it could not address those Article 2.1(c) factors in its case brief and defend its interests ignores the unambiguous finding of the original panel on this issue, which indicated that USDOC would consider these factors in reaching any *de facto* specificity determination for the sale of high grade iron ore by the NMDC.

X. INDIA'S CLAIM UNDER ARTICLE 19.3 SHOULD BE REJECTED

38. India claims that the USDOC's determinations in the challenged investigations are inconsistent with Article 19.3 of the SCM Agreement because the USDOC's Section 129 Final Determination changed the cash deposit rates for JSW and Tata from those applied pursuant to U.S. domestic litigation settlements.

39. The WTO-consistency of the Section 129 Determinations relates to whether the findings by the USDOC comport with the SCM Agreement. There is no obligation, however, in the DSU or the SCM Agreement to apply revised CVD rates no higher than certain rates that may have been applied pursuant to domestic proceedings. Article 19.3 of the SCM Agreement speaks to non-discriminatory application of countervailing duties, as appropriate to each source of imports, and does not create any rule by which if rates were lower in the past, they may not rise in the future (a so-called "ratchet").

40. The logical implication of India's argument is that when, subsequent to a domestic settlement, there are WTO proceedings that revise CVD rates, investigating authorities must defer to the settled rates, and cannot revise CVD rates to implement DSB recommendations and rulings. Such an argument is absurd and contrary to Articles 19.3 and 19.4, under which the CVD rate should be appropriate to the source, imposed on all sources of subsidized imports causing injury, and not in excess of the rate of subsidization. Consider: had the USDOC's revision of CVD rates during its Section 129 proceedings resulted in rates *lower* than the settled rates pursuant to domestic proceedings, India would surely complain if the USDOC did not implement the Section 129 rates, and instead chose to rely on the earlier, settled rates. But India cannot have it both ways, through an argument that converts Article 19.3 into a review for whatever a Member (or panel) may not consider "appropriate".

41. India's claim rests on an erroneous interpretation of Article 19.3. Article 19.3 does not provide a basis apart from the substantive provisions of the SCM Agreement to challenge how CVD rates are calculated; instead, this provision speaks to the application of CVDs on a non-discriminatory basis, in the amount that is appropriate to the source of the subsidized imports. The CVD rates determined through the USDOC's Section 129 proceedings implemented the DSB recommendations and rulings related to facts available findings – and India, notably, has

not challenged the USDOC's implementation of those findings. India's suggestion that the USDOC needed to conduct a comparison of those rates, reflecting implementation of the DSB's recommendations, to the previous settled rates to consider which were more (in a seemingly abstract sense) "appropriate" is disingenuous and unsupported by the text and plain meaning of Article 19.3.

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. INDIA'S CLAIMS THAT THE UNITED STATES FAILED TO COMPLY WITH THE DSB'S RECOMMENDATION AND RULING AS TO 19 USC §1677(7)(G)(i)(III) ARE MERITLESS

42. India in its rebuttal submission asserts that the Appellate Body's "as such" finding as to Section 1677(7)(G)(i)(III) "cannot be questioned by the United States." The meaning and WTO-consistency of Section 1677(7)(G)(i)(III) was not an issue of law covered by the panel report and was thus not properly before the Appellate Body. Moreover, the Appellate Body's report does not reflect an accurate understanding of Subpart III because it fails to take into account the discretion accorded by the statute to the USDOC.

43. A proper understanding of Subpart III does not require the United States to take WTO-inconsistent action. If the USDOC refrains from self-initiating an anti-dumping investigation on the same day a countervailing duty petition is filed by an industry, or vice versa, the circumstance covered under Subpart III of the statute will not be triggered. In fact, the USDOC has never self-initiated an investigation on the same day a petition was filed by an industry so as to invoke this provision, and has stated its intent to not exercise its discretion in such a manner. Accounting for this discretion is necessary to draw an accurate conclusion of whether Section 1677(7)(G)(i)(III) mandates WTO-inconsistent action or precludes WTO consistent action. There is no measure the United States must take to comply with the DSB recommendation.

44. India asserts that the United States has not come into compliance with the DSB recommendations because the RPT in this dispute expired in April 2016, and the measures taken to comply occurred after that date. Nowhere does the DSU provide that a compliance Panel must deem a Member to have failed to implement DSB recommendations and rulings solely because compliance measures were taken after the expiration of the RPT. If a complaining Member deems the other Member in a dispute to have not implemented DSB recommendations and rulings, it can raise its concerns at DSB meetings and, if still not satisfied, request consultations and the establishment of a compliance panel.

45. Moreover, India misunderstands the United States' position in this dispute. The United States does not rely on the June 2016 exchange of letters between the Office of the United States Trade Representative and the USDOC, or the United States' DSB statements in 2016, to show that it has not failed to take the appropriate action in response to the DSB recommendation concerning Subpart III. Rather, as explained above, the exchange of letters and other U.S. statements serve to *confirm* that the United States has been, and continues to be, in compliance with the obligations underlying the DSB's rulings and recommendations concerning Subpart III.

46. This is not to say that the exchange of letters and DSB statements in 2016 are not relevant to the Panel's assessment. They clearly corroborate the interpretation of the U.S. statute set out by the United States. Further, they reflect the USDOC's stated position as to how it intends to exercise that discretion: by not self-initiating an antidumping investigation on the same day as the filing of a countervailing duty petition by an industry, or vice versa, such that the conditions of Subpart III would take effect. Thus, the USDOC's letter confirms both the existence of discretion in the U.S. statute with respect to self-initiation, and a decision by the agency as to how it intends to exercise its discretion to self-initiate, a decision which is further reinforced through formal statements by the United States at repeated DSB meetings in 2016.

II. INDIA HAS FAILED TO DEMONSTRATE THAT THE USDOC'S PUBLIC BODY DETERMINATION IS INCONSISTENT WITH ARTICLE 1.1(A)(1)

47. In its second written submission, India makes broad statements regarding the interpretation of Article 1.1(a)(1), alleging that "the GATT and the SCM Agreement are intended to apply only when entities operate in the public realm and the Appellate Body has evolved the test of 'governmental functions' as a tool to determine areas that do not concern the 'public realm'". India then goes on to state that it "believes that setting-up commercial enterprises like NMDC involve the government operating in the private realm and such commercial enterprises cannot be considered to be public bodies."

48. However, under Article 1.1(a)(1), the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. The conduct at issue in the financial contribution analysis necessarily will be those actions described in the subparagraphs of Article 1.1(a)(1). Where the economic value being transferred, through one of the actions described in Article 1.1(a)(1) of the SCM Agreement, belongs to the government, that transfer is an exercise of governmental authority – the authority over the government's own economic resources. That is, under the Appellate Body's approach, an entity is a public body if it possesses, exercises or is vested with government authority (*e.g.*, authority over the government's own economic resources). Thus, when an entity transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv). The behavior contemplated by Article 1.1(a)(1) of the SCM Agreement is not limited to the public realm, as India suggests.

49. Indeed, the *realm* in which an entity operates is not, and should not be, the focus of a public body inquiry. Rather, the inquiry is on the entity itself. This logic accords with the Appellate Body's approach to "public body," where it has stated that a public body is an entity that possesses, exercises or is vested with governmental authority. The Appellate Body has stressed that the focus of the public body examination properly is on the "core features of the entity concerned, and its relationship with the government in the narrow sense".

50. Thus, the commercial nature of an entity also does not preclude it from being a public body. The panel in *Korea – Commercial Vessels* likewise recognized this, finding that "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." Rather, an investigating authority must take into consideration the totality of the evidence regarding the relationship between the government and the public body at issue, and base its determination on the specific facts of each case.

51. India also argues that "there *must* have been positive evidence on the 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." This argument, however, results from a too narrow reading of the Appellate Body's findings. Examining whether the functions or conduct of an entity are of a kind that are ordinarily classified as governmental is but one relevant consideration that *may* be examined on a case-by-case basis.

III. INDIA'S CLAIM UNDER ARTICLE 19.3 OF THE SCM AGREEMENT RELIES ON AN ERRONEOUS INTERPRETATION

52. India has failed to explain why the reasoning of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* would be analogous to the dramatically different facts in the present dispute such that this Panel should find it persuasive. India simply misrepresents the Appellate Body's report, where the observations as to Article 19.3 were focused on concerns over double remedies. This is clear throughout the report's discussion of Article 19.3. To maintain that the Appellate Body's observations as to the interpretation of "appropriate amounts" in Article 19.3 are relevant to the unique factual circumstances of this dispute, which do not involve any concerns over double remedies, is simply not credible.

53. India submits that if the USDOC's higher rates calculated in the Section 129 Proceedings could be imposed instead of lower settled rates negotiated between the parties, it would set up a conflict between the domestic judicial review provided for under Article 23 of the SCM Agreement and WTO dispute settlement proceedings under Article 30 of the SCM Agreement. 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. Accordingly, this is not a situation where proceedings under Article 23 are superseded and nullified by proceedings under Article 30. Further, although India argues that Article 23 of the SCM Agreement is not subject to Article 30, accepting India's interpretation would effectively render Article 30 subject to Article 23. That is, administering authorities would be limited in their ability to fully implement DSB recommendations if they were required to modify the results of such implementation based on prior rates determined pursuant to domestic judicial proceedings. Such a result would run contrary to the text of both provisions and lead to absurd results, as illustrated by India's arguments before this panel.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S QUESTIONS

U.S. RESPONSE TO PANEL QUESTION 14

54. Nothing in Article 1.1(a)(1) suggests that the existence of profit-maximizing, commercial behavior – or of non-market-oriented, non-commercial behavior – would be dispositive of, or even relevant to, whether a government exercises meaningful control over an entity and its conduct. It is not the case that a government, or a government-controlled entity, cannot act in a commercial manner or operate in the private realm. Similarly, non-profit-maximizing, non-commercial behavior also does not add more to the inquiry of the relationship between the government and the entity. Rather, commercial behavior or non-commercial behavior goes to the issue of whether a benefit has been conferred.

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

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

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

58. Further, the issue under Article 1.1(a)(1) is not whether the *conduct* of the entity is governmental. Rather, the question is whether the *entity* engaging in the conduct is governmental or pertaining or belonging to the people, i.e., whether the entity is "*a government* or any *public body*." Focus on the specific *conduct* of an entity would be relevant to an analysis

of benefit, for example, or when examining whether there was government entrustment or direction of a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement.

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

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

61. By requiring specific evidence that the Turkish Prime Ministry Privatization Administration (TPA) in fact *exercised* its veto power or sought to influence Erdemir's pricing, production or financial decisions, the panel in *US – Pipes and Tubes Products (Turkey)* considered that an investigating authority must find that the government (TPA) directed the conduct (pricing, production, and other decisions) of the entity in question. The panel's approach conflates the public body analysis with that of entrustment and direction, which would render the term "public body" meaningless. Under the panel's interpretation, to find a financial contribution involving any entity other than the government in the narrow sense, an investigating authority would need to show the government's control *over the conduct* in question. The panel's approach in *US – Pipes and Tubes Products (Turkey)* effectively denies that any analysis of the entity or its core attributes is necessary to analyze whether the entity is a public body.

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

U.S. RESPONSE TO PANEL QUESTION 45

63. During the Section 129 proceedings, the USDOC determined that "India had mining programs for iron ore"; "all mineral rights are owned by the state governments"; and "the GOI granted leases to mine iron ore and coal, receiving a royalty per unit extracted." 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. 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. Accordingly, the USDOC found that "the GOI's provision of mining rights was specific . . . because the provision of the rights was limited to two industries, specifically steel producers and mining companies." Significantly, the USDOC in conducting this *de facto* specificity analysis made no findings that the "use" of the mining rights of iron ore program extended to downstream beneficiaries. For this reason, the United States does not believe that this Panel needs to, or should, address the interpretive issue presented in this question of whether the term "use" in Article 2.1(c) extends to downstream beneficiaries.

U.S. RESPONSE TO PANEL QUESTION 49

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

U.S. RESPONSE TO PANEL QUESTION 55

65. As previous Appellate Body and panel reports have found, a measure will only be found to be WTO-inconsistent "as such" where it *necessarily leads to* WTO-inconsistent action. Because the United States may apply the measure in a WTO-consistent manner, there is no basis to find that the measure is "as such" WTO-inconsistent. Therefore, the United States need not take any action to implement the DSB recommendation.

U.S. RESPONSE TO PANEL QUESTION 56

66. The USDOC's commitment expresses its decision, as the investigating authority responsible for administering U.S. laws relating to investigations of dumping and subsidization, to exercise its discretion under those laws in a particular way. Unless and until a U.S. court finds otherwise, the practice and interpretation of the investigating authority of U.S. law, including the extent of its discretion, *is* U.S. law.

U.S. RESPONSE TO PANEL QUESTION 72

67. The Amended Final Results came into effect before India requested a panel in the original dispute, and despite the fact that they contained the deposit rates then applicable to JSW and Tata, India chose not to challenge them before the original panel. Instead, India chose

to challenge the specific findings and calculations made with respect to JSW and Tata in the underlying CVD determinations. The United States has complied with the findings of the panel and Appellate Body in the underlying proceedings, and this compliance Panel has been asked by India to examine whether it has done so successfully. The Amended Final Results are not a measure taken to comply; nor has India alleged that they are a measure taken to comply. Therefore, examination of the basis for these, now expired, rates is not within the scope of these proceedings. Were the Panel to consider the basis for these settlement rates to be a relevant inquiry in the context of India's claims, it would be for India to submit the evidence and argumentation necessary to substantiate those claims under Article 19.3. It has not done so.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON INDIA'S RESPONSES TO THE PANEL'S QUESTIONS

U.S. COMMENT ON RESPONSE TO THIRD PARTY PANEL QUESTION 10

68. Canada, the European Union, and Japan assert that a compliance panel cannot revisit "as such" findings that have been adopted by the DSB. 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." 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."

69. 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. 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 applicability of existing provisions of the covered agreements, as understood objectively through customary rule 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.